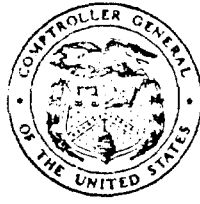


24-1

DECISION



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

FILE: B-208752

DATE: January 18, 1983

MATTER OF: Captain Henry C. Schueller, USAF -
Waiver of Erroneous Overpayments of Pay

DIGEST: An Air Force officer received overpayments of pay based on erroneous service credit for education. After he was aware that his paydate had been revised to correct the error, he knew or should have known that the change would affect his pay. He should have been prepared to refund excess payments made to him after the Air Force had corrected the paydate error. Since collection of the debt is not against equity, good conscience, or the best interests of the United States, the claim may not be waived under 10 U.S.C. § 2774 (1976).

Captain Henry C. Schueller, United States Air Force, requests reconsideration of our Claims Group's decision of January 8, 1981, to partially waive Captain Schueller's debt to the United States in the amount of \$7,763.77. The debt arose from overpayments of pay during the period July 1978 to August 1980 due to an erroneous pay entry base date. We sustain the Claims Group's determination to waive overpayments in the amount of \$1,746.31 but to deny waiver of overpayments totalling \$6,017.46 that Captain Schueller received after he became aware that his paydate had been revised.

On July 4, 1978, Captain Schueller was appointed as First Lieutenant in the Air Force and entered on active duty as a medical officer. At that time, Captain Schueller's paydate was erroneously established as September 30, 1974, based on a determination that the prior 4 years during which he studied podiatry counted as creditable years of service. The paydate error resulted in Captain Schueller being paid as a Lieutenant O-2 and Captain O-3 with over 3 and later with over 4 years of service instead of with 2 or less years of service. At the time of his appointment, this meant a difference in monthly base pay of \$263.70 (\$1,107.90 instead of \$844.20).

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In January 1979, Air Force personnel corrected Captain Schueller's Leave and Earnings Statement (LES) to show his payday as April 29, 1978, which was based on the date Captain Schueller accepted his commission plus his prior military service. Upon receipt of his LES for January 1979, Captain Schueller contacted personnel in the Air Force finance office and inquired as to the correctness of the revised payday. In response, finance personnel conducted an investigation and verbally informed Captain Schueller on a number of different occasions that the payday stated on his LES was correct. In December 1979, he was notified in writing that he was not eligible to receive constructive service credit for the period of his podiatric training.

Although the payday error was corrected in January 1979, Captain Schueller continued to receive payments based on a payday of September 30, 1974, until the overpayments were discovered in August 1980. The Air Force recommended partial waiver of the overpayments covering the period prior to written confirmation of the correction of his payday (December 1, 1979). Our Claims Group waived the overpayments prior to January 1979 but considered Captain Schueller at least partially at fault after his payday was corrected in January 1979, since he was aware of the change in payday and knew or should have known that such a change, if correct, would affect his entitlement to pay and allowances.

Captain Schueller, in his original request for waiver, contended that he was not aware of the overpayments until July 1980, and that repayment of the debt would impose severe financial hardship on him. Correspondence forwarded to us by Senator Jake Garn, on behalf of Captain Schueller, expresses Senator Garn's concern that collection of the debt is against equity and good conscience since it unduly penalizes Captain Schueller for an error that was committed by the Air Force.

Section 2774 of Title 10, United States Code (1976), provides our authority to waive certain debts when collection would be against equity and good conscience and not in the best interests of the United States. However, subsection 2774(b) precludes waiver if in the opinion of the Comptroller General--

"* * * there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member * * *."

We interpret the word "fault", as used in 10 U.S.C. § 2774, 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 the facts it is determined that the member should have known that an error existed and taken action to have it corrected. Lieutenant Lennart Wendel, B-200118, February 18, 1981. 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. John J. Carson, Jr., B-184514, September 10, 1975, and Petty Officer Mueller, B-193450, February 26, 1979.

In the present case, Captain Schueller was aware of the change in his paydate as reflected in his January 1979 LES since he immediately questioned the change with Air Force officials. Between January and December 1979 he was repeatedly advised that this revised paydate was, in fact, correct. What is missing from the record before us is whether Captain Schueller knew, or whether the Air Force advised him, how a change in his paydate would affect his monthly base pay.

Monthly base pay for the uniformed services is determined on the basis of years of creditable service with increases in pay occurring generally every 2 years. 37 U.S.C. §§ 205, 1009 (1976). A change in the pay entry base date affects pay since it reflects the member's years of creditable service. Although Captain Schueller states he did not know he was overpaid until July 1980, we believe he should have known as of January 1979 that a change in his paydate would affect his pay, and that any further payment of pay at the rate for over 4 years of service would be erroneous. We doubt that he would have repeatedly inquired as to the correctness of this revised paydate without knowing or inquiring about the pay consequences of such a change. Such knowledge on his part carried with it the responsibility to set aside excess amounts of pay until a definite administrative determination concerning his

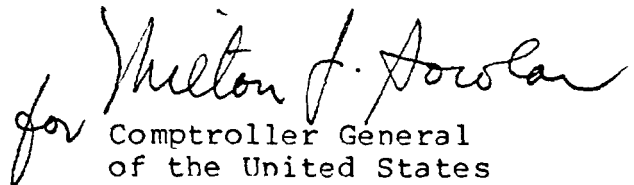
B-208752

entitlement was made. See Colonel William J. Lumpkins, Jr., B-198918, January 26, 1981; Captain David H. Scott, B-188595, June 3, 1977. Since Captain Schueller did not take such action, it is our view that he is not free from fault and that collection action is not against equity and good conscience nor contrary to the best interests of the United States.

The fact that the overpayments were made through administrative error does not relieve an individual who is aware of the possibility he is being overpaid from the responsibility of refunding the overpayments. It is fundamental that persons receiving money erroneously paid by a Government agency or official acquire no right to the money; such persons are bound by equity and good conscience to make restitution. See Lumpkins and Scott, cited above.

Although Captain Schueller's financial capacities may be considered in arranging repayment (4 C.F.R. § 102.10 (1982)), the fact that repayment may cause financial hardship is not sufficient to authorize waiver. James T. Harrod, B-195889, February 14, 1980.

Accordingly, the action of our Claims Group denying waiver in the amount of \$6,017.46 for erroneous payments made during the period January 1979 to August 1980 is sustained.

for 
Comptroller General
of the United States