

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-185105

DATE: MAR 11 1976

MATTER OF: First Lieutenant Barbara S. Becker, USA

DIGEST:

While on excess leave after completing nurses training member erroneously was paid pay and allowances which she brought to attention of proper officials. However, she believed she was entitled to difference between pay as a second lieutenant and pay as a private first class for five months because she had been commissioned late. She thought a check for \$744 which was received later was an adjustment with pay already received for late commissioning. Since her belief appears reasonable collection of amounts she received to that date is waived however later erroneous payments she received must be collected.

This action is in response to a letter dated October 3, 1975, with enclosures, from Ms. Barbara S. Becker, by which she requests reconsideration of our Transportation and Claims Division letter dated September 15, 1975, which denied her request for waiver of collection of a debt to the United States. The debt arose out of erroneous overpayments of pay and allowances in the amount of \$3,116.42 incident to her service as an officer in the United States Army.

The record shows that the member, a participant in the United States Army Nurse Program, after graduation from the University of Massachusetts and promotion to the grade of first lieutenant was in an excess leave status during the period from May 28, 1972, through September 20, 1972, while awaiting orders for basic training. During such period she was erroneously paid pay and allowances, initially based on the rate paid to a private first class (E-3), but later adjusted to the rate paid to a first lieutenant (O-2), resulting in an overpayment of \$3,005.35.

The member stated in her application for waiver of erroneous payment that when she received a pay voucher dated June 30, 1972, reflecting that she was paid pay and allowances based on the rate

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paid to a private first class for that month, she suspected that she was being paid erroneously. The member also stated that upon receiving that Leave and Earnings Statement, she made two telephone calls to the "Finance Code-A-Phone" at Fort Meade, Maryland, but received no response from either call. The member indicated that the purpose of those calls was to request that her pay records be audited and corrected and to advise the Finance Center that she was a first lieutenant not a private first class and that she was on excess leave and not entitled to receive pay and allowances. The member also indicated that when she received a Leave and Earnings Statement dated July 31, 1972, which reflected that she was again paid the pay and allowances of a private first class for that month, she doubted the accuracy of her financial records because she knew that she was not eligible to receive pay and allowances for a period of excess leave.

In mid-August 1972, the member received a check in the amount of \$744 and seven Leave and Earnings Statements which showed that her pay was adjusted to credit her with the pay and allowances of a first lieutenant from April 28 through August 31, 1972. Two of those Leave and Earnings Statements covering the period April 28 through May 27, 1972, clearly indicated that the member was erroneously paid as a first lieutenant instead of a second lieutenant, resulting in an additional overpayment of \$111.07.

The member contends that since the Army erroneously commissioned her five months late, she believed that she was entitled to an additional payment. She explains as follows:

"While on excess leave as an O2, commencing 28 May 1972, I received a pay voucher dated 30 June 1972 paying me entitlements as an E-3. * * * I suspected at this time that I was being paid erroneously. However, my commissioning date had been enacted by the Army five months late. I knew this was due to administrative error * * * therefore making me eligible for five months partial retroactive pay. And, because my pay for the month of May, the month prior to my commencing Excess Leave, was figured on an E-3 vice an O1 pay scale, I was not certain if I was underpaid or overpaid."

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The member also contends that when she received the check for \$744 and the Leave and Earnings Statements in mid-August 1972, she did not understand them and she asked a staff member of the ROTC unit at the University of Massachusetts to explain those documents. She says that she was told that it appeared that her financial records were audited and corrected by the Finance Center and that the check for \$744 settled her account.

The member indicates that she relied on that explanation and took no further action to obtain an explanation from the finance officer in charge of her pay account. The member also stated that on November 14, 1972, she was informed by the Finance Center representative at Fort Eustis, Virginia, that she may have been overpaid by at least \$1,200.

As a result of that explanation and several meetings with officials at that Finance Center, it became clear to the member that the amount received by her was an erroneous overpayment and not payment for the difference in pay and allowances for the five-month late commissioning. The member then requested that her records be corrected to show that she was commissioned as a second lieutenant on November 27, 1971, instead of April 28, 1972.

The record shows that the member's records were so corrected on October 19, 1973. By letter dated May 13, 1974, the member was advised by the Finance and Accounting Office at Fort Eustis that \$3,110.36 (later revised to \$3,116.42) representing erroneous overpayments would be collected from her account. By D. O. Voucher No. 665425 dated May 17, 1974, the United States Army Finance Support Agency, Indianapolis, Indiana, authorized a net payment in the amount \$756.53 in favor of the member representing the difference in pay and allowances between a second lieutenant and a private first class for the period November 27, 1971, through April 27, 1972, less applicable deductions.

By letter received on November 11, 1974, in our Transportation and Claims Division, the member's request for waiver of erroneous payments was forwarded by the Army Finance Support Agency. That agency reported that there was no indication of fraud, misrepresentation or lack of good faith on the part of the member or any other person having an interest in obtaining waiver of the claim and that the erroneous payments appeared to have been due to errors on the part of Army administrative personnel. That

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agency also reported that the member was on excess leave from May 28 through September 20, 1972, that she suspected she was paid erroneously, and that she received Leave and Earnings Statements and military pay vouchers during such period. That agency concluded that the member was partially at fault and should not have spent the amounts in question without expecting to make repayment.

By letter dated September 15, 1975, to the Army Finance and Accounting Center, our Transportation and Claims Division concluded that under the provisions of 10 U. S. C. 2774 (Supp. II, 1972) waiver must be denied since there was an indication of fault on the part of the member. The basis for this conclusion was the fact that the member received Leave and Earnings Statements while on excess leave and, therefore, had notice that the payments which she was receiving were erroneous. Further, one of the purposes of issuing such statements is to give members the opportunity to verify pay and deduction items and bring to the attention of proper authorities any errors. Thus, the member was considered to be at least partially at fault for failing to make immediate inquiry as to the correctness of her pay.

By letter dated October 3, 1975, the member requests reconsideration of the denial of her request for waiver because in her view she made several immediate inquiries concerning the correctness of her pay, first on June 30, and later in July and August 1972.

Section 2774 of title 10, United States Code (Supp. II, 1972), provides in pertinent part as follows:

"(a) A claim of the United States against a person arising out of an erroneous payment of any pay * * * to or on behalf of 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, may be waived in whole or in part by--

"(1) the Comptroller General * * *

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"(b) The Comptroller General * * * may not exercise his authority under this section to waive any claim--

"(1) if, in his opinion, there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member * * *."

To implement this waiver authority, the Comptroller General has established standards for waiver, which are found in 4 C.F.R. 91 et seq., subsection 91.5(c) of which provides in pertinent part:

"* * * Any significant unexplained increase in pay or allowances which would require a reasonable person to make inquiry concerning the correctness of his pay or allowances, ordinarily would preclude a waiver when the employee or member fails to bring the matter to the attention of appropriate officials. * * *"

It is provided in 10 U. S. C. 2774(b)(1) that the Comptroller General may not exercise his authority under that section to waive any claim if, in his opinion, there exists, in connection with the claim, an indication of "fault" on the part of the member. The word "fault" has been interpreted as including something more than a proven overt act or omission by the member. "Fault" is considered 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 employed by this Office is to determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlements.

The record shows that the member was commissioned as a second lieutenant five months late and, after graduation and promotion to first lieutenant she was on excess leave beginning May 28, 1972, while waiting for her September 21, 1972 reporting date for her next active duty assignment. As a participant in the Army Nurse Program, she knew that she was permitted to

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be on excess leave during such period and that she was not entitled to receive pay and allowances during such period. Army Regulation 610-19 subparagraph 3-2f(5) (ch. 4, May 21, 1971). Cf. 52 Comp. Gen. 482 (1973).

The record indicates that the member received a check and a Leave and Earnings Statement in June and July 1972. On each occasion it was indicated that she was paid as a private first class as if she had been on active duty and was entitled to pay and allowances for each entire month. The record also indicates that she knew such payments were erroneous and she requested that her pay record be corrected. In mid-August 1972, the member received a check for \$744 and seven Leave and Earnings Statements. The member apparently did not understand the explanation contained on those statements and she obtained an explanation from an ROTC instructor. At that point, based on that explanation, the member may have reasonably thought that her pay account was corrected and that the amounts she received in May, June, July and August reflected the underpayment caused by her late commissioning. Those payments also included the overpayment of \$111.07 for payment as a first lieutenant when she was a second lieutenant and totaled \$1,786.61. That amount is more than double the amount to which the member would have been entitled if her records relative to her commissioning date had been corrected at that time.

In the circumstances, it is our view that the member may have reasonably believed at that point that her pay records were in order and no further action was required on her part. Accordingly, we waive collection of \$1,786.61 of her indebtedness to the United States, if otherwise correct.

The remainder of the member's indebtedness to the United States (\$1,329.81) represents payments of pay and allowances for a period including the month of August and September 1 through 20, 1972--a period while she was on excess leave. When the member received the August and September payments and the accompanying Leave and Earnings Statements, which reflected that she was paid during a period of excess leave, she had a duty to again make inquiry concerning the correctness of her pay. Since the member failed to bring the matter to the attention of

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appropriate officials, it is our view that waiver of the \$1,329.81 amount, if otherwise correct, must be denied because she was at least partially at fault.

The settlement of September 15, 1975, is modified accordingly.

R. S. KELLER

Deputy

Comptroller General
of the United States