

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548Hutchinson  
PLM-II

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**FILE:** B-216951**DATE:** April 12, 1985**MATTER OF:** Lieutenant Colonel Roger B. Files, USAF,  
Retired**DIGEST:**

A retired service member who received overpayments of retired pay should have known that the payments were erroneous, considering his rank, years of service, the amount of the erroneous overpayments, and the fact that he was aware that he was being paid based upon retirement as a colonel rather than his retired rank of lieutenant colonel. Therefore, waiver of this indebtedness is not granted.

Lieutenant Colonel Roger B. Files, USAF, Retired, requests reconsideration of our Claims Group's denial of his application for waiver of his debt to the United States in the amount of \$50,007.85. The debt arose from erroneous payments of military retired pay during the period September 1, 1973, through September 30, 1982. In light of the facts presented and the applicable provisions of law, our Claims Group's action in this matter is sustained.

As a Regular commissioned officer in the United States Air Force, Colonel Files was retired from active duty mandatorily in the grade of lieutenant colonel effective September 1, 1973, in accordance with 10 U.S.C. § 8916 (1970). Despite the fact that his retirement orders stated clearly that he was retired in the grade of lieutenant colonel, he was inadvertently listed as a colonel when his retired pay account was established in the Air Force Accounting and Finance Center. The error was discovered when the Finance Center records were reconciled with information received in July 1982 from the Air Force Manpower Personnel Center. The reconciliation revealed that he was being paid erroneously as colonel rather than as a lieutenant colonel. The retired pay record was corrected effective October 1, 1982, the debt was established for the period September 1, 1973, through September 30, 1982, and collection action was initiated effective with his November 1982 retired pay.

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In his original request for waiver Colonel Files indicated that he believed he was being paid correctly in the Reserve grade of colonel and that he could have retired voluntarily as a colonel subsequent to his Reserve promotion to that grade. He stated that he understood that retired pay is based upon the highest rank an officer could have held at the time of retirement and that his pay would be computed under the formula most favorable to him.

As evidence that he held the rank of colonel he has submitted a copy of Department of the Air Force General Orders Number 70, November 30, 1956, captioned "Recommended List for Promotion to Colonel." The orders provided:

"The following approved recommended list of Reserve officers selected in accordance with the provisions of section 516, the Reserve Officer Personnel Act of 1954 (Air Force Bulletin 17, 17 September 1954) for promotion to the permanent grade of Colonel, Reserve Air Force (Air Force Reserve), is announced. This announcement does not constitute the actual promotion of officers concerned. Promotion will be accomplished by appropriate commanders. The effective date of promotion is 30 November 1956. Officers listed hereon, serving on extended active duty, who have not completed periods of required active duty under any provision of law or regulations will not be promoted until they complete such required active duty service obligation, or until promoted to a temporary grade equivalent to the permanent grade to which recommended. At such time as they become eligible by completing an active duty service obligation or by receiving a higher temporary grade, they will, upon their own application therefor, be promoted with effective date of the Reserve promotion as shown in this order and be subject to the provisions of section 511(b), the Reserve Officer as shown this order and be subject to the provision of section 511(b), the Reserve Officer Personnel Act \* \* \*"

At the time those orders were issued Colonel Files was serving on active duty in the Reserve grade of lieutenant colonel. In his letter of November 4, 1982, he indicates that he continued to serve on active duty in his Reserve grade of lieutenant colonel from that date until the date he

was appointed as a lieutenant colonel in the Regular Air Force. Thus, he was not promoted to the rank of colonel while he served as a Reserve on active duty. The Air Force has indicated that upon receiving his appointment as a lieutenant colonel in the Regular Air Force his Reserve appointment was voided. Accordingly, it appears that he was never promoted to colonel either in the Air Force Reserve or in the Regular Air Force.

In his appeal from the denial of his waiver request by our Claims Group, Colonel Files contends that he is unfamiliar with the law governing the proper determination of his retired pay. He reiterates that a person entitled to retired pay under more than one pay formula is entitled to be paid under the applicable formula most favorable to him and that an officer may retire voluntarily and receive the monthly basic pay based upon his permanent Reserve grade. He further believes that he was qualified for voluntary retirement as a Reserve member in the grade of colonel any time before he was retired mandatorily.

A claim against a member or former member of the uniformed services arising out of an erroneous payment of pay or allowances may be waived if collection "would be against equity and good conscience and not in the best interest of the United States." But the Comptroller General may not exercise his authority 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 \* \* \*"  
10 U.S.C. § 2774.

We interpret the word "fault," as used in that provision of law 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. Chief Petty Officer William F. Seacrest, Jr., B-201814, September 18, 1981, and 56 Comp. Gen. 943 (1977).

It is fundamental that officers retiring from a military service on the basis of active service performed are entitled to pay of the highest grade in which they have served on active duty and satisfactorily for not less than

6 months. This provision was contained in 10 U.S.C. § 8963(a) (1970) applicable to Air Force officers at the time Colonel Files retired. See the general provision, applicable to all military officers, at 10 U.S.C. § 1370(a)(1). An officer of Colonel Files' rank and length of service knew or should have known that retired pay could not be predicated upon a rank which he never attained while on active duty. As a matter of fact it was a Reserve rank to which he may never have been promoted. Since he knew his highest active duty grade was lieutenant colonel, he should not have expected to receive retired pay based upon the grade of colonel. Further, as he had not served on active duty as a Reserve colonel, there was no reason to believe that he was entitled to be retired in that grade at a time before he was retired mandatorily as a lieutenant colonel.

Colonel Files should have had doubt at the outset of his entitlement to receive retired pay based upon the retired grade of colonel. Since he knew that his pay was based upon the grade of colonel, not lieutenant colonel, he should have known or at least suspected he was being overpaid and should have requested a complete explanation of his pay.

The fact that the overpayments were made through administrative error does not relieve an individual of responsibility to determine the true state of affairs in connection with overpayments. A person receiving money erroneously paid by a Government agency or official acquires no right to the money; such persons are bound by equity and good conscience to make restitution. Captain David H. Scott, B-188595, June 3, 1977, Colonel Frederick H. Mueller, B-197286, May 20, 1980.

Since Colonel Files should have known that he was being overpaid, we are unable to conclude that he is free from fault. Therefore, collection action is not against equity and good conscience nor is it contrary to the best interests of the United States.

Accordingly, the action of our Claims Group denying waiver is sustained.

*for* Harry D. Van Cleave  
Comptroller General  
of the United States