

DECISION



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

10,217

FILE: B-194027

DATE: May 17, 1979

MATTER OF: Master Sergeant Charles E. Lawler, USMC

[REconsideration Request CONCERNING ERRONEOUS DEPENDENCY
ALLOTMENTS]

- DIGEST:
1. A service member who, because of a debt arising out of erroneous payments of a dependency allotment to his spouse, seeks waiver under 10 U. S. C. 2774 on the basis that the error was solely administrative since he had properly terminated the allotment, may not be allowed waiver on that basis alone. The Government has the right to recover erroneous payments; therefore, the provisions governing waiver focus on the recipient and whether the facts in the individual case support waiver. Where it appears that a reasonable person should have been aware that improper payments were being made, the person is considered at least partially at "fault", precluding waiver, if he takes no action to notify responsible officials.

 2. A service member's debt due to erroneous allotment payments made to his spouse which were not deducted from his pay may not be waived since he was responsible for the support of his dependents, he and his spouse were living as husband and wife, and he reasonably should have been aware of the erroneous payments. Under 10 U. S. C. 2774, the burden of establishing that he had no reasonable basis for knowing or suspecting that erroneous payments were being made is primarily on the individual seeking waiver. Where the information provided fails to establish an adequate basis upon which such a determination may be made, waiver may not be granted.

 3. Where erroneous payments of pay are made to a member, recovery of amounts so paid may be made by involuntary deductions from the member's pay in monthly installments, ordinarily not to exceed two-thirds of his monthly pay. 5 U. S. C. 5514, and Rule 1, Table 7-7-6 of the DODPM.

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This action is in response to letters dated October 22, and November 9, 1978, from Master Sergeant Charles E. Lawler, USMC, requesting reconsideration of our Claims Division's denial of waiver of his debt to the United States which arose from erroneous payments of dependency allotments during the period January-June 1973.

Effective May 1971, Sergeant Lawler authorized a monthly dependency allotment in the amount of \$500 payable to his wife, Salena D. Lawler. Sergeant Lawler states that in December 1972, while stationed at Camp Lejeune, North Carolina, he filed a written request to have the allotment terminated effective that month, but the allotment was not stopped because the request had been misplaced. He refiled the request, to be effective January 1973. According to his pay account records, the allotment deduction from his pay was properly terminated; however, through administrative error, payment of the allotment continued to be made to his wife through June 1973, creating a total overpayment of \$3,000. The error was discovered in July 1973 at the close of that 6-month pay period. Also at that time \$367.58 otherwise due him was applied to the debt reducing it to \$2,632.42.

The basis for denial of waiver in Sergeant Lawler's case was that the item of pay in question was a significantly large dependency allotment to his wife which had been in effect for quite some time. The presumption was that it was unlikely that he would terminate it without at least informing her of his action; therefore, he should have known that she continued to receive the allotment and taken action to report the error to the appropriate service officials. As a result, it was felt that his failure to do so established at least partial fault on his part.

Sergeant Lawler states that he was transferred from Camp Lejeune to Okinawa in March 1973. He contends that since his pay account was correct at that time, he had no reason to believe that any improper payments were being made. He also argues that since the basic error was administrative and that he had twice requested termination of the allotment, those facts alone are a sufficient basis for the granting of waiver in his case. Additionally, he complains about the rate (\$120 a month) at which the Marine Corps is collecting the debt from his pay.

The law governing waiver of claims by the United States arising out of erroneous payments of pay and allowances made to or on behalf

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a member of a uniformed service is contained in 10 U.S.C. 2774 (1976). That provision authorizes the Comptroller General to waive such a claim if its collection "would be against equity and good conscience and not in the best interest of the United States." However, subsection 2774(b)(1) prohibits the exercise of that authority if there is "an indication of * * * fault * * * on the part of the member or any other person having an interest in obtaining waiver of the claim."

We recognize that erroneous payments often arise as a result of mistakes by those who are charged with the administrative responsibility for making the payments. However, where a payment is in excess of that authorized by law, the Government has the right to recover the excessive amount and the recipient has the obligation to make restitution even though the payment resulted from the error of personnel responsible for making the payments. The provisions of the waiver statute, therefore, focus on the recipient of the erroneous payments and whether the facts in the individual case support waiver. It is to be noted that the granting of waiver, in whole or in part, is not a matter of right. Rather, it is a matter of administrative grace or dispensation subject to the limitations contained in the law.

We interpret the word "fault" as used in 10 U.S.C. 2774(b)(1) as including something more than a proven overt act or omission. The standard employed is to determine whether, in light of all the facts, a reasonable person should have been aware that payments in excess of his proper entitlement were being made. If it is so determined, and no action had been taken by the member to have the matter corrected, fault is considered to exist on his part. B-184783, May 12, 1976.

The burden is on the individual seeking waiver to show that there was no reasonable basis for him to know or suspect that erroneous payments were being made. There is nothing in the law which requires the Government to establish a basis for waiver.

Information furnished by the Marine Corps shows that Sergeant Lawler's family included his spouse and 4 dependent children and that their living expenses at the time of the erroneous payments were not less than \$500 a month. Since an individual has the responsibility to provide financial support for his family, and there is nothing


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in the record to show that Sergeant and Mrs. Lawler were not living as husband and wife, it is not unreasonable to assume that the member would have discussed the allotment with Mrs. Lawler prior to its termination. Also, it would appear that upon termination of the allotment he would make other arrangements for their financial support, especially in view of his impending overseas transfer in March 1973. In these circumstances it would appear that a reasonable person should have been aware that the allotment payments were continuing. We note that he apparently reinstated the allotment shortly after the erroneous payments were stopped in July 1973.

The only information we have been given concerning the member's lack of knowledge or awareness of these improper payments is his assertion that his pay account was correct. In the total circumstances of the case, we do not believe that such a statement provides an adequate basis upon which a determination can be made that he could not reasonably be expected to realize that erroneous payments were being made.

Therefore, it is our view, that the record before us does not provide a basis upon which waiver may be granted and the action taken by our Claims Division is sustained.

With regard to the \$120 a month which Sergeant Lawler states is being deducted from his pay to satisfy his debt, 5 U.S.C. 5514 (1976) and Rule 1, Table 7-7-6 of the Department of Defense Military Pay and Allowances Entitlements Manual authorize involuntary collection in that manner. In most cases the amount collected may not exceed two-thirds of the member's monthly pay. Thus, the amount being collected from his pay appears proper.


Deputy Comptroller General
of the United States