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DECISION



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

[Request for Waiver of Debt]

FILE: B-197503

DATE: March 6, 1980

MATTER OF:

Seaman Teresa ~~Zaleski~~ MacDonald, USN

DIGEST:

Service member receiving erroneous payments of BAQ at the with dependent rate based on her daughter's dependency during a period when her service member spouse from whom she was separated was properly entitled to the payment is without fault in the matter, since she did not have sufficient information to determine that she was not entitled to the payments, and waiver may be granted. However, when she failed to request a complete explanation of her pay after receiving an overpayment of retroactive pay and allowances, she is not without fault in the matter so as to permit waiver of the erroneous payment. Further, financial hardship, alone, resulting from collection is not a sufficient reason to retain the payments that she should have known did not belong to her.

Seaman Teresa (Zaleski) MacDonald, USN, requests reconsideration of our Claims Division's August 1, 1979 denial of her application for waiver of her debt to the United States in the total amount of \$949.42. The debt arose from erroneous payments of basic allowance for quarters (BAQ) at the with dependent rate totaling \$642.42 and an overpayment of \$307 made through miscalculation of pay and allowances based on BAQ adjustment entries on her pay account while in a transient status. Waiver may be granted for the overpayment of BAQ, but is denied for overpayment of pay and allowances.

The record shows that Seaman MacDonald (formerly Zaleski) was erroneously paid BAQ at the with dependent rate based upon claiming her daughter, Maryska, as a dependent during the period January 15, through June 30,

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B-197503

1976. At the time she began active duty on January 15, 1976, she was married to another Navy member, Petty Officer Henry B. Zaleski, although she had been separated from him since about June 25, 1975. She was awarded temporary custody of the daughter on May 21, 1976, by the Circuit Court of Tennessee for the Fifteenth Judicial Circuit of Tennessee at Memphis, although no determination was made by the court relative to support. She was divorced from Petty Officer Zaleski on August 6, 1976.

Upon entering on active duty, Seaman MacDonald applied for and, although her application was disapproved, erroneously received BAQ with dependents through June 30, 1976, when payment was stopped after being questioned by disbursing officials. Also, during this period, she made an allotment of \$116.10 payable to her mother for support of the daughter. Petty Officer Zaleski was also paid BAQ with dependents based on his contribution to the support of the daughter from the date of separation until he and Seaman MacDonald were divorced on August 6, 1976. He states that he sent money orders for child support in the amount of \$60 from March until May 1976. Also, an overpayment of pay and allowances in the amount of \$307 was paid Seaman MacDonald in a single payment on December 11, 1976, based on erroneous computations of credit due her for BAQ.

Seaman MacDonald, in her original request for waiver, contended in essence that prior to her enlistment in the Navy, Petty Officer Zaleski did not support her and their daughter after June 1975 and, since she was separated and no longer living in Navy housing, she did not know that Petty Officer Zaleski continued to receive BAQ at the with dependents rate. She also stated that after her enlistment in the Navy she continued to receive BAQ payments after they were questioned so she assumed that she was entitled to them. In addition, she stated that she thought that the \$307 payment was made to correct underpayments attributable to irregular paychecks due to the BAQ question. In addition, she contended that payment would cause her financial hardship.

B-197503

Her request for waiver of the erroneous BAQ payments was denied based on a finding that she was aware that her husband was sending allotments for support of their daughter, that she was not providing adequate support prior to August 1976 and that she knew that the purpose of the BAQ was to provide dependents with support; therefore, her good faith in accepting the BAQ payments was questioned. Waiver of the erroneous payment of \$307 was also denied since her Leave and Earnings Statements (LES's) from August through December 1976 indicated that she had been paid BAQ. It was determined that she was partially at fault in failing to notify the disbursing office of the error.

In her appeal, Seaman MacDonald contends that she did provide her daughter support after separation from her husband and that after entering service she made an allotment in her mother and daughter's name and also sent them money orders. She further denied receiving any allotment checks from her husband after she entered service.

Section 2774 of title 10, United States Code (1976), provides our authority to waive certain debts when collection would be against equity and good conscience and not in the best interests of the United States. However, subsection 2774(b) precludes waiver if in the opinion of the Comptroller General--

"* * * there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member * * *"

We interpret the word "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 of 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 she was receiving payment in excess

B-197503

of her proper entitlement. See decisions B-184514, September 10, 1975, and B-193450, February 26, 1979.

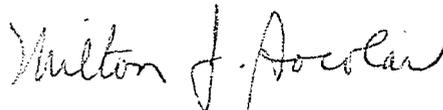
In the present situation, Petty Officer Zaleski submitted evidence of support and as the senior service member he was determined to be eligible and entitled to BAQ at the with dependents rate under the provisions of paragraph 30232a of the Department of Defense Military Pay and Allowances Entitlements Manual during the period both parties were credited with the allowance. However, it appears that during the period the dependent was not in the physical custody of either parent during the period of the claim, but in the custody and care of Seaman MacDonald's mother. It also appears that Seaman MacDonald forwarded to her mother an allotment in excess of the payments Petty Officer Zaleski claimed that he made, which indicates that the child was dependent on Seaman MacDonald for over one-half of her support. Under these circumstances, it does not appear that Seaman MacDonald, as a newly enlisted service member, had sufficient information to determine that she was not entitled to BAQ at the with dependents rate rather than her husband with whom she had no contact. Even though the entitlement was questioned on one occasion, it now appears she was not fully aware that an error existed which might be corrected until she was notified by disbursing officials that such error had been discovered and the amount of her indebtedness in July 1978. Therefore, on the record before us it appears that she may have reasonably considered that the amount of BAQ she received from January through June 1976 was correct and the excess payment of \$642.42 should be waived. However, after receiving LES's for August through November 1976, which verified the amount of her pay, she had no reason to believe that she should receive further unexplained BAQ payments by a retroactive payment of \$307 on December 11, 1976.

Therefore, Seaman MacDonald should have known on December 11, 1976, and again upon receipt of her December LES statement that she was receiving money to which she was not entitled. Such knowledge on her part carried with it a duty and legal obligation to bring it to the

B-197503

attention of appropriate officials and to return the excess sums or set aside this amount for refund at such time as the administrative error was corrected. Since she did not do so, it is our view that she did not accept such payments in good faith, she is not free from fault, and collection action is not against equity and good conscience nor contrary to the best interests of the United States. Further, financial hardship resulting from collection is not a sufficient reason to retain the payments that she should have known did not belong to her. B-183460, May 28, 1975.

Accordingly, waiver is granted for the erroneous payments of BAQ in the amount of \$642.42, but the action of our Claims Division denying waiver of the additional payment in the amount of \$307 is sustained.



Acting Comptroller General
of the United States