

December 14, 1999

In Re:

[Redacted]

Claimant

Claims Case No. 99100801

CLAIMS APPEALS BOARD DECISION

DIGEST

A retired Air Force officer who holds a civilian position with the Air Force previously received overpayments totaling over \$40,000 when his military retired pay was not reduced in accordance with the pay cap limitation in the dual compensation statute, 5 U.S.C. § 5532. Collection of that debt was waived in 1993. His retired pay was not reduced following six raises in civilian pay which he received between October 1994 and January 1998. With the discovery of the earlier debt, the member should have been aware of the pay cap limitation and the calculations necessary to accomplish them. He is at fault in the continuing accrual of the subsequent debt, and that debt cannot be waived under 10 U.S.C. § 2774.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate DOHA Claim No. 98112013, dated June 17, 1999, which denied a retired military officer's waiver request. The debt arose when his military retired pay was incorrectly reduced under the pay cap provision of the dual compensation statute while he held a civilian position with the federal government.

Background

The member retired from the United States Air Force on August 1, 1987. On September 29, 1987, he accepted a civilian position with the Air Force. By the time the Defense Finance and Accounting Service (DFAS) learned of his civilian position through a comparison of military and civilian payroll lists and began making dual compensation offset deductions from his military retired pay, a debt of \$6,236.92 had accrued. He did not request waiver of that debt, and that amount was collected from him. In May 1990 DFAS discovered that it had failed since September 1987 to reduce the member's military retired pay to reflect the pay cap limitation which is also part of the dual compensation statute. Between September 29, 1987, and April 30, 1990, a debt of \$40,041.35 had accrued. The General Accounting Office (GAO), which at that time had the authority to waive erroneous payments of pay and allowances, granted waiver of collection of that amount on June 2, 1993.

The record indicates that the member's retired pay was properly reduced between May 1, 1990, and October 1, 1994, under both the dual compensation offset and the pay cap limitation. Between October 7, 1994, and January 4, 1998,

however, the member received six raises in annual salary totaling \$11,940. DFAS did not receive notification of those raises and therefore did not make additional reductions in the member's retired pay to bring it within the pay cap limitation. The resulting overpayment between October 1994 and January 1998 amounted to \$18,597.92. That amount is the subject of this appeal.

The member argues that his current debt should be waived because the debt was the result of DFAS's errors. He states that DFAS was informed of his raises through his Civilian Personnel Office.⁽¹⁾ He does not believe that he could have done anything else to prevent the accrual of his debt.

Discussion

We have the authority under 10 U.S.C. § 2774 to waive collection of overpayments of pay and allowances to a member or former member of the uniformed services, the collection of which would be against equity and good conscience and not in the best interest of the United States. Waiver may not be granted if there is any indication of fault on the part of the member or former member in the accrual of the debt. The standard we employ to determine fault is whether a reasonable person, under the specific circumstances of the case, would or should know that he is receiving erroneous payments. If he knows or should know that he is being overpaid and fails to bring such overpayments to the attention of the proper authorities, he is at fault, and waiver is precluded. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996). The fact that the overpayment arose due to administrative error does not provide a basis for waiver if the member does not otherwise meet the standards for waiver. *See Colonel Bruce R. Rauhe, USAF (Retired)*, B-244505, Jan. 14, 1992.

The dual compensation statute, 5 U.S.C. § 5532, contained two provisions which resulted in the reduction of the military retired pay for those governed by it who accepted civilian positions in the federal government. The first was the dual compensation offset, which reduced the retired pay of a retired officer of a regular component of a uniformed service by a formula set out in the statute. The second was the pay cap limitation, which limited the total compensation a retired member received in retired pay and civilian compensation to no more than the base pay for level V of the Executive Schedule.⁽²⁾ Current level V salary levels were readily available from various sources including DFAS and public libraries.

In the case before us, the member's retired pay was not reduced at all when he began his civilian employment. When DFAS learned of the member's civilian employment, it reduced his pay under the dual compensation offset. GAO apparently determined that the member did not know that a further reduction should have been made on account of the pay cap limitation and therefore waived his debt of \$40,041.35. It is our view that the accrual of that debt put the member on notice regarding the pay cap limitation. At that point he should have familiarized himself with the calculations necessary to keep his pay within the cap. *See DOHA Claims Case No. 99020211* (February 18, 1999); *Lieutenant Colonel Christopher N. Maniscalco, USAF (Retired)*, B-253968, Dec. 23, 1993. The member's retired pay was already being reduced on account of the pay cap when he received a raise of \$2,220 per year effective October 4, 1994. Unless the pay cap was raised at the same time, he should have expected a corresponding decrease in his retired pay soon thereafter. While he states the Civilian Personnel Office told him that DFAS would be informed of his raises, he should have notified DFAS himself when he saw that his retired pay was not reduced accordingly. The member is considered to be at fault for not contacting DFAS regarding that decrease and subsequent ones after each raise in civilian pay that was not accompanied by an equal raise in the pay cap. Waiver is therefore precluded. *See DOHA Claims Case No. 99020211, 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. He states that he received a Standard Form 50 (SF-50) for each raise and that he was advised that the information on the SF-50 was electronically transmitted to DFAS after each raise and the retired pay automatically adjusted after each raise.

2. Effective October 1, 1999, Congress prospectively repealed § 5532. *See* § 651 of the National Defense Authorization Act for Fiscal Year 2000.