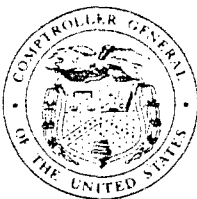


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Kramer
PLM/TI

DECISION



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

FILE: B-197513

DATE: September 24, 1980

MATTER OF: Petty Officer James K. Boatman, USN

DIGEST: Service member received BAQ at the with dependent rate due to administrative error during a period he and his dependents occupied Government quarters. Member questioned the accuracy of his pay and informed the disbursing officer that he was residing in Government quarters. Waiver may be granted for period in which he did not receive his regular leave and earnings statements (LES). However, waiver may not be granted for the period in which he regularly received an LES since they plainly indicated that he was being paid BAQ and he failed to question the accuracy of his pay after he began receiving them.

Petty Officer James K. Boatman, United States Navy, requests reconsideration of our Claims Division's denial of his application for waiver of the claim of the United States against him resulting from erroneous payments made to him of a basic allowance for quarters (BAQ) during the period from January 13, 1976, through November 10, 1977, when he and his family were residing in rent-free Government quarters. For the following reasons the claim against Petty Officer Boatman may be partially waived.

On January 13, 1976, while stationed in Philadelphia, Pennsylvania, Petty Officer Boatman was assigned to Government quarters. An "Assignment to Government Quarters" form was prepared by an officer of the Philadelphia Naval Shipyard for Petty Officer Boatman and was sent to the Navy Finance Office, Philadelphia. Through an administrative error this form was never received by the correct payroll clerk and Petty Officer Boatman's credit for BAQ

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[Request for Reconsideration]

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at the with dependent rate was not properly terminated on his pay record. As a result, he was erroneously paid BAQ at the with dependent rate from January 13, 1976, through November 10, 1977, the date he vacated Government quarters.

The member, in his original request for waiver, acknowledges that as a result of moving into Government quarters he was no longer entitled to receive BAQ. Thus, he states that upon receipt of his first paycheck after moving into Government quarters he called the Navy Finance Office to inquire if he was being overpaid. During this conversation he informed the disbursing officer that he was residing in Government quarters. He was then told that his pay was correct. Petty Officer Boatman further states that he called again the next month when his pay seemed questionable and was told that his pay was correct. Also, his superior checked into why his pay seemed excessive and was informed that Petty Officer Boatman was receiving the correct pay.

During this period of time, the member was not regularly receiving his leave and earnings statements (LES). However, after January 1, 1977, the member regularly received an LES which indicated that he was being paid BAQ at the with dependent rate.

The report from the Navy Finance Center indicates that there is no indication of fraud, misrepresentation, or lack of good faith on the part of Petty Officer Boatman. In their opinion, Petty Officer Boatman should have been aware of an overpayment when his pay increased by \$90 per pay period. The increase was due to his stopping one allotment and starting another. The Navy contends that since Petty Officer Boatman had to be aware of the allotment change then he should have been able to compute his norm pay after a deduction for BAQ at the with dependent rate. Moreover, the Navy considers that Petty Officer Boatman was remiss in not questioning his LES after January 1, 1977, which showed him receiving BAQ at the with dependent rate.

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Subsection 2774(a) of title 10, United States Code (1976), provides that the Comptroller General may waive in whole or in part a claim of the United States against a member or former member of the uniformed services arising out of an erroneous payment of pay or allowances, if its collection would be against equity and good conscience and not in the best interest of the United States. Subsection 2774(b) further provides that the claim may not be waived if in the opinion of the Comptroller General there exists an indication of fraud, misrepresentation, fault or lack of good faith on the part of the claimant.

"Fault," as used in the above subsection has been interpreted as including something more than a proven overt act or omission by the claimant. It is considered to exist if in light of all the facts it is determined that the claimant should have been aware that he was receiving payments in excess of his proper entitlements. See B-194233, September 12, 1979, and B-191757, July 24, 1978.

In the present situation, the action of Petty Officer Boatman in questioning the appropriate Navy disbursing office about his pay and informing them that he was living in Government quarters indicates an effort on his part to determine the accuracy of his pay at this time. Based upon this action and the fact that he was not regularly receiving an LES from January 1976 until January 1, 1977, we conclude that the payments for BAQ for the above period should be waived. Cf. B-191757, July 24, 1978.

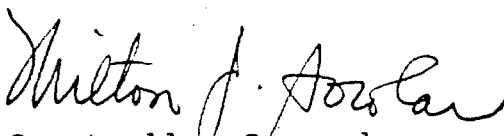
However, Petty Officer Boatman's application for waiver may not be granted for the period from January 1, 1977 until November 10, 1977. As stated previously, Petty Officer Boatman regularly received an LES from January 1, 1977, onward which plainly indicated that he was receiving BAQ at the with dependent rate.

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In this regard, we have held that a person is at least partially at fault for his failure to examine an LES furnished him which, had it been examined, would have alerted the recipient to the fact that erroneous payments were being made. See: B-192380, November 8, 1978, and decisions cited therein.

Thus, Petty Officer Boatman should have known beginning January 1, 1977 and each time thereafter he received his pay for each pay period he occupied Government quarters that he was being paid BAQ to which he was not entitled. Such knowledge on his part carried with it a duty and obligation to return the excess sums or set aside these amounts for refund at such time as the accounting error was corrected. See B-196637, February 27, 1980, and B-193020, December 7, 1978. Since he did not do so, it is our view that he is not free from fault and collection action is not against equity and good conscience nor contrary to the best interests of the United States. B-192380, supra. Moreover, financial hardship alone, resulting from collection, is not sufficient reason to retain the payments he should have known did not belong to him. B-196637, supra.

Accordingly, waiver is granted for BAQ payments made for the period January 13, 1976, through January 1, 1977, and denied for the BAQ payments made for the period January 1, 1977, through November 10, 1977.


For the Comptroller General
of the United States