

DECISION



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

FILE: B-196226

DATE: August 30, 1984

MATTER OF: Petty Officer Robert R. McGhee, Jr.
USN/Retired

DIGEST:

A service member who upon retirement had excess leave charged to him totaling a number of days in excess of the number of days pay to which he was entitled, should not have expected to receive the payment erroneously made to him at retirement. Since the member is not without "fault", he may not be granted waiver for the debt under 10 U.S.C. § 2774.

Petty Officer Robert R. McGhee, Jr., USN (Retired) requests reconsideration of our Claims Group's December 12, 1983 denial of his application for waiver of his debt to the United States in the amount of \$700.

The overpayments were the result of errors in computing excess leave and failure to take into consideration on his final pay his regular pay received on March 30, 1982. He was charged for 10.5 days of excess leave, whereas he should have been charged for 18 days of excess leave. This resulted in an erroneous payment of \$587.10. Additionally, a \$700 payment received on March 30, 1982, was not taken into account when his final pay was prepared at the end of April 1982. His final pay totaled \$1,287.10, when he should have received nothing.

That portion of his indebtedness attributable to the error in computing his excess leave was waived by our Claims Group on the Navy's recommendation. It was the view of the Claims Group and the Navy that while the member should have known that he had a negative leave balance, the exact amount of excess leave was not ascertainable and, as a result, \$587.10 of his debt was waived.

However, the \$700 payment that he received which was not recorded resulted in increasing the overpayment to such an extent that he should have known an error had been made. In other words, when he received a final payment of

029897

\$1,287.10 he should have known that it was incorrect. As a result waiver was denied for \$700 of the total overpayment.

Mr. McGhee contends that he does not remember receiving the payment of \$700 on March 30, 1982, and that his regular pay always came in uneven amounts, not amounts such as \$700. He states that he does not believe that he has been paid erroneously and that collection of the debt would cause undue hardship to him. Mr. McGhee also contends that when he retired he checked with the disbursing office and he was assured that his pay was correct. In requesting reconsideration, Mr. McGhee suggests that the conclusion reached by the Claims Group is unfair.

Subsection 2774(a) of title 10, United States Code, provides in pertinent part, that a claim against a member or former member of the uniformed services arising out of an erroneous payment of pay or allowances, 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. Subsection 2774(b) further provides that 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 or any other person having an interest in obtaining a waiver of the claim * * *"

The word "fault" as used in 10 U.S.C. § 2774 includes more than a proven overt act or omission by the member. Thus, we consider "fault" to exist if, in light of all of the facts, it is determined that the member should have known that an error existed and should have 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. See Thomas M. Welsch, B-196461 February 13, 1980.

In this case, the record shows that Mr. McGhee was paid \$700 on March 30, 1982, as regular pay. It appears that he was also paid \$719 on April 15, 1982, as regular pay.

Although Mr. McGhee contends he does not remember receiving that amount on March 30, the record reflects that he was paid and it is difficult to believe that had Mr. McGhee not received his regular pay, that he would not have contacted the disbursing office to find out why he had not received regular pay. The March 30th payment was erroneously omitted in computation of Mr. McGhee's separation pay, which is why he received pay not due him.

Mr. McGhee then retired on April 30, 1982. At the time he retired, he was entitled to 15 days of pay and allowances (April 15-April 30). However, Mr. McGhee had also charged 18 days of advanced leave which became excess leave due to his early retirement. Due to another administrative error, only 10.5 days of excess leave (April 20-April 30) were computed in his separation pay resulting in an additional overpayment. Although he may not have known his exact leave total, knowing he had taken the excess leave, Mr. McGhee as a reasonable person, should not have expected to receive regular pay of \$700 for the period during which he was on advance or excess leave and not have that amount deducted from his separation payment. As was pointed out by Navy disbursing officials, Mr. McGhee, as a member with an excess of 20 years naval experience should have known that the amount of the final pay check he received was an error. Although Mr. McGhee says he checked with the disbursing office, it is our view that the payment was so large that he should have pursued the matter and requested an itemized breakdown of his separation pay which would have revealed the error to him.

Mr. McGhee questions the fairness of requiring him to repay the funds. However, Mr. McGhee was overpaid money not due him and a service member who suspects or has reason to know he is being overpaid has a duty to retain the excessive payments for eventual return to the Government.

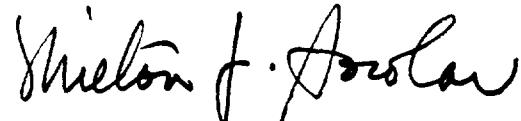
Mr. McGhee stresses that the overpayment was due to another person's error. We realize that the overpayment was made through administrative error. However it is fundamental that persons receiving money erroneously paid by a Government agency or official acquire no right to the money and they are bound in equity and good conscience to make restitution. Chief Warrant Officer Harmon H. Simes, Jr., B-202492, October 9, 1981.

B-196226

The record reflects a detailed statement by Mr. McGhee explaining why paying back the money would be a hardship to him. Financial hardship involved in making a restitution of such funds is not a factor we may properly consider in determining whether the member was without "fault" and is eligible to have the erroneous payment waived. See Chief Petty Officer William F. Seacrest, Jr., USN, B-201814, September 18, 1981.

The waiver law was enacted to provide specific statutory authority to relieve members or former members of their obligation to refund erroneous overpayment only in certain circumstances. These include as stated above, when a member is without "fault" in the matter. In view of all the facts in this case we find that Mr. McGhee was not without "fault" in this matter and requiring him to pay his debt is neither against equity or good conscience nor contrary to the best interest of the United States.

Accordingly, the action taken by our Claims Division in denying waiver in this case is sustained.

for 
Comptroller General
of the United States