

DOCUMENT RESUME

08033 - [C3488592]

[Request for Waiver of Debt Arising from Erroneous Payments of Retired Pay]. B-193375. December 11, 1978. 3 pp.

Decision re: Capt. James E. Dunn; by Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel: Personnel Law Matters II.

Organization Concerned: Department of the Air Force.

Authority: 10 U.S.C. 2774. United States v. Northwestern Nat. Bank and Trust, 35 F. Supp. 484 (1940). Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947). Posey v. United States, 449 F.2d 228 (1971).

A retired Air Force member appealed the denial of his request for waiver of a debt which resulted from erroneous payments of retired pay. The denial was sustained since granting of a waiver is not a matter of right. Although the member was not at fault and notified officials of the error, he knew of the overpayment and had the responsibility of insuring that it would be returned. (HTW)

Pickenger
PLM-IP
8592

DECISION



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

FILE: B-193375

DATE: December 11, 1978

MATTER OF: Captain James H. Dunn, USAF, Retired

DIGEST: Retired service member's request for waiver of debt due the United States arising from erroneous payments of retired pay, must be denied even though he was without fault and had promptly notified officials of error, because the granting of waiver under 10 U. S. C. 2774 is not a matter of right, rather a matter of grace and dispensation and since member immediately knew of overpayment and knew that payment would eventually be requested, he had the responsibility of insuring that money would be returnable. Therefore, collection was not against equity and good conscience nor contrary to the best interest of the United States.

This action is in response to a letter dated September 19, 1978, of Captain James H. Dunn, USAF, Retired, concerning his indebtedness to the United States, which arose from erroneous payments of military retired pay during the period February through May 1976. That letter is considered as an appeal from a determination by our Claims Division, which by letter dated November 2, 1977, addressed to the Air Force Accounting and Finance Center, denied Captain Dunn's request for waiver.

The file shows that the member, who retired from the Air Force in 1961, and thereafter was employed by the Federal Government in a civilian capacity, retired from that latter position effective February 1, 1976. Preparatory to that retirement, the member chose to waive receipt of his military retired pay so that he could add his military service credits to his civil service time for annuity computation purposes. His statement requesting this action was dated December 4, 1975, but for some unexplained reason the request was not received in the Finance Center's Retired Pay Division until May 25, 1976. During the interim, the member received his civil service annuity computed based on his combined military and civil service years of service as well as military retired pay. The overpayment in his military retired pay account continued until June 1976 and totaled \$1,361. On audit it was

B-193375

determined that \$83.16 was due the member, thereby reducing the indebtedness to \$1,277.84.

The waiver denial was based on questionable good faith on the member's part. The member requests that he be specifically advised of the grounds as to why his claim did not meet the requirements for waiver.

The law governing waiver of claims of the United States arising out of erroneous payments of pay and allowances, including retired pay, made to or on behalf of a member of a uniformed service is contained in 10 U. S. C. 2774 (1976). That provision authorizes the Comptroller General to waive such claim if "the collection * * * would be against equity and good conscience and not in the best interest of the United States." However, subsection 2774(b)(1) thereof prohibits the exercise of that authority if there is "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 waiver of the claim."

We would point out, that waiver action under 10 U. S. C. 2774 is considered a matter of grace or dispensation, and not a matter of right that arises solely by virtue of an erroneous payment being made by the Government. If it were merely a matter of right, then all erroneous payments made by the Government to service members would be excused from repayment.

The foregoing directly ties in with the precept that persons receiving money erroneously paid by a Government agency or official acquire no right to the money. The courts have consistently held that such persons are bound in equity and good conscience to make restitution. In other words, if a benefit is bestowed through mistake, no matter how careless the act of the bestower may have been, the recipient of the benefit must make restitution, the theory being that restitution results in no loss to the recipient. He merely received something for nothing. See for example United States v. Northwestern Nat. Bank & Trust, 35 F. Supp. 434 (1940). Also compare Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380 (1947); and Posey v. United States, 449 F. 2d 220 (1971).

The file shows that the member's last military retired pay payment should have been for January 1976, and that no monthly payments should have been made thereafter. According to the

B-193375

member, upon receipt of payment of retired pay for February 1976, he notified the Air Force Accounting and Finance Center that an erroneous payment was made to him. In this regard, the member stated in his application for waiver that his basis for seeking waiver was that he was aware of the overpayments but could not stop them and that he exerted maximum efforts to preclude the overpayments of military retired pay.

The fact that the member did what he could to stop the overpayments is not a basis for authorizing waiver. As previously noted, the member waived receipt of retired pay and he was not entitled to military retired pay from the Air Force. He knew that he was not entitled to military retired pay and that he was being overpaid when he received the February 1976 check. Therefore, it is our view that he had the responsibility of insuring that the money would be returnable, by either holding the checks uncashed or setting aside the money for subsequent refund on request.

In the circumstances, it is our view that requiring the member to repay the debt is not against equity and good conscience nor contrary to the best interests of the United States.

Accordingly, the action by our Claims Division denying waiver in Captain Dunn's case is sustained.


Deputy Comptroller General
of the United States