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DECISION



12839 PLMT
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

111557
FILE: B-196460

DATE: February 13, 1980

MATTER OF: Major

ARNG

DIGEST: Army National Guard officer's request for waiver of his debt to the United States arising out of erroneous payments of military inactive duty training pay must be denied, where it appeared that he received the erroneous payments in contravention of basic National Guard regulations with which he should have been familiar. Under the governing provisions of statutory law, waiver is authorized only if it is established that the service member could not have reasonably known he was being overpaid at the time he received the erroneous payments. 10 U.S.C. 2774 (1976).

Major , ARNG, , requests reconsideration of our Claims Division's denial of his request for waiver of the Government's claim against him resulting from erroneous payments of military inactive duty training pay he received for the period from December 1973 through August 1974. In view of the facts presented, and the applicable provisions of law and regulation, we sustain the Claims Division action.

Major was called to active duty for training (ADT), during the following periods in 1974: January 2-31, February 4-28, May 1-31, July 15-August 16, and August 19-September 30. He received active duty military pay and allowances during those periods.

Major 's Army National Guard unit held regularly scheduled weekend inactive duty training assemblies at various times while he was on active duty, and it appears that he did inactive duty equivalent training in lieu of those regularly scheduled unit assemblies. Major performed individual equivalent training as follows: December 28-29, 1973, in lieu of unit assemblies on January 26-27, 1974; February 1-2, 1974, in lieu of unit assemblies on February 9-10, 1974; June 20-23, 1974, in lieu of unit assemblies on July 27-28

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and August 10-11, 1974; and August 17-18, 1974, in lieu of unit assemblies on September 28-29, 1974.

Major [redacted] received inactive duty training pay for all of those days of equivalent training. In addition, while he was on active duty in May 1974, he attended his National Guard unit's regularly scheduled inactive duty training assemblies on the weekend of May 18-19, and he received inactive duty training pay for attending those assemblies. Thus, throughout the period in question, Major [redacted] received military inactive duty training pay on the basis of his unit's inactive duty training assemblies held while he was on active duty and receiving active duty military pay and allowances.

During a review of individual finance records of Army National Guard members conducted in 1975 and 1976, Army Reserve finance and accounting officials discovered there were discrepancies in Major [redacted]'s pay accounts, and they determined that he had improperly received active duty pay and allowances concurrently with inactive duty training pay between December 1973 and September 1974. It was concluded that payments of inactive duty training pay received by Major [redacted] totalling \$960.96 during that period had been erroneous, and he was then required to repay that amount to the Government.

Major [redacted] has requested that those erroneous payments be waived and that the amount collected from him, \$960.96, be refunded. As previously indicated, our Claims Division denied his request, essentially for the reason that Major [redacted] should have known the payments were erroneous at the time he received them.

Major [redacted] has asked that the Claims Division's denial of his waiver request be reconsidered. In substance, he has stated that he was unfamiliar with the regulations and did not actually know that his receipt of inactive duty training pay at the time was improper. He states that he asked whether he could perform equivalent training in lieu of attending his regular unit assemblies while he was on active duty, and was

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verbally advised that there would be "no difficulty." In addition, while he now concedes that he improperly received inactive duty training pay for the unit training assemblies he attended in May 1974 while he was on active duty, he asserts he had no reasonable way of knowing that it was actually improper for him to perform the equivalent training when he was not on active duty. In effect, he suggests that he should be entitled to waiver of the inactive duty training pay he received for the days of equivalent training duty he performed when he was not on active duty and in receipt of active duty pay and allowances.

Section 206 of title 37, United States Code (1970 ed. and 1976), provides that under regulations prescribed by the Secretary concerned, a member of the National Guard, "who is not entitled to basic pay," is entitled to compensation, at the rate of 1/30 of the basic pay authorized for a member of a uniformed service of a corresponding grade entitled to basic pay, for each period of instruction, or period of appropriate duty, at which he is engaged for at least 2 hours, including that performed on a Sunday or holiday, or for the performance of such other equivalent training, instruction, duty, or appropriate duties, as the Secretary may prescribe.

Implementing regulations prescribed by the Secretary of the Army for members of the Army National Guard are contained in Army Regulation 140-1, entitled "Army Reserve Mission, Organization, and Training." Chapter 4 of the editions of that regulation dated November 1, 1972, and April 26, 1974, which were in effect at the time here in question, contain the following explicit directive:

"Equivalent training will not be authorized for training assemblies missed due to ADT of more than 5 days."

Thus, Major _____ was not entitled to inactive duty pay for the training assemblies held by his unit while he was on active duty and receiving active duty basic pay, either

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on the basis of his actual attendance at those assemblies or the performance of equivalent training. The erroneous payments of inactive duty pay he received between December 1973 and September 1974 therefore constitute a debt owed to the United States, if not waived.

Subsection 2774(a) of title 10, United States Code (1976), 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 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 * * *"

"Fault," as used in this subsection is considered to exist if it is determined that the the member should have known that an error existed but failed to take action to have it corrected. See 4 C.F.R. 91.5 (1978); and 56 Comp. Gen. 943, 951 (1977).

In the present case it appears that Major was aware of the general rule prohibiting the concurrent performance of active duty and inactive duty for training, since it appears that the dates of the equivalent inactive duty training and the dates of active duty were arranged in advance in an attempt to avoid the application of that rule. The circumstances indicate that he might easily as well have been placed on active duty on all the days in question, but that would have resulted in the loss of the additional pay and retirement point credits for the performance of the monthly inactive duty training authorized

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for National Guard members not on active duty. In any event, it is evident that he knew at the time that it was improper for him to apply for inactive duty pay for the weekend of May 18-19, 1974, while he was on active duty, and for that reason we cannot favorably consider his request for waiver of the amounts of inactive duty pay he improperly received that weekend.

With respect to Major _____'s request for waiver of the other amounts of inactive duty pay he received for performing equivalent training while not in an active duty status, it appears that he may not have consulted the regulations between December 1973 and September 1974, and it may be that he was not actually aware that what he was doing was in contravention of the regulations. However, in our view, an officer of his grade in the Army National Guard acting reasonably in those circumstances should have consulted those basic regulations. We therefore conclude that Major _____ was at least partially at fault in receiving the inactive duty pay for the equivalent training in question, in contravention of basic National Guard regulations with which he should have been familiar.

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


Deputy Comptroller General
of the United States