



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Major James P. Burton, USAFR—Waiver Request

File: B-265873

Date: February 29, 1996

DIGEST

An Air Force Reserve officer who was receiving aviation career incentive pay (ACIP) was assigned to a nonflying position. While regulations authorize continuing ACIP in these circumstances for a maximum of 24 months, he received an order indicating that it would continue for 4 years. He continued receiving ACIP for 4 years under the order, plus an additional year after the order expired. Collection of the ACIP he received attributable to the extra 2 years erroneously authorized by the order was properly waived. However, waiver of the amounts paid for the period after the order expired was properly denied. He had a duty to verify his entitlement to ACIP after the order expired. Since he did not do so for a year, he is not without fault in regard to these payments.

DECISION

This is in response to an appeal of a Claims Group settlement¹ which denied in part the waiver request of Major James P. Burton, USAFR. We affirm the Claims Group's settlement.

In March 1988 Major Burton, who was assigned to a flying position entitling him to receive aviation career incentive pay (ACIP),² was reassigned to a nonflying position. Air Force regulations provide that a Reserve officer temporarily reassigned to a nonflying rated position, under certain conditions, continues to be eligible for ACIP for up to 24 months.³ Incident to his reassignment, Major Burton received orders in 1988 which incorrectly indicated that ACIP was unaffected by the change through March 25, 1992, *i.e.* for 4 years. Major Burton received ACIP through March 1992, and beyond. In March 1993, a year after the erroneous 4-year

¹Z-2927351-025, dated August 17, 1994.

²Authorized under 37 U.S.C. § 301a, and implementing regulations.

³Air Force Regulation 60-13, para. 13-16.

period expired, he questioned whether his pay was correct. As a result of his inquiry, orders to correct the termination of the ACIP were issued February 24, 1994, effective March 18, 1990, 2 years after his change to a nonflying position.

Payments of ACIP made after March 18, 1990, were erroneous, since that is the end of the maximum 24-month period for which the flight pay was authorized to be paid under applicable regulations. The Air Force determined that the erroneous payments totalled \$12,436.64, and advised Major Burton that he was in debt for that amount. He requested that the debt be waived.

The Air Force advised our Claims Group that Major Burton appeared to be without fault in accepting payments of ACIP for the erroneous 2 years authorized under his aeronautical order which expired in March 1992, and therefore recommended waiver of the government's claim for \$6,196.70, the erroneous amount received before that date. However, the Air Force recommended denial of waiver of \$6,239.94, the amount received after that date, since Major Burton appeared to be at fault for not verifying his entitlement to receive ACIP after the 1988 order expired. Our Claims Group agreed with the Air Force, partially granting and partially denying Major Burton's waiver request on this basis.

In appealing the partial denial of waiver, Major Burton argues that he was unaware of the 24-month limit on ACIP for a member in his situation and that he was told that his ACIP would continue as long as he passed an annual flight physical. He states that until a change in the way ACIP was being certified on orders led him to check his entitlement (apparently in March 1993), he was never aware of a problem with his receipt of this pay or that there may not have been any new aeronautical orders issued to continue his ACIP. He said he thought that such orders had been issued locally. He contends, therefore, that the entire debt should be waived because he was without fault in the matter, noting that it was because he questioned his pay in March 1993, that the error was discovered. He also states that repayment would be a hardship for him and his family.

Under 10 U.S.C. § 2774, the Comptroller General may waive a claim against a member of the uniformed services arising out of an erroneous payment of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States. The statute also provides that the claim may not be waived if there is any indication of fraud, fault, or lack of good faith on the member's part.

We interpret "fault," as used in 10 U.S.C. § 2774, as including something more than a proven overt act or omission by the member. Thus, we consider fault to exist if in light of all the facts it is determined that the member should have known that an error existed and taken action to have it corrected. The standard we employ is to determine whether a reasonable person should have been aware that he was

receiving payment in excess of his proper entitlement. See Lieutenant Commander Melvin W. Mills, USN, Retired, B-194738, Feb. 29, 1980.

Waiver of the erroneous ACIP Major Burton received for the 2-year period before March 25, 1992, was based on a finding that he was without fault in receiving ACIP payments during that period because his orders authorized its continuation until that date, and he had no reason to know the orders were erroneous. However, we cannot agree with Major Burton that he was without fault in accepting amounts paid after that time. He knew that he had been reassigned to a nonflying position in 1988, and that the order issued at that time under which his ACIP was being continued expired in March 1992. Although he may have received some incorrect information about his entitlement to such pay and may have thought that new orders had been issued, he had a responsibility to verify that his entitlement in fact continued beyond the expiration date indicated on the 1988 order. If he had done so promptly, the error could have been corrected much sooner. Since he did not do so until a year after the order expired, we cannot conclude that he is free from fault in receiving the erroneous payments made after March 25, 1992. See B-194738, supra. As noted above, an indication of fault on the member's part precludes waiver under 10 U.S.C. § 2774.

Finally, concerning his statement that repayment of the debt will cause him financial hardship, that fact alone does not provide a basis for waiver. See B-194738, supra. If he finds the repayment schedule the Air Force has established for him overly burdensome, he may request that the Air Force adjust it. That, however, is a matter primarily for the Air Force to consider.

Accordingly, we affirm the Claims Group settlement.

/s/Lowell Dodge
for Robert P. Murphy
General Counsel