

## DECISION



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

FILE: B-182846

DATE: NOV 14 1975

MATTER OF: Request for waiver of indebtedness -  
Lieutenant Commander

## DIGEST:

1. Determination disallowing service member's request for waiver of indebtedness pursuant to 10 U.S.C. 2774 is affirmed where record shows that application for waiver was not received within three years of date of discovery of overpayments.
2. A member who has a \$400 allotment deducted from his pay and whose pay is suddenly and substantially increased by \$400 a month for a fifteen-month period, in spite of fluctuations in his pay must be considered to be at fault in not realizing that such increased payments may be in error at least to have caused him to promptly investigate the matter. As a result, this Office is precluded by 10 U.S.C. 2774 (b)(1) from waiving the overpayments.

This action is in response to a letter, with enclosures, from Lieutenant Commander , USN, , which constitutes an appeal from the determination by the Transportation and Claims Division of this Office, which by letter dated March 20, 1974, denied the member's request for a waiver of the claim of the United States against him in the amount of \$6,000.

The file in Lieutenant Commander case shows that during the semiannual transition of his pay records at the end of 1968, a deduction for a \$400 monthly dependent's allotment, which he had authorized, was inadvertently not entered on his January 1969 and succeeding pay records. The allotment continued to be paid for fifteen months before the lack of entry was discovered in September 1970 and notification of the indebtedness was made to the officer on September 17, 1970. By letter dated October 4, 1973, addressed to the Director, Navy Family Allowance Activity, Cleveland, Ohio, the officer requested waiver of all or part of the indebtedness.

The officer's request for waiver was forwarded, together with an administrative report on the matter, to the Transportation and Claims Division of this Office by the Navy Family Allowance Activity, by letter dated December 10, 1973. The Navy report contained the recommendation that the officer's request for waiver be denied since the claim was not received within three years from the date of discovery of the overpayment as provided by 10 U.S.C. 2774. ✓

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The member's request for reconsideration states that in late August 1973 he had written his original letter on this subject and submitted it through the chain of command at his place of assignment, U.S. Naval Station, Keflavik, Iceland. He states that the letter was endorsed by his command and forwarded to the disbursing officer there, but that the letter was returned to him. The member contends that he was advised that this action was taken in order to achieve compliance with a Navy instruction pertaining to application for waiver filed under 10 U.S.C. 2774, which he contends was not received by the disbursing officer until September 4, 1973.

The officer states that having to put his request letter "in the proper format and all of the requested statements entered \* \* \* caused the time frame to slip into October and therefore over the three year time limit". The officer concludes by stating that since the intent of 10 U.S.C. 2774 was to make the Government responsible for its errors rather than to penalize personnel for errors over which they have no control, he is being further penalized because it took the Government almost one year to provide the fleet with information on this program and the procedures for its implementation.

Authority to waive claims of this nature is contained in 10 U.S.C. 2774 (Supp. II, 1972), subsection (a) of which provides in part that a claim of the United States against a person arising out of an erroneous payment of pay or allowances, other than travel or transportation allowances, 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 interests of the United States, may be waived in whole or in part. Subsection (b) provides that the Comptroller General or the Secretary concerned, as the case may be, 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 or any other person having an interest in obtaining a waiver of the claim; or

"(2) if application for waiver is received in his office after expiration of three years immediately following the date on which the erroneous payment of pay or allowances \* \* \* was discovered."

Section 91.5 of the Standards for Waiver (4 C.F.R. 91.5), promulgated pursuant to 10 U.S.C. 2774, provides in pertinent part:

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"Claims of the United States arising out of an erroneous payment of pay or allowances may be waived in whole or in part in accordance with the provisions of section 91.4 whenever:

"(b) the claim arises out of an erroneous payment of pay or allowances made to or in behalf of a member except that waiver action may not be taken unless application is received either in the General Accounting Office or the office of the Secretary concerned within 3 years immediately following the date on which the erroneous payment of pay or allowances was discovered."

It is to be observed that both subsection 2774(b)(2) and the standards implementing that law clearly require that an application for waiver may be considered for waiver only if "received" within three years from the date of discovery. In this regard, we are unaware of any authority whereby this filing requirement or the time limitation imposed may be voided or modified by this Office or that of the Secretary concerned.

While the member contends that an earlier request was sent, the record in the case includes only the request by the member for waiver of this indebtedness by letter dated October 4, 1973. In the absence of receipt of a timely application for waiver of overpayments, this Office would be precluded from considering this claim for waiver under 10 U.S.C. 2774.

Notwithstanding the foregoing, even if we assume that a letter was sent by the member and received by the disbursing officer prior to the expiration of three years and even if we assume that this constituted receipt by the Secretary of a timely application, this Office would be precluded under 10 U.S.C. 2774(b)(1) from granting waiver on the basis that there was at least partial fault on the part of the member.

The word "fault" as used in 10 U.S.C. 2774(b)(1) has been interpreted as including something more than a proven overt act or omission by a member. Thus, 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. B-184514, September 10, 1975,

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Further, subsection 91.5(c) of the Standards for Waiver provides in part that 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 the appropriate officials.

The officer, in his letter dated October 4, 1973, points out that he did not notice the overpayments for the following reasons:

"\* \* \* First, I was not drawing full pay due to my location. Secondly, I was drawing combat pay, receiving a tax deduction for service in Viet Nam and received a longevity and periodic pay raise during this time period all of which tended to distort my actual pay rate."

While it is recognized that the member's pay may not have been the same in various months, the increase of \$400 in a single month for no reason except the administrative error was an increase which would not go unnoticed by a reasonable member. Also, itemized leave and earnings statements are issued periodically to members of the uniformed services for the purpose of informing them of exactly what entitlements and deductions go into arriving at their net pay.

In the present case, in spite of fluctuations in his pay while in Vietnam, the member's pay was, in effect, increased by \$400 a month, effective in January 1969. In our view, this large increase should have been sufficient to have alerted the member to the probability that he was receiving more than his otherwise proper entitlements and should have caused him to promptly investigate the matter to determine the correctness of his net pay.

Accordingly, we see no basis upon which the member's request for waiver may be considered and the action taken by our Transportation and Claims Division is sustained.

MILTON SOCOLAR

For the Comptroller General  
of the United States