

**DECISION**



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

FILE:

**B-185359**

DATE:

**MAR 10 1976**

MATTER OF:

**Chief Petty Officer**

**USN**

DIGEST:

Member's request for waiver under 10 U. S. C. 2774 (Supp. II, 1972) for erroneous payments discovered in August 1973 resulting from proficiency pay which terminated on July 7, 1971, but which the member continued to receive, is denied for payments received after February 1972 since the member received a monthly earnings statement which should have made him aware that an error existed and that he was receiving payment in excess of his proper entitlement. However, for the period prior to March 1, 1972, member's request for waiver is granted since pay records indicate that there were significant fluctuations in the pay received after July 7, 1971. Since member did not receive monthly earnings statements or leave and earnings statements during this time, it appears reasonable to believe that the member was not aware of such overpayments.

This action is in response to a letter dated October 10, 1975, with enclosures, from Chief Petty Officer, USN, wherein the member, in effect, requests further consideration of our Transportation and Claims Division determination dated September 16, 1975, which denied the member's request for waiver of an indebtedness due the United States in the amount \$1,835, arising out of erroneous payments of proficiency pay during the period July 7, 1971, through August 31, 1973.

The record shows that the member was drawing proficiency pay while serving in an instructor billet at the Naval Air Technical Training Center, Glynnco, Georgia, until July 7, 1971, when he was transferred on permanent change-of-station assignment to the U. S. Naval Station, Roosevelt Roads, Puerto Rico. The record shows that effective July 8, 1971, the member was no longer serving in an authorized billet for proficiency pay purposes.

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B-185359

However, due to administrative error, he continued to receive proficiency payment while stationed in Puerto Rico. The Personnel Office at Roosevelt Roads, Puerto Rico, discovered the overpayment in late August 1973 and so notified the member. The record shows that none of the debt has been repaid.

Our Transportation and Claims Division letter dated September 18, 1975, denied waiver of the Government's claim against the member on the basis that anyone with his rank and years of experience reasonably should have been aware that he was not entitled to the continued receipt of proficiency pay after termination of his instructor duty; that he should have at least questioned the continued payment of \$75 a month after his transfer to Puerto Rico; and that his failure to do so placed him in a position of being at least partially at fault in the continuation of the overpayment, thereby statutorily precluding waiver of the claim.

In response to that letter, the member contends that upon his transfer to Puerto Rico, there were significant fluctuations in the amount of pay he received after July 1971, including a service pay raise and a new allotment to the Navy Federal Credit Union. The member further stated that he had served the Navy for 25 years and that to the best of his judgment, all of his pay was correct and in order and that he did not feel he was at fault in that he "didn't question the entries on the monthly earnings statements in March 1972 and over a year later in July 1973."

Section 3776 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 \* \* \*

\* \* \* \* \*

B-185359

"(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  
\* \* \*

The word "fault," as used in 10 U. S. C. 2774 has been interpreted as including something more than a proven overt act or omission by the member. Thus, fault is considered 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 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 entitlement. See B-184514, September 10, 1975, and B-184859, October 31, 1975.

A review of the member's pay records shows that he received an advance of pay at the time of his transfer in July 1971, and a longevity pay increase in August, and that he apparently authorized a new allotment of his pay, the deduction for which began in September. In addition, it has been established that the first monthly earnings statement issued to the member subsequent to his transfer was on March 1, 1972.

Based on the foregoing, it is reasonable to conclude that the member neither knew nor even had reason to suspect that payments made to him prior to March 1, 1972, were in any way erroneous. Therefore, under the authority granted this Office by 10 U. S. C. 2774(a), that portion of the member's indebtedness arising out of the erroneous payments of proficiency pay made to him prior to March 1, 1972, is hereby waived.

With respect to the erroneous payments of proficiency pay made thereafter, we have been informed that the earnings statement issued to the member in March 1972 listed proficiency pay as an entitlement item. While the member contends that his failure to note and question the propriety of entries on such statement does not constitute fault on his part, it is to be observed that one of the purposes for issuing such a statement is to inform

**B-185359**

the member of his proper entitlements. We do not view a member's failure to carefully scrutinize such a document in order to ascertain the correctness of his pay as constituting justification for accepting the payments represented therein without question. Therefore, it is our view that as to the payments made after February 1972, since the member could have ascertained that he was receiving payment in excess of his proper entitlements and taken corrective action, he is to be considered at least partially at fault in the matter, thereby precluding waiver.

Accordingly, the action taken by our Transportation and Claims Division regarding payments received after February 1972, is sustained.

R. F. KELLER

Deputy ) **Comptroller General**  
**of the United States**