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DECISION



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

FILE: B-203620

DATE:

March 4, 1982

MATTER OF: Bruce P. Lenz

DIGEST: Navy member erroneously received basic allowance for quarters (BAQ) at the with dependents rate while making court-ordered support payments to his dependent child in amounts less than the applicable BAQ rate. He had been informed that to be entitled to BAQ his support payments could not be less than the BAQ rate. Later he received conflicting information regarding the effect of reducing his allotment for support payments. In the circumstances it is deemed equitable to grant partial waiver in the amount which he actually allotted to the support of the child.

Mr. Bruce P. Lenz, a former member of the United States Navy, requests reconsideration of our Claims Division's July 9, 1979 denial of his application for waiver of his debt to the United States in the amount of \$685.50. The debt arose from erroneous payments of basic allowance for quarters (BAQ) at the with dependents rate that he received during the period October 1, 1976, through February 15, 1977, when the amount of support provided his dependent was less than the applicable BAQ rate. Upon review we find that partial waiver of the debt may be granted.

By judgment of the County Court of Grant County, Wisconsin, dated June 23, 1975, Mr. Lenz was adjudged to be the father of a child born May 25, 1975, and he was ordered to make support payments in the amount of \$50 per month beginning August 1, 1975. He was further ordered to pay \$641.80 for doctor bills and hospitalization, at the rate of \$20 per month, such payment also beginning August 1, 1975. Both payments were to be made through the Clerk of the Court. At that time Mr. Lenz was 18 years of age and had just recently enlisted in the Navy.

Mr. Lenz applied for BAQ at the with dependents rate on September 26, 1975, claiming the child as his dependent effective August 1, 1975. The application was received at the Navy Family Allowance Activity on November 7, 1975. Prior to approval of the application, the Family Allowance Activity requested a copy of the child's birth certificate

and a statement relative to the amount and method of support provided to the child. It also stated that the support provided must equal the amount provided in the court order or the applicable rate of BAQ whichever was greater. Since in Mr. Lenz's case the BAQ rate exceeded the court-ordered amount, the request indicated that the amount of the BAQ would be required as the allotment for support.

Although on January 6, 1976, his command forwarded a copy of the birth certificate and documentary evidence that Mr. Lenz had met the court-ordered support requirement for August 1, 1975, through December 31, 1976, BAQ was not authorized until after he established an allotment of \$134.40, the amount of the BAQ, beginning March 1, 1976. At that time Mr. Lenz was assigned to duty on board ship.

Apparently some time after the allotment was begun, Mr. Lenz wrote to the Assistant District Attorney for Grant County, Wisconsin, asking what was being done with the \$64.40 by which his BAQ allotment (\$134.40) exceeded the monthly payments (\$70) required by the Court. Mr. Lenz has furnished us a copy of a letter dated August 31, 1976, from the Assistant District Attorney replying to his questions. The letter indicates that the additional amounts of the allotment over the required \$70 support payment was used for delinquent support and that future overages would be used to pay the doctor and hospital expenses sooner than ordered. The letter further stated that the Assistant District Attorney had called the Navy Finance Center about the matter and personnel there had indicated that the amount of the allotment was a matter between Mr. Lenz and the Navy and that he could have the allotment checks changed to conform with the court obligations.

Mr. Lenz indicates that after receiving this letter and consulting his disbursing officer who informed him that he could reduce the allotment and continue to receive BAQ, Mr. Lenz reduced his allotment to \$70 effective with the deduction for October 1976. This allotment was subsequently terminated with the final deduction being made in his January 1977 pay. He continued to receive BAQ in his pay through February 15, 1977.

The Navy Family Allowance Activity received an application for change in dependency status on February 23, 1977, removing

the child as an approved dependent due to its being adopted in January 1977. Upon investigation, the Activity was informed that Mr. Lenz's support allotment had been reduced in October 1976 and completely discontinued after January 1977. Therefore, the Navy determined that BAQ paid to Mr. Lenz after September 30, 1976, was erroneous due to inadequate support being provided to the dependent for him to qualify for BAQ. Collection of the erroneous amount was begun.

The basis for the Navy's determination was that for a service member to qualify for BAQ at the with dependents rate when he is assigned to Government quarters on the basis of a child he is required to support, he must provide monthly support at least equal to the BAQ. See paragraph 30238b, Department of Defense Military Pay and Allowances Entitlements Manual, implementing 37 U.S.C. §§ 401, 403 (1976). Thus, when Mr. Lenz had no support allotment in effect or reduced his support allotment below the BAQ rate, he was not entitled to BAQ.

Mr. Lenz, in his original request for waiver, contended in essence that he did not know or suspect that he was being overpaid when he reduced the allotment for support of his dependent child after relying upon his disbursing officer's approval. Waiver was denied since he was told when BAQ was first approved that he must provide support at least equal to the amount of his BAQ, and he knew or should have known that contradictory information received from his disbursing officer was erroneous and that he should have pursued the matter further.

In his appeal, Mr. Lenz contends that he was not at fault in regard to the indebtedness since Navy Finance Center personnel had advised the Assistant District Attorney that he might change his allotment, and he was misinformed as to appropriate action by the disbursing officer who did not fully understand his problem.

Section 2774 of title 10, United States Code (1976), provides our authority to waive certain debts, in whole or in part, 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 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 decisions B-201814, September 18, 1981; and 56 Comp. Gen. 943 (1977).

In the present situation, while Mr. Lenz made support payments in accordance with the court order for over 6 months, these accumulative payments did not establish entitlement to BAQ until he had met the regulation's requirement by making an allotment of support payments at least equal to the amount of his BAQ. Thus, it seems clear that he was aware of this requirement when he first began receiving BAQ. Later, after receiving the Assistant District Attorney's letter and being told by his disbursing officer that he could reduce his monthly support allotment to an amount less than he was receiving for BAQ, he may have been confused as to his entitlement, particularly in view of his limited Navy experience.

Therefore, in the circumstances of this case, considering Mr. Lenz's inexperience at the time, the fact that he did actually allot \$70 per month of the erroneous BAQ payments to the support of his child, and that if he had continued the full allotment in effect, the BAQ payments would not have been erroneous, we deem a partial waiver of the debt appropriate. Accordingly, we hereby waive \$350 of the debt which equals the \$70 per month Mr. Lenz paid to the child for the 5 months involved (October 1976-February 1977). However, the remaining \$335.50 of the debt is not waived.

Since it appears that the full \$685.50 has been collected from Mr. Lenz, the amount waived may be refunded

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to him if he applies to the Navy for such refund within
2 years of his action. 10 U.S.C. § 2774(c).

Milton J. Fowler
for Comptroller General
of the United States