

DECISION

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DIGEST - L - *msl***THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

299

FILE: B-195558

DATE: December 14, 1979

MATTER OF:

[REDACTED], AUS

DIGEST:

1. When an Army member is found to have been erroneously separated from active duty and is retroactively restored to active duty status under the provision of law authorizing the correction of military records, he thereby becomes entitled to retroactive payment of his interim military active duty pay and allowances, and also to reimbursement of his ascertainable interim medical expenses covering the period when he was deprived of free military medical care. 10 U.S.C. 1552(c) (1976).
2. An Army member involuntarily separated from but later retroactively restored to active duty by administrative record correction action, may not be reimbursed on account of his being deprived of the use of military commissaries, exchanges, and entertainment facilities during the interim period, since the value of the privilege of using those facilities cannot be definitely ascertained and reduced to a sum certain. 10 U.S.C. 1552(c) (1976).
3. An Army member's claims for indemnification for jobhunting expenses and compensation for hardships experienced in civilian employment following his erroneous separation from active military service, are claims sounding in tort premised on the wrongful acts of Government agents in causing his severance from military service in

contravention of a statute or regulation. Such claims are not payable under 10 U.S.C. 1552(c) incident to a correction of the member's military record retroactively restoring him to active duty.

4. An Army member involuntarily separated from but later retroactively restored to active duty through the correction of his military records under 10 U.S.C. 1552, does not under that or other provisions of Federal law thereby become entitled to compensation from Federal funds for State income taxes he paid on his interim civilian earnings. The State tax consequences of a military records correction action under 10 U.S.C. 1552 are matters for consideration by the concerned State authorities.
5. If an Army Reserve member receives the readjustment payment authorized by 10 U.S.C. 687 (1976) at the time of his involuntary separation from extended active duty, but his military records are later corrected to show that his separation was invalid, the readjustment payment is also rendered invalid and constitutes an erroneous payment to be recouped in the settlement of the member's pay accounts upon his restoration to active duty.
6. If an Army member is involuntarily separated from but later retroactively restored to active duty through the correction of his military records under the authority of 10 U.S.C. 1552, his interim earnings from civilian employment do not thereby become a debt

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that the member owes to the Government. However, under applicable regulations the gross amount of those interim civilian earnings must be deducted from the retroactive military pay and allowances due to him, as mitigation of the Government's monetary obligations in such circumstances.

This action is in response to correspondence received from [REDACTED], whose involuntary separation from active duty with the United States Army in 1975 was nullified in 1978 by the Army Board for Correction of Military Records (ABCMR). [REDACTED] disagrees with the monetary settlement offered to him by the Army in connection with that correction of his records.

Background

On October 31, 1975, [REDACTED] was involuntarily separated from active Army service in the grade of major (O-4). The separation resulted from his having been twice passed over for promotion to the grade of lieutenant colonel (O-5). However, in July 1978 the ABCMR concluded his promotion boards had not been properly constituted under statute and corrected his military records to show that he had been promoted to the grade of lieutenant colonel effective December 1, 1973. The records were further corrected to show that his separation from active duty on October 31, 1975, was void and without force or effect.

As a result of these corrections in his records, [REDACTED] was restored to active duty with the Army in 1978.

Army finance and accounting officials determined that because of those corrections in his records, [REDACTED] had also become entitled to the following monetary credits:
(1) the difference in pay between lieutenant colonel and

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major for the period from December 1, 1973, to October 31, 1975; (2) active duty pay and allowances in the grade of lieutenant colonel for the period from November 1, 1975, to July 27, 1978; and (3) reimbursement for medical expenses incurred during the period from November 1, 1975, to the date of restoration to active duty in 1978. The finance and accounting officials further determined that these monetary credits were subject to reduction on account of the following items: (1) recoupment of readjustment pay and lump-sum payment for accrued leave received in October 1975; (2) deduction of Servicemen's Group Life Insurance (SGLI) premiums for the period from November 1975 through July 1978; (3) Social Security (FICA) tax deductions for the years 1976, 1977 and 1978; and (4) Federal income tax withholdings from basic pay due for the period from January 1 through July 27, 1978. It was further determined that the resulting net amount then found to be due [REDACTED] was subject to being offset by the interim civilian earnings he received between 1975 and 1978. Consequently, in May 1979 the Army Finance and Accounting Center offered [REDACTED] a settlement on that basis which would result in his being paid the net amount of \$15,710.60.

[REDACTED] declined to accept this proposed settlement, and the Army Finance Center then referred the matter to our Office for resolution.

[REDACTED] states that he does not dispute the accuracy of the dollar amounts shown as credits and debits in the proposed settlement. However, he has expressed the belief that he should be allowed additional credits not shown in the settlement offered to him.

In substance, [REDACTED] explains that between the time of his involuntary separation from active duty in 1975 and the time of his restoration to duty in 1978, he and the members of his family were denied shopping privileges at military commissaries and exchanges, and that they were deprived of the use of entertainment facilities at military golf courses, tennis courts,

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swimming pools, theaters, bowling centers, etc. He claims reimbursement in the amount of \$3,283.17, representing the value of commissary and exchange privileges lost between 1975 and 1978. He claims further reimbursement in the amount of \$660.52, representing the value to him of military entertainment facilities he could not use between 1975 and 1978. In effect, he suggests that if he is entitled to reimbursement for medical expenses incurred between 1975 and 1978 on account of the loss of free military medical care, then he should also be reimbursed amounts representing the value of those other military benefits as well.

In addition, [REDACTED] states that when he was separated from military service in October 1975, he was compelled to seek civilian employment so that he could support his family. Between October 1975 and March 1976 he traveled from Maryland to Arizona, California, Illinois, and other places in search of suitable employment. Eventually in March 1976 he secured a position in Emmitsburg, Maryland, and he kept that position until he was restored to active duty with the Army in 1978. He therefore claims indemnification in a total amount of \$3,579 for job-hunting and related traveling expenses he incurred between October 1975 and March 1976.

He also states that his civilian position required him to be on call 24 hours a day, 7 days a week, and that he worked significantly more hours in his civilian position than would have been required of him under normal military duty hours had he been retained in the Army during that time. He claims compensation in the amount of \$9,943.31 on account of the longer hours he worked as a civilian and the loss of pay from part-time off-duty civilian employment he might have earned if he had been retained on active duty by the Army between 1975 and 1978.

Finally, [REDACTED] indicates that he paid \$2,995.39 of his interim civilian earnings between 1975 and 1978 to the State of Maryland in the form of State

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income taxes. To date the State of Maryland has declined to refund those taxes to him. [REDACTED] notes that throughout his active military service he has remained a citizen of the State of Illinois, and as such, while on active duty his military pay and allowances would not be subject to Maryland income tax. Since he was restored to active duty retroactively he believes he should not bear the burden of paying income tax to Maryland on his interim civilian earnings. He therefore claims \$2,995.39 he paid in Maryland tax as an additional item of compensation to be posted to his credit in the settlement of his military pay accounts.

Aside from these claims for additional amounts he believes should be included as credits in the proposed settlement, [REDACTED] also questions the propriety of subtracting the \$15,000 readjustment pay he received in October 1975 and the \$49,656.39 interim civilian earnings he received between 1975 and 1978, from the total amount due to him.

With regard to the readjustment pay he received in October 1975, [REDACTED] states, "The \$15,000 represents three traumatic years of readjustment under aggravating circumstances." He therefore questions why he should be required to repay that amount to the Government.

With respect to the interim civilian earnings he received between 1975 and 1978, [REDACTED] states, "The \$49,656.39 represents three years of working days, nights, weekends and being responsive to * * * emergencies on a 24 hour per day, seven days per week basis." He adds that he feels the deduction of that amount in the settlement results in him "being penalized for having struggled to make a living to support my family," and he therefore asks why any amount of his interim civilian earnings should be subtracted from the military pay due to him. He also, in effect, suggests that if we nevertheless determine that the interim military pay due him is subject to being offset by his interim civilian

earnings, then only the amount of his net interim civilian earnings (less income taxes paid) should be used in the settlement computation.

Claims for the Value of Lost Military Pecuniary Benefits

Subsection 1552(a) of title 10, United States Code (1976), authorizes the correction of military records when necessary to correct an error or remove an injustice. Subsection 1552(c) provides that upon a correction of records, the department concerned may pay from applicable current appropriations, "a claim for the loss of pay, allowances, compensation, emoluments or other pecuniary benefits."

An Army member involuntarily separated from but later retroactively restored to active duty by administrative record correction action under 10 U.S.C. 1552 may properly claim retroactive payment of military pay and allowances. See 56 Comp. Gen. 587 (1977) and 57 Comp. Gen. 554 (1978). In addition, he may also properly claim "other pecuniary benefits," including reimbursement for medical expenses incurred during the interim period when he was deprived of free military medical care, provided that those interim medical expenses can be definitely ascertained and reduced to a sum certain. See Garner v. United States, 161 Ct. Cl. 73 (1963); and Gearinger v. United States, 188 Ct. Cl. 512 (1969).

In the proposed settlement, [REDACTED] has been credited with the retroactive military pay and allowances due to him, and with his interim out-of-pocket medical expenses. However, his claims for the interim loss of commissary and exchange privileges and for the interim loss of the use of military entertainment facilities have not been included. He bases these claims on his own estimates of how

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much he might have saved if he and the members of his family had been permitted to shop at military commissary and exchange stores, and on his own estimates of the percentage of his income that is devoted to family entertainment.

Although 10 U.S.C. 1552(c)[†] authorizes the payment of claims for lost pay and allowances and "other pecuniary benefits," the statute does not define those "other pecuniary benefits." As indicated, reimbursement may be allowed for interim medical expenses covering the period when the service member was deprived of free military medical care, since ordinarily those medical expenses can be definitely ascertained and reduced to a sum certain. However, monetary savings the member might have enjoyed in the interim period if he had been allowed to use military commissaries and exchanges or entertainment facilities, cannot be definitely ascertained. The values of these fringe benefits are a matter of speculation and can only be roughly estimated. Hence, any claim based on the loss of the privilege of using those facilities may not be allowed.

Accordingly, we deny [REDACTED] claim for \$3,283.17 based on his interim loss of military commissary and exchange privileges, and his claim for \$660.52 based on his interim loss of the use of military entertainment facilities.

Claims for Compensation For Loss of Employment Opportunities and for Costs Incurred in Finding Interim Civilian Employment

Under 10 U.S.C. 1552(c)[†], the Secretary of a military department is authorized to pay a claim for "the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits" to a service member whose military records are corrected. Thus, as has been mentioned, a service member found

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to have been improperly separated from active duty may properly claim credit for interim military pay and allowances, and also credit for the value of other interim military pecuniary benefits, if the value of those other benefits can be definitely ascertained and reduced to a sum certain. However, claims for consequential or compensatory damages for indemnification of job-hunting expenses, loss of part-time employment opportunities, etc., based on a service member's invalid separation from active duty, are claims sounding in tort premised on the wrongful acts of Government agents in causing the member's severance in contravention of a statute or regulation. There is no authority under 10 U.S.C. 1552⁺ for the payment of claims of that nature brought against the United States. 57 Comp. Gen. 554⁺, 558, and compare 55 Comp. Gen. 564⁺ (1975); B-182282⁺, May 28, 1975.

Accordingly, we deny [REDACTED] claim for \$3,579 for indemnification of his job-hunting expenses and his claim for \$9,943.31, representing compensation on account of the hardships of his interim civilian employment and the loss of interim part-time civilian employment opportunities.

Claim for Compensation for Interim State Income Tax

Section 1552(c)⁺ of title 10, United States Code, makes no provision for compensating a service member retroactively restored to active duty, for State taxes he may have paid during the interim period. The State tax consequences of a military records correction action under 10 U.S.C. 1552⁺ are instead matters for consideration by the concerned State authorities. Compare 58 Comp. Gen. 528⁺ (1979).

Accordingly, we deny [REDACTED] claim for \$2,995.39, representing the amount of a State income tax refund believed due to him on account of the correction of his military records.

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Recoupment of Readjustment Pay

Section 687 of title 10, United States Code (1976), provides that a Reserve member who is released from active duty involuntarily, and who has completed, immediately before his release, at least 5 years of continuous active duty, is entitled to a readjustment payment.

If a Reserve member receives that readjustment payment upon his involuntary separation from extended active duty, but his military records are later corrected under 10 U.S.C. 1552 to show his separation was invalid, the readjustment payment is also rendered invalid. Thus, it becomes an erroneous payment and a debt owed to the Government which must be recouped. 56 Comp. Gen. 587, supra. See also Craft v. United States, ___ Ct. Cl. ___, 589 F. 2d 1057, 1068-1069 (1978).

Accordingly, since [REDACTED] elects to accept the benefits of the action taken in his case to retroactively restore him to active duty, he must refund the readjustment payment he received under 10 U.S.C. 687 at the time of his invalid separation from service.

Deduction of Interim Civilian Earnings,

Paragraph 25, AR 15-185, specifically requires that when an Army member is retroactively restored to active duty through administrative record correction proceedings, "Earnings received from civilian employment during any period for which active duty pay and allowances are payable will be deducted from the settlement." The interim civilian earnings are not a debt that the service member owes to the Government; however, those earnings are subject to deduction from the retroactive military pay and allowances due to him as a requirement under regulation based on the member's duty to mitigate the Government's monetary obligations in such circumstances. See 56 Comp. Gen. 587, 591, and Craft v. United States, 589 F. 2d 1057, 1066-1068, and cases cited therein. The interim civilian earnings must be offset in the gross

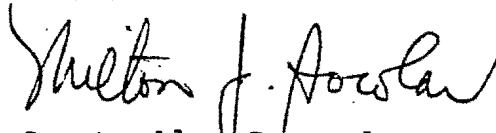
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amount without regard to income taxes that may have been paid on those earnings. The tax consequences of the correction action are matters for the concerned revenue authorities. Compare Garner v. United States, 161 Ct. Cl. 73; 57 Comp. Gen. 554, 561-562; and 58 Comp. Gen. 528.

Accordingly, in concluding the settlement with [REDACTED] the gross amount of his interim civilian earnings must be deducted from the military backpay due him.

Conclusion

The proposed settlement offered to [REDACTED] by the Army appears to correctly set forth his monetary entitlements and obligations with respect to the Department of the Army, in accordance with the principles set out in our decisions, 56 Comp. Gen. 587 and 57 Comp. Gen. 554, for this type of case. Accordingly, the proposed settlement and the related correspondence are being returned to the Army Finance and Accounting Center for settlement.



For The Comptroller General
of the United States

MILITARY PERSONNEL

Record correction
Payment basis

MILITARY PERSONNEL

Record correction
Payment basis

"Other pecuniary benefits"

Requirement that value be ascertainable

MILITARY PERSONNEL

Record correction
Payment basis

TORTS

Military personnel
Wrongful separation

MILITARY PERSONNEL

Record correction
Payment basis
None

TAXES

State
Income tax
Federal employees
Refunds
Military records correction

MILITARY PERSONNEL

Record correction
Overpayment liability
Readjustment payments

MILITARY PERSONNEL

Record correction
Civilian employment during separation or suspension
Earnings deducted from back pay

MILITARY PERSONNEL

Record correction
Payment basis
Interim civilian earnings

MILITARY PERSONNEL

Removals, suspensions, etc.
Back pay
Civilian employment earnings