

September 10, 1999

In Re:

[Redacted]

Claimant

)

Claims Case No. 99071602

CLAIMS APPEALS BOARD DECISION

DIGEST

When a member is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment. In such a situation, waiver is not appropriate.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 99050602, dated May 13, 1999, which denied the request of a reservist for waiver of a debt which arose when he was overpaid incident to a period of active duty he performed in 1993.

Background

The record indicates that the member was ordered to active duty for 44 days, from June 6, to July 19, 1993. For that period of time, he was due pay and allowances in the amount of \$5,932.90. The first pay which the member received for that duty was a check for \$5,000, dated July 13, 1993, which the member received the day before his period of active duty ended. That payment was considered an advance. As soon as the member received it, he questioned his entitlement to that amount and the fact that deductions had not been subtracted from it. He was advised that the check was correct and that the exact amount would be adjusted in 30 to 45 days. During August the member received three more checks totaling \$4,194.18, bringing his total pay for the period to \$9,194.18. He was therefore overpaid in the amount of \$3,261.28. In the Settlement Certificate we denied the member's request on the grounds that he knew or should have known that he was paid in excess of his entitlements. The member argues that the debt should be waived because the overpayment was caused by government error. In an appeal letter addressed to his congressman, the member appears to suggest that he was instructed to return the \$5,000 check with a letter explaining the circumstances of its return. He states that he did so, although the record contains a copy of a canceled check from July 1993 for \$5,000 with what appears to be the member's signature on it. ⁽¹⁾

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive collection of erroneous payments of pay or allowances from 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 there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996). By itself, the fact that erroneous payments were made due to administrative error does not entitle the member to waiver. *See DOHA Claims Case No. 99033117* (April 15, 1999); and *Lieutenant (JG) Larry L. Butler, USN (Retired)*, B-196548, Jan. 23, 1980. Waiver is precluded when the member was aware or should have been aware that he was receiving payments in excess of his entitlements. *See DOHA Claims Case No. 97030302* (May 13, 1997). In such a situation, the member does not acquire title to the excess amounts and has a duty to hold the excess for eventual repayment to the government. *See DOHA Claims Case*

⁽²⁾

99012606 (March 31, 1999).

While we acknowledge that the member's debt was the result of administrative error, that fact alone does not entitle him to waiver. *See* DOHA Claims Case No. 97030302, *supra*. We appreciate the fact that the member did not request the \$5,000 in advance pay which he received in July 1993 and questioned his entitlement to it. However, when a member or a civilian employee is aware that he is receiving an erroneous or questionable payment, he does not acquire title to the excess amount, and waiver is not appropriate. *See* DOHA Claims Case No. 99012606, *supra*. He has a duty to hold the erroneous or questionable amount until he is requested to repay it or until the propriety of the payment has been established.

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. In the member's waiver application dated September 20, 1997, he states that he held \$1,300 from the \$5,000 check because no deductions had been withheld from it and that he returned a check for \$819 which he believed to be erroneous. The \$819 does not appear in the list of payments the member received and is therefore not part of the member's debt.

2. The standards for waiver for civilian employees are the same.