

FILE: .B-190375

DATE:June 13, 1978

MATTER OF: Reserve Members Restored to Duty

- **DIGEST:** 1. Army members involuntarily separated from but later retroactively restored to active duty by administrative record correction action (10 U.S.C. 1552 (1970» thereby become entitled to retroactive payment of military pay and allowances; however, they do not gain entitlement to either reimbursement of legal fees incurred in the matter or damages based on a tort theory of wrongful separation from active duty.
  - 2. In the absence of a mutual nlistake in numerical computation or similar undisputed error which remains' undetected at the time of settlement, acceptance of settlement by an Army member incident to administrative action taken to correct his military records bars the pursuit of further claims by the member against the Government in the matter. 10 U. S. C. 1552(c) (1970).
  - 3. Acceptance of settlement by an Army member incilent to the administrative correction of his military records would not operate to bar his subsequent request for waiver of erroneous payments of military pay and allowances shown as debits to his account in the settlement statement; and the gross amount of such erroneous payments could be considered for waiver. 10 U. S. C. 2774 (Supp. II, 1972).
  - 4. Requests for waiver of erroneous payments submitted by Army members retroactively restored to active duty through the correction of their military records, will ordinarily be favorably considered only to an extent which will prevent the individual member from having a net indebtedness upon his actual return to duty; however, waiver of further amounts may be granted for leave payments required to be collected but for which due to the statutory leave limit, restoration of the leave cannot be made.

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- 5. If an Army member is retroactively restored to active duty through the correction of his military records, and this produces a result showing the member to have improperly received Federal **civilian** compensation concurrently with military **pay**, the interim Federal civilian compensation is rendered erroneous and subject to recoupment, but is also subject to waiver under 5 U. S. C. 5584 (Supp. IV, 1974); and a request for waiver of such erroneous civilian compensation will be favorably considered to an extent which will prevent the member from having a net indebtedness upon his actual return to active military service.
- 6. In the case of Army members retroactively restored to active duty by the correction of their military records, waiver of erroneous payments made to the members incident to their invalid release from active duty would not operate to validate the members' release or to create any valid separation payments; hence, the amounts waived would not later be subject to recoupment under 10 U. S. C. 687(f) (1970), which requires that readjustment payments be deducted from retired pay if the member qualifies for retirement for years of service:

This action is in response to a letter dated August 22, 1977 (file reference FINCY-AB), with enclosures, from Mr. R. F. Benjamin. Special Disbursing Agent, United States Army Finance and Accounting Center, Indianapolis, Indiana, requesting a decision with respect to the proper adjustments to be made in the accounts of several hundred Army Reserve officers who were involuntarily separated from active service.. but Who were subsequently restored to active-duty status retroactively as the result of action taken to correct their military records. The request was forwarded to this *Office* by the Office of the Comptroller of the Army by letter dated October 4, 1977 (DACA-FAF-M), and has been assigned control number DO-A-1273 by the Department of Defense Military Pay and Allowance Committee.

### Background

The Reserve officers concerned were released from extended active duty in the Army under the provisions of 10 U. S. C. 681 (1970) and implementing departmental regulations. However, the Secretary of the Army, acting through the Army Board for Correction of Military Records, later determined that such releases had been improper. Consequently, the members' records were corrected to expunge the fact of their release and to show their uninterrupted continuation on active duty, pursuant to 10 U. S. C. 1552 (1970) which authorizes the correction of military records in such circumstances.

As the result of this corrective action, the members became entitled to payment for the military pay and allowances they would have teceived had they been retained on active duty. In the settlement of the members' accounts, however, a number of questions arose concerning the proper treatment to be accorded certain amounts of money received by them in the interim. These were amounts the members would not have obtained but for their actual release from active service.

Responding to those questions in decision 56 Compo Gen. 587 (1977), we held that the members were indebted to the United States for amounts received by them upon their separation as readjustment pay under 10 U. S. C. 687 (1970). We held the members were also "indebted for unused accrued leave payments received pursuant to 37 U. S. C. 501 (1970) at the time of separation, but that they were entitled to be recredited with the days of unused accrued leave for which payment had been made. We held further that the members were indebted for any interim military pay and allowances earned for services performed with a Reserve component. In addition, we expressed the view that the members' interim civilian earnings were deductible from the net balance due them after setoff of their debts to the Government, but were not recoupable in excess of that net balance.

In that decision we observed further that payments of military pay and allowances which had been rendered erroneous by the correction action could be considered for waiver under the provisions of 10 U. S. C. 2774 (Supp. II, 1972). We said that application for waiver would have to be considered on a case-by-case bas"is, and that generally waiver should be granted only to an extent which would prevent the individual member from having a net indebtedness upon restoration to active duty.

In the present submission, it is indicated that further questions have arisen as the result of problems encountered in concluding final settlements of the members' accounts in the aftermath of the correction action. It appears that a number of the members are reluctant to accept settlement and sign a claim release certificate, fearing that this might act to bar their claims for additional amounts believed due to them in the matter. In this connection it is suggested that certain members believe they are entitled to reimbursement of legal fees incurred in the record correction proceedings and also to damages for inconveniences and economic losses suffered as the result of their separation from active duty. In addition, the members apparently fear that acceptance of settlement might act to bar their applications for waiver of erroneous paylnents created by the correction of their records. They appear to be concerned, too, that even if waivers are granted as to erroneous payments made incident to their invalid separations from active duty, they may nevertheless be reqUired to repay the amounts waived at some time in the future.

In the submission it is also said that in attempting to apply the principles enunciated in 56 Comp. Gen. 587, supra, certain inequities have been encountered in determining the precedence of collection and the amounts to be considered for waiver under 10 U.S.C. 2774. Proposed settlements in 5 example or representative cases are presented to illustrate the point. Among these 5 examples, it appears that in one case the member's interim civilian earnings were from Federal sources, and it is noted by the Special Disbursing Agent that such earnings must be regarded as a debt to be recouped in the gross amount under the dual compensation laws, with specific reference to 5 U.S.C. 5536 (1970), while in another case the member's interim earnings were from non-Federal sources, and as such are not subject to recoupment but rather only to set off against the net amount due. In addition, it appears that in some cases members have lost days of leave recredited to their accounts, since they were also credited with days of leave for the interim period of constructive active duty, and the total amount of accrued leave thus exceeded the 60-day limit imposed by 10 U. S. C. 701(b) (Supp. II, 1972). The proper treatment to be accorded such items in the adjustment of the members' accounts is therefore brought into question.

Effect of Accepting a Settlement Under 10 U.S.C. 1552(c)

Questions "a" and "b" presented in the submission are:

"a• Does the acceptance of a settlement under 10 U. S. C. 1552 bar the pursuit of other types of claims incident to these matters against the United States?

lib. If a member has signed a claim certificate and accepted a settlement offered under 10 U. S. C. 1552. is he eligible to apply for consideration of waiver of erroneous payments under 10 U. S. C. 2774?"

With respect to question "a•" subsection 1552(c) of title 10. United States Code specifically directs that: "A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. " Hence. in the absence of a mutual mistake in numerical computation or similar undisputed error which remains undetected at the time of settlement, acceptance of settlement bars the pursuit of further claims against the Government incident to the records correction action. See 45 Compo Gen. 140 (1965); Hiett v. United States. 131 Ct. Cl. 585 (1955). Therefore. a member's acceptance of settlement would bar most additional claims for reimbursement. Claims for damages based on a theory of wrongful or tortious separation from active duty would not be payable under 10 U.S.C. 1552(c) in any event nor would claims for reimbursement of legal fees. Compare decisions B-185612. August 12. 1976; Yee v. United States. 206 Ct. Cl. 388 (1975); and Middleton v. United States, 175 Ct. Cl. 786 (1966). Therefore. question *a*" is answered in the affirmative.

However. acceptance of a settlement under 10 U. S. C. 1552 does not preclUde a member (or former member) from applying for a waiver of collection of erroneous payments under 10 U. S. C. 2774. It should be noted that a claim against the United States is not eqUivalent to a request for a waiver. A claim is an alleged legal right against the Government which. if valid. may be .collected. A request for a waiver of erroneous payment. on the other hand. derives from a member's indebtedness to the United States. Hence. a member's acceptance of a settlement. which would operate to satisfy his claims against the Government incident to the correction of his records. would not operate to bar from consideration a request subsequently submitted by him for waiver of the Government's claims against him resulting from erroneous payments created by the records correction action. Hence, question "b" is answered in the affirmative.

#### <u>Waiver</u>

Question "c" IS as follows:

"c. If the answer to fbI above is the affirmative, can the gross amount of the erroneous payments be considered for waiver under 10 U. S. C. 2774?

Under 10 U. S. C. 2774 erroneous payments of military pay and allowances may be waived " in whole or in part." Thus, a member who accepts a settlement in connection with the records correction action may properly request waiver of the gross amount of all the erroneous payments of payor allowances deemed to have occurred as the result of the correction action. However, while we will consider for waiver the gross amounts, there is no legal right or entitlement to an approval of a request for waiver. As we stated in 56 Compo Gen. 587, supra, it is our general policy in these and similar cases to grant waivers only to the extent of preventing individual members from having a net indebtedness upon restoration to active duty, since that policy seems in keeping with the purpose of the correction of the members' records, that is to restore the members as nearly as possible to the positions they would have been in had the errors not been made. This should not be taken to mean that requests for waiver of the total amount of the erroneous payments would be barred from consideration since the amount to be waived, if any, will be a question to be resolved in the individual case on the basis of equitable principles. Question "c" is, therefore, answered in the affirmative.

Question "d" as presented in the submission is:

"d. If a member refuses to sign the claim release certificate and requests waiver, must the waiver be resolved before further action can be taken to finalize the claim under 10 U. S. C. 1552?"

With regard to question "d" concerning the possibility of granting waiver in advance of settlement, we note that by accepting settlement under 10 U.S.C. 1552, a member thereby acknowledges that the items

and amounts shown as debits and credits to his account are correct. If the member chooses to contest rather than accept the settlement, however, the entire matter remains in a state of suspense, and although the Government has determined the amount of the member's debt and the Government's liability, the matter is not settled. The member may request waiver at any time of a debt to the Government provided his request is made within 3 years after the debt is discovered. However, in cases of this type, if the member has not accepted settlement under 10 U. S. C. 2774, consideration of the waiver request would not be appropriate because the member has not agreed to the Government's statement of his account. Therefore, in the absence of special circumstances, consideration of the waiver request by the Department and forwarding of a report to this Office, if necessary, should be delayed until the member has accepted the Government's settlement. Question "d" Is answered accordingly.

Questions "e" and "f" are:

lie. If the request for waiver is favorably considered, does this validate the erroneous payments for all purposes as provided by 10 **U. S.** C. 2774(e)?

"f. If the answer to Ie' above is in the affirmative, is immediate recoupment of **75%** of readjustment pay required under 10 U. S. C. 687(f) in the event a member later qualifies for retired payor VA compensation?"

Subsection 2774(e) of title 10, United States Code, provides that:

"An erroneous payment, the collection of which is waived under this section, is considered a valid payment for all purposes. "

Subsection 687(f) of title 10, United States Code (1970) provides:

"(f) If a member who received a readjustment payment under this section after June 28, 1962, qualifies for retired pay under any provision of this title or title 14 that authorizes his retirement upon completion of twenty years of active service, an amount equal to 75 percent of that payment, without interest, shall be deducted immediately from his retired pay. 'I The readjustment payments to the members concerned here have been rendered completely invalid by the records correction action, and the members are liable to repay all the amounts they received. 56 Compo Gen. 587, <u>supra.</u> If a member's request for waiver is approved in whole or in part, the provisions of 10 U. S. C. 2774(e) would convert the amount waived into a valid payment, but would not serve to validate the erroneous personnel actions giving rise to such payment. See 49 Compo Gen. 18 (1969); and compare B-185192, March 2, 1976. Hence, waiver here would not operate to validate a member's separation or any readjustment payment made incident thereto, but would simply serve to convert an erroneous payment into a valid payment. -Therefore, any amount waived would not be subject to recoupment under 10 U. S. C. 687(f). Question "e" is answered accordingly and question "f" is answered in the negative.

Question "g" is as follows:

"g. Can the reductions for civilian earnings from private employment, earnings from Federal employment (Civil Service), inactive duty military pay and allowances, active duty military pay and allowances, and retired pay be applied as the first stoppage against the retroactive pay and allowances?"

We note that departr, lental regulations do not prescribe an order of precedence for stoppages with respect to the items mentioned in the question. In the absence of such regulations, it is our view that the purposes of the records correction statute will be best served by collecting the described items in the following sequence: (1) debts arising from erroneous interim payments of military pay and allowances (erroneous readjustment, retired, active duty, inactive duty pay, etc.) together with other debts incurred incident to Army service; (2) debts owed to the Government arising from transactions with other Government agencies, such as the Veterans Administration; (3) interim earnings from Government civilian. employment which are subject to recoupment in full. . 46 Compo Gen. 400 (1966) and compare Seastrom v. United States, 147 Ct. C!. 453 (1959); and (4) interim civilian earnings not from Government employment which are not subject to recoupment but only to setoff against any balance of retroactive pay and allowances due. See 56 Compo Gen. 587, 591, supra; 49 Compo Gen. 656, 662 (1970). Question "gll is answered accordingly.

#### <u>Representative Cases - Lump-Sum Leave Payments</u>

Question "h" concerns the correct order of collection in the 5 representative or example cases described in the submission. It does not appear that anyone of the 5 members has accepted the settlement offered to him. Based on the information submitted to . us the following should aid in the proper resolution of these 5 cases and the cases of other members similarly situated.

The first example is as follows:

• \* \* The "Example #1, Davis Sherman E., officer was relieved from active duty on 31 October 1974 and reenlisted as an E -5 on 1 November 1974. The ABCMR corrected the officer's records to show the relief from active duty on 31 October 1974 and the reenlistment on . 1 November 1974 were void and without force and effect. The records were further corrected to show a promotion to 0-5 on 1 August 1974. At the date of relief from active duty, the officer was paid readjustment pay in the amount of \$15,000.00 and \$3, 623.64 for 60 days unused accrued leave. As a result of the voiding of the officer's relief from active duty these separation payments became erroneous paylnents. As shown by the computation sheet attached to the voucher, the officer gained entitlement to military pay and allowances in the gross amount of \$53,483.00. During the same period he incurred liabilities, including the readjustment pay of \$15,000.00 and the accrued leave payment of \$3,623.64, for a total of \$45,588.15. Net amount due officer: \$7,894.85. Since the payment for accrued leave was collected in full. the 60 days accrued leave must be recredited to the member's leave account effective 1 November 1974. Due to the leave accrual limitation imposed by 10 U.S.C. 701(b), the member lost a certain amount of leave accrual as of the end of the fiscal year. The member requests that the erroneous payments of readjustment pay and accrued leave be considered for waiver in the gross amount of \$18,623.64, under the provisions of 10 U. S. C. 2774."

In this case, the items shown as credits and debits in the proposed settlement appear to be correct, and since the amount of retroactive pay and allowances due to the member exceeds the total amount of his debts, the order of precedence in the collection of those debts **is**, in our view, not of great importance; however, the order of ' precedenc'e set out in response to question "g" should be followed. As to the member's request for waiver, it appears that he lost 38 days of earned accrued leave in the transaction which, because of the statutory limitation on accrued leave, cannot be restored to him although the amount he received for such leave must be collected from him. Therefore, although he was not in debt upon restoration to active duty, it appears equitable to grant waiver of the amount to be collected for the lost leave. Thus, if he accepts settlement, favorable consideration could be given to waiver of 38/60 of \$3,623.64 (the amount of the erroneous payment for 60 days accrued leave).

The member also bases his request for waiver on the premise that he was and will be subjected to unusually high Federal taxes because of lump-sum payments. The amount a person is required to pay in income tax in any given year is dependent upon his situation at the time the tax is due and the applicable tax laws and regulations, which include provisions for income averaging to reduce tax liability for years in which unusually large amounts of income are received. 26 U. S. C. 1301 et seq. (1970). Our waiver authority relates to overpayments <u>orpay and</u> allowances and not to tax liability which may be a secondary result of overpayments or refunds thereof. Therefore, the member's tax liability is not a basis for waiver. Compare B-183430, November 28, 1975.

In addition, the member requests waiver generally on the theory that he served at reduced pay as an enlisted member after he was separated from active duty as a commissioned officer and he suggests this was against equity and good conscience; however, this has been rectified through retroactive payment of his pay and allowances as a commissioned officer, and this factor may therefore not be regarded as a proper basis for granting waiver.

The second example is:

"Example #2, Wallace, Clarence C., Jr., Officer was relieved from active duty effective 30 June 1974 and placed on the retired list with retired pay effective 1 July 1974. Incident to his relief from active duty he was paid \$2,820.36 for 60 days unused accrued leave. The ABCMR corrected the officer's records to show that his relief from active duty was void and without force or effect and that he was promoted to

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the grade of CW-4. effective 1 July 1974. As a result of the ABCMR's actions and as evidenced by the attached USAFAC computation sheet. the member gained entitlement to military pay and allowances for the period 1 July 1974 to 17 November 1976. in the amount of \$50.397.81. During the same period he incurred liabilities for retired pay. accrued leave payment and other miscellaneous collections in the amount of \$35.800.97 Net amount due **member:** \$14. 596.84. Since the payment for unused accrued leave has been collected. it is necessary to recredit the 60 days leave to the member's leave account effective 1 July 1974. Due to the leave accrual limitation imposed by 10 U. S. Co' 701(b), the member will lose accrued leave at the end of the fiscal years. The member has requested that the gross amount of the erroneous accrued leave payment be considered for waiver under the provisions of 10 U.S.C. 2774."

The comments made with respect to the order of precedence of collections in the first example are equally applicable here. Waiver of the erroneous unused accrued leave payment could be granted in an amount representing the number of days of leave earned but subsequently lost by operation of the statute.

The third example is as follows:

"Example #3. Hyatt. John J.. The Officer was relieved from active duty on 15 November 1975. Incident to his separation from active duty. he .was paid readjustment pay in the amount of \$15.000.00 and \$3,120.88 for 58-1/2 days accrued leave. The ABCMR corrected the officer's records to show that his relief from active duty was void and without force or effect and that he was promoted to the grade of Major effective 1 September 1975. As a result of the ABCMR's actions and as evidenced by attached computation sheet the member gained entitlement to military pay and allowances for the period 16 November 1975 to 17 November 1976 in the amount of \$22.856.37. As a further result of the correction of his records he incurred liabilities including the readjustment payment and payment for unused accrued leave, in the amount of

\$19,847.89. Net amount due: \$3,008.48. However, in the interval between 16 November 1975 and 17 November 1976, the member earned from private civilian employment \$12,233.91. Of this amount, \$3,008.48, was collected to "zero" out the member's account or the net amount due, \$3,008.48 less \$3,008.48 civilian earnings, resulting in no amount due the member. II

In this **case**, the member's debts to the Government have been first set off against backpay due to him, and his interim civilian earnings have been deducted from the remaining net balance, properly and in conformity with our views as expressed in 56 Compo Gen. 587, <u>supra</u>, and 49 Compo Gen. 656, <u>supra</u>. While it is not indicated that the member has expressed an <u>interest</u> in obtaining waiver of any of the erroneous payments he received, he may initiate a request for waiver. Such request should be treated in the same manner as the requests which may be submitted by the members in examples 1 and 2; that is, a request based on days of leave lost (if any), for example, 'could receive similar favorable consideration, *:if* warranted, even though the member in example 3 had a substantial amount of interim civilian earnings.

The fourth example is:

"Example #4, Fulcher, Walter, H., Jr.,

Officer was 11 lieved from active duty on 28 October 1975. Incident to hIS relief from active duty he was paid readjustment pay in the amount of \$15, 000.00 and \$3,805.10 for 60 days unused accrued leave. The ABCMR corrected the officer's records to show that his relief was void and without force or effect and that he was promoted to Lieutenant Colonel effective 1 August 1974. As a result of the ABCMR is actions and as evidenced by the attached USAFAC computation sheet, the member gained entitlement to military pay and allowances for the period 29 October 1975 to 16 November 1976 in the amount" of \$29,795.87. During the period, the member earned as an employee of the Federal government (Civil Service) \$18,450.80. In view of the dual compensation statute, 5 U. S. C. 5536, this amount must be collected in full and not offset in the same manner as earnings from private civilian employment. Accordingly, as a further result of

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the ABCMR's actions, the member incurred liabilities including the readjustment pay, accrued leave payment and civilian earnings in the amount of \$38,150.95. Amount due the United States: \$8,355.08.

"Your attention is invited to the inequity between the treatment afforded a member who had civilian earnings as opposed to a member who had earnings from employment by the Federal Government. Compare examples 3 and 4."

The order of precedence of collections should be in accord with our answer to question "g." Here. the correction of military records produced a result showing the member to have erroneously and improperly received Federal civilian compensation concurrently with military pay. The Federal civilian earnings are thus subject to recoupment, but they are also subject to waiver under the civilian compensation waiver statute. 5 U. S. C. 5584 (Supp. IV. 1974). The member may therefore request waiver of the erroneous payments of civilian compensation under that statutory provision and his request could be favorably considered for waiver in the amount of \$8.355.08, so that he will not have a net indebtedness upon restoration to duty, and his interim Federal civilian earnings will effectively be treated in the same manner as ordinary outside earnings. He may also apply for waiver of the erroneous military payments for accrued leave under 10 U. S.C. 2774; and he could receive favorable consideration on such request to the extent that he can show that he actually lost leave.

The fifth example is as follows:

\* \* \*

"Example 5. Stalder. Lee R., Jr., Officer was relieved from active duty on 16 November 1975. Incident to his relief from active duty he was paid readjustment pay in the amount of \$15.000.00 and \$3,203.47 for 56-1/2 days unused accrued leave. The ABCMR corrected the officer's records to show his relief was void and without force of effect and that he was promoted to the grade of Major effective 1 July 1974. As a result of the ABCMR's actions and as evidenced by the attached USAFAC computation sheet the member gained entitlement to Inilitary pay and allowances for the period 17 November 1975 to 17 November 1976 in the amount of \$27,455.33. During this same period he earned as reserve member on active duty \$18,114.45 and is indebted to the Veterans Administration for benefits received in the amount of \$198.72. As a further result of the ABCMR S actions, the member incurred liabilities, including the readjustment payment, accrued leave payment, amounts earned as a reserve member and the VA benefits in the amount of \$37, 449.09. Amount due the United States: \$9,993.76."

The order of precedence of collections in this case should be in accord with our answer to question"g. <sup>II</sup> The member may request waiver of the erroneol.1.S interim active duty pay and allowances, and such request could be favorably considered in the amount of \$9, 993.76, so that he will not have a net indebtedness upon his restoration to extended active duty. The member could also receive favorable consideration for waiver of further amounts on the basis of leave lost.

Question "h"is answered accordingly.

## Conclusion

In summary, the adjustment of accounts of the members concerned in the aftermath of the action taken to correct their records, should proceed in the following manner. First, the member should be offered settlement. Second, the member should ascertain that the proposed settlement is correct, since his acceptance of settlement will ordinarily bar any further claims against the Government incident to the matter. Third, upon acceptance of settlement, the member's request for waiver of erroneous payments of military pay and allowances and civilian compensation resulting from the records correction action, if any, will be considered. Requests for waiver will ordinarily be favorably considered only to an extent which will prevent the individual member from having a net indebtedness upon restoration to active duty; however, waiver of further amounts may be granted as noted above upon a showing that the member lost leave for which collection was required. Since presumably in most cases the amount of the erroneous payments for which waiver is sought exceeds \$500, the requests for waivers in those cases should be forwarded to our Claims Division where they will be considered under the guidelines established in this decision and in 56 Compo Gen. 587.

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The submitted vouchers are returned for further processing in conformity with the views expressed herein.

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Acting Comptroller General of the United States

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## DECISION RECIPIENTS

B- 190375

JUN 1 ່ວ 1978

Date:

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