

**This decision was affirmed by the Deputy General Counsel (Fiscal), Department of Defense, on February 9, 2001.**

August 18, 1999

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In Re:

[Redacted]

Claimant

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Claims Case No. 99070516

## **CLAIMS APPEALS BOARD DECISION**

### **DIGEST**

Upon discharge, a member reviewed the worksheet for his final separation payment. He noted that his readjustment pay was not based on his full term of service. He received a partial payment and returned the next day for the balance. He then noted that optional state income tax withholding had been deducted and asked that it be restored. When the deduction for state income tax withholding was deleted, his withholding for federal income tax was also deleted. This caused his final check to be more than 2.5 times the amount it should have been. The member is partly at fault for not questioning his entitlement to that amount and calling it to the attention of the proper authorities.

### **DECISION**

This is in response to an appeal of the Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 99033114, dated April 12, 1999, which denied the request of a former Navy member for waiver of a debt which occurred when his final payment was miscalculated.

### **Background**

The former member was discharged on January 27, 1998. At that time he was due a net final separation payment of \$13,765.13. Instead, due to administrative error, he received payments totaling \$19,374.01. The Settlement Certificate states that the member was partially at fault for not identifying the error on the worksheet and calling it to the attention of finance personnel. The member argues that he did bring other errors to the attention of the authorities. He states that when he arrived on January 29 to pick up his final separation pay, he discovered that his readjustment entitlement had been based on 12 years of service rather than 16 years and ten months. He received a partial payment of \$10,546.31. When he returned the next day, he noticed that state income tax withholding had been deducted. Since he had the option of having it withheld then or paying it when he filed his state income tax forms, he asked to have that amount added to his pay. <sup>(1)</sup> He was told that the correction would be made that day, and he went to another office for information about the calculation of his pay. When his withholding for state income tax was deleted, his federal tax withholding also was deleted. Therefore, although he was due approximately \$3,300, <sup>(2)</sup> he received \$8,827.70. The final amount of his debt is

\$5,608.88. He maintains that he should not be held responsible for that administrative error.

### Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of pay and allowances of members or former members of the Uniformed Services if collection would be against equity and good conscience and not in the best interest of the United States, provided that there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996). The standard we employ to determine whether a member was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person would have been aware that he was being overpaid. *See* DOHA Claims Case No. 99060218 (July 26, 1999). A member has a duty to verify his entitlements, and he is considered to be at fault if he is provided information which would indicate that he was being overpaid and fails to bring the information to the attention of the appropriate authorities. *Id.* The fact that administrative error caused the overpayment does not by itself entitle the member to waiver if the standards for waiver are not met. *Id.*

In the present situation, the member reviewed the worksheet on which his final pay was calculated. On January 29, he noticed that his readjustment pay had been based on 12 years of service rather than 16 years and ten months. When he returned the next day, he observed that state income tax had been deducted. The two lines on the first worksheet which pertain to state income tax withholding total \$331.38. Adding the state tax withholding back to the member's entitlements should not have created a change of more than that amount. When the member returned for his final check, the change was more than \$5,500. Moreover, the lines for federal income tax withholding on the worksheet are immediately below the lines for state tax withholding. In our view, a reasonable person would have noticed the large change and would have reviewed the second worksheet carefully. He would have looked at the state tax withholding lines on the second worksheet to be sure that the state tax withholding had been removed and would have noted that the amount of federal income tax withholding on the next line was "0" on the second worksheet, while the federal withholding on the corresponding line on the first worksheet was \$4,320.44.

While the member argues that he should not be held accountable for the mistakes of finance personnel, the waiver statute precludes waiver if there is an indication of fault on the part of the member. Moreover, waiver is an equitable remedy and therefore depends on the facts of each case. Equity is not available to a party who is in any way at fault. *See* DOHA Claims Case No. 98112018 (January 11, 1999).<sup>(3)</sup> The member was provided information which indicated the error and should have been aware of it and called it to the attention of the authorities. Therefore, he is considered to be at least partially at fault, and waiver is not appropriate. *See* DOHA Claims Case No. 99060218, *supra*.

### Conclusion

We affirm the Settlement Certificate.

/s/ \_\_\_\_\_

Michael D. Hipple

Chairman, Claims Appeals Board

\_\_\_\_\_/s/\_\_\_\_\_

Christine M. Kopocis

Member, Claims Appeals Board

\_\_\_\_\_/s/\_\_\_\_\_

Jean E. Smallin

Member Claims Appeals Board

1. The record indicates that the amount to be thus added to the member's pay was \$275.97.
2. According to the record, on January 30 he should have expected \$17,976.99 (for 16 years and 10 months of service) minus \$13,798.56 (for 12 years of service) = \$4,178.43 minus \$1,169.96 (28% federal tax withholding) plus the state tax withholding, a total of approximately \$3,300.
3. The same standards apply to the waiver statute for civilian employees, 5 U.S.C. § 5584.