



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Isaac L. Tillman—Separation Pay—Waiver Request

File: B-266193

Date: February 23, 1996

DIGEST

An Army member separating from the service properly was paid separation pay upon separation. Subsequently, he was granted monthly disability compensation by the Department of Veterans Affairs retroactive to his separation from the Army. In this situation, the separation pay statute (10 U.S.C. § 1174) requires that there be deducted from the disability compensation an amount equal to the separation pay the former member received. A subsequent disability award does not render the separation pay payment "erroneous" and subject to waiver under 10 U.S.C. § 2774. Therefore, action by the General Accounting Office Claims Group waiving the separation pay was incorrect, and it is rescinded.

DECISION

This decision is in response to a request from the Department of Veterans Affairs (VA) that we reconsider the action of our Claims Group in waiving collection of separation pay Mr. Isaac L. Tillman received upon separation from the Army, which subsequently became collectible when VA awarded him disability compensation.¹ We rescind the Claims Group's waiver action because the separation pay Mr. Tillman received was not an "erroneous" payment to which our waiver authority (10 U.S.C. § 2774) applies.

BACKGROUND

In January 1993, Mr. Tillman, then a Warrant Officer with insufficient service to qualify for retirement, was involuntarily separated from the Army, pursuant to which he was properly determined to be entitled to separation pay under 10 U.S.C. § 1174, which the Army paid him in the amount of \$52,822.80. In September 1993,

¹The request for reconsideration was presented on behalf of VA by their Assistant General Counsel and concerns the Claims Group's Settlement Z-2927061, June 7, 1994. We have also received a submission from James W. Stanley, Jr., of the law firm of Pierce, Stanley & Robinson, on behalf of Mr. Tillman.

the VA awarded Mr. Tillman monthly disability compensation payments effective February 1, 1993. Upon doing so, VA notified Mr. Tillman that his disability compensation payments were subject to withholding until the amount withheld equaled the amount of separation pay he had received from the Army, as required by 10 U.S.C. § 1174(h)(2). VA accordingly began withholding payment of the disability compensation payments. Subsequently, apparently upon Mr. Tillman's inquiry, the Defense Finance and Accounting Service (DFAS) referred the matter to our Claims Group, recommending that collection of Mr. Tillman's separation pay be waived pursuant to our authority under 10 U.S.C. § 2774. In support of this request, DFAS cited our decision Henry B. Jenkins, 64 Comp. Gen. 15 (1994), in which we had waived an erroneous payment of severance pay made to a civilian employee upon his separation from federal service. Our Claims Group accepted the DFAS request and granted the waiver.

VA, however, disagrees with the waiver action and continues to withhold the disability compensation. VA states that it is aware of our authority under 10 U.S.C. § 2774 to waive a claim of the United States "arising out of an erroneous payment" of any pay or allowances to or on behalf of a member or former member of the uniformed services, if collection would be against equity and good conscience and not in the best interest of the United States. It is VA's position, however, that collection of the severance pay in this case by withholding the disability compensation is not subject to our waiver authority under 10 U.S.C. § 2774 because the amount subject to collection does not arise out of an "erroneous payment."

VA notes that the separation pay statute, 10 U.S.C. § 1174, does not condition payment of separation pay upon VA compensation not being awarded. Instead, the statute recognizes that VA compensation may be awarded subsequent to payment of separation pay and requires that in such a case, payment of the compensation is to be withheld in an amount equal to the separation pay received by the former member. In VA's view, this does not render the payment of the separation pay "erroneous."

VA distinguishes 64 Comp. Gen. 15, supra, the decision cited by DFAS, from the current case. VA notes that the former case involved a civilian employee who was paid severance pay incident to his involuntary separation and who was later determined by the Merit Systems Protection Board to have been erroneously denied retirement for disability. The retroactive correction to disability retirement status rendered the severance pay he had received an "erroneous payment" because the severance pay statute (5 U.S.C. § 5595(a)(2)) specifically precludes payment of severance pay to an employee eligible for a retirement annuity. Thus, in that case we could properly exercise our authority to waive the debt as one arising out of an "erroneous payment."

ANALYSIS

Separation pay under 10 U.S.C. § 1174 is a contingency payment to ease the re-entry into civilian life of members of the armed services involuntarily separated from active duty prior to becoming entitled to retired pay. See 62 Comp. Gen. 174 (1983). The statute requires "coordination" when a member who has received a separation pay payment later qualifies for retired or retainer pay or VA disability compensation. 10 U.S.C. § 1174(h). Regarding coordination with disability compensation, the statute provides in pertinent part as follows:

A member who has received separation pay . . . based on service in the armed forces shall not be deprived, by reason of his receipt of such separation pay . . . of any disability compensation to which he is entitled under the laws administered by the Department of Veterans Affairs, but there shall be deducted from that disability compensation an amount equal to the total amount of separation pay . . . received. 10 U.S.C. § 1174(h)(2). [Emphasis added.]

Clearly the statute contemplates the not uncommon situation found in Mr. Tillman's case where a member is paid separation pay upon release from the service and is later determined by VA to be entitled to disability compensation. Congress did not intend that the member receive both separation pay and disability compensation, so it provided that an amount equal to the separation pay would be withheld from the disability compensation.² In such a case, the member's separation was not erroneous and the payment to him of separation pay was not erroneous when it was made. Thus, we agree with VA that this situation substantially differs from the situation in 64 Comp. Gen. 15, described above, where it was determined that the employee's separation was erroneous and the severance pay thus should not have been paid. As noted, in Mr. Tillman's case, the fact that subsequently VA determined him to be entitled to disability compensation did not convert the separation pay to an erroneous payment. That payment was proper when made and it does not become improper because the statute requires that an amount equal to it be deducted from the disability compensation.³ In such a situation, there is no debt

²We lack jurisdiction over the issues of the correctness of the amount of VA's award of disability compensation and the timing of its commencement. See 38 U.S.C. § 511(a), and 56 Comp. Gen. 591 (1977).

³Compare 56 Comp. Gen. 587, 592 (1977), where the opposite conclusion was reached concerning officers who received readjustment pay (similar to severance pay) upon separation, were later determined by a correction board to have been improperly separated, and the separations were retroactively expunged. The
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"arising out of an erroneous payment" and, therefore, the waiver statute, 10 U.S.C. § 2774, is inapplicable. See Eugene M. Edynak, B-200113, Feb. 13, 1981; and Charles E. Raiford, Jr., B-254196, Dec. 23, 1993.⁴

In view of the above, the waiver should not have been granted and it is of no effect. Accordingly, the Claims Group's waiver action is rescinded.

/s/Seymour Efros
for Robert P. Murphy
General Counsel

³(...continued)

correction action was deemed to have rendered the readjustment payments erroneous, making them subject to waiver under 10 U.S.C. § 2774.

⁴These cases concerned requests for waiver by two former members who had received variable incentive pay or a selective reenlistment bonus, respectively, for committing themselves to specified terms of service, but who did not complete the terms of service and, therefore, were required, under the statutes applicable to the payments, to refund a portion of the amounts received. The waiver statute was determined to be inapplicable to the debts because the payments were proper when made.