

DECISION

19738 *Estwood*
Plus
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-202492**DATE:** October 9, 1981**MATTER OF:** Chief Warrant Officer Harmon H. Simes, Jr.
(Retired)

DIGEST: A service member receiving an unexplained payment of active duty pay which the Army sent to his bank due to administrative error after his retirement should have known the payment was erroneous and that he would be required to refund it. Since he did not pursue the matter with appropriate service officials, he is not without fault in the matter so as to permit waiver of his debt.

Chief Warrant Officer Harmon H. Simes, Jr., AUS, Retired, requests reconsideration of our Claims Division's denial of his application for waiver of his \$650 debt to the United States. The debt arose from his receipt of an erroneous payment of pay and allowances after his discharge from the Army. In light of the facts presented, and the applicable provisions of law, we are sustaining our Claims Division's action.

Mr. Simes retired from the United States Army on November 30, 1978. He was paid regular pay and allowances due him through November 30 and he received a final cash settlement for his accrued leave upon his retirement. He knew at this point that no additional monies would be due him for active service after November 30, 1978. However, due to an administrative error, the Army failed to stop sending his regular pay and allowances to his bank in time and sent a \$650 mid-month payment in December 1978 to his bank. That payment was sent to his account at the same bank as his prior active duty paychecks had been sent.

Mr. Simes indicates that in the middle of January 1979, when he received his December bank statement, he became aware that his account had more money in it than he had expected in approximately the same amount as his former mid-month paycheck. He checked with Army finance officers at a post near his bank to see if they could explain the unexplained increase in his account, but they could not because his pay records were not at the post. After receiving no explanation from his initial contact with local Army finance officers, Mr. Simes let the matter drop and did nothing further until notified by the Army in July of 1979 that he was indebted for the erroneous \$650 payment. Apparently, Mr. Simes made no attempt to ascertain the

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source of the unexplained additional \$650 through checking with his own bank, which, presumably, would have been able to clear up the source of the unexpected payment. However, Mr. Simes states that since he was no longer receiving Leave and Earnings Statements when he received the erroneous payment in his bank account, and since he was not advised of the source of the unexpected increase in funds through Army channels at the time it occurred, he believes that he is eligible for waiver of his debt to the United States under 10 U.S.C. 2774 (1976).

Subsection 2774(a) of title 10, United States Code, provides in 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. However, subsection 2774(b) limits the exercise of this authority by providing 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 * * *."

We interpret the word "fault", as used in 10 U.S.C. 2774(b), as including something 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 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 4 C.F.R. 91.5 (1980), and 56 Comp. Gen. 943, 951 (1977).

In the present case Mr. Simes had no reason to believe that he should receive a further mid-month payment of \$650 in December 1978. He became aware of the unexpected increase in his bank account and admits he contacted Army finance

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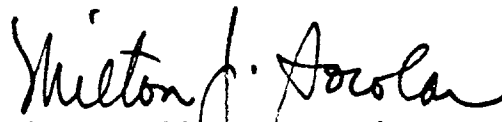
officers because he suspected an erroneous payment. In effect he is claiming that he had no further duty than his initial contact. It is our view that a reasonable person in the circumstances should have checked with his bank or contacted other Army finance officials to determine the source of the unexplained increase in his bank account. Had he done so he would have ascertained the source, seen that he had no entitlement to it, and set aside the erroneous payment for return to the Government. Since Mr. Simes did not do this, it is our view that he was at least partially at fault in the matter, and we are consequently precluded by 10 U.S.C. 2774(b) from granting his application for waiver of the erroneous payment after his discharge.

We recognize that the overpayment in this case was made through administrative error, but that alone may not serve as a basis for relieving Mr. Simes of his obligation to refund the overpayment. In that connection, 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. See, e.g., Barnes et al. v. District of Columbia, 22 Ct. Cl. 366, 394 (1887); United States v. Sutton Chemical Co., 11 F.2d 24 (1926); and B-195668, February 1, 1980.

The waiver law, 10 U.S.C. 2774, was enacted to provide specific statutory authority to relieve members or former members of the uniformed services of their obligation to refund erroneous overpayments, but only in certain circumstances including, as stated above, when the service member was without fault in the matter. The fact that recoupment of overpayments from a service member may cause him personal financial hardship is not a factor that we may consider in determining whether he was without fault. B-198170, June 25, 1980.

Accordingly, we sustain the action taken by our Claims Division in denying waiver of Mr. Simes' debt.

Acting


Comptroller General
of the United States