

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

415

SEP 16 1975

FILE: B-184532

DATE: SEP 16 1975

MATTER OF: Waiver of recovery of erroneous Survivor Benefit Plan annuity payments - Mrs.**DIGEST**

1. Recovery of unrecovered overpayments resulting from erroneous annuity payments under the Survivor Benefit Plan made to a member's widow should be waived under 10 U.S.C 1453 (Supp. 1972) since the overpayments resulted from administrative error and the widow was without fault and recovery would be contrary to the purpose of the Plan and against equity and good conscience.
2. Refund to an annuitant of an amount withheld from annuity payments representing recovery of an overpayment made under the Survivor Benefit Plan, properly recovered prior to receipt of a request for waiver by the service concerned from the annuitant, is not authorized under 10 U.S.C. 1453; however, since it is appropriate to suspend collection action pending disposition of waiver request, where waiver is authorized, amounts collected after receipt of waiver request should be refunded.

This action is in response to letter dated October 15, 1974, with enclosures (file reference FINCY-AD, (Retired) (Deceased)), from the United States Army Finance Support Agency, recommending waiver of recovery of \$2,678.01, representing an overpayment of annuity payments under the Survivor Benefit Plan (SBP), 10 U.S.C. 1447-1455 (Supp. II 1972), in the case of Mrs. [redacted] as surviving spouse of the late Master Sergeant [redacted]

From the record it appears that Sergeant [redacted] retired on November 1, 1963, and later elected to participate in the SBP. Upon Sergeant [redacted] death on February 3, 1973, Mrs. [redacted] became eligible to receive an annuity under the SBP. Since Mrs. [redacted] was also eligible for Social Security benefits at that time, the SBP annuity which she was entitled to receive should have been reduced by the amount of the Social Security benefit which was earned by the member as a result of his military service after December 31, 1956.

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It appears that at the outset the Department of the Army erroneously computed the Social Security offset to be \$146.93. Through an additional administrative error, the amount was recorded as \$14.69. The actual amount of the offset should have been \$159.30.

By letters dated January 28, 1974, and March 11, 1974, Mrs. [redacted] questioned the propriety of the amount of deduction for the Social Security offset. In reply to her questions, Mrs. [redacted] was furnished information from which it was reasonable for her to conclude that she was being paid properly. The overpayment was discovered by the Army Finance Support Agency on or about July 25, 1974. By letter dated July 25, 1974, the Army Finance Support Agency explained the nature and cause of the overpayment to Mrs. [redacted] and informed her that they would begin immediate collection action by withholding \$17 of the \$19 a month SBP payment to which she was then entitled.

During the period February 4, 1973, through June 30, 1974, Mrs. [redacted] received annuity payments in the amount of \$2,893.67. The Army Finance Support Agency reports that she should have received a total of \$215.66, therefore, the overpayment is \$2,678.01.

The Army Finance Support Agency reports that there is no indication of fraud, lack of good faith, or misrepresentation on the part of Mrs. [redacted] or any other party having an interest in obtaining a waiver of recovery of the overpayment. Additionally, the record shows that Mrs. [redacted] is presently receiving \$2 per month from her SBP annuity and her only other income is approximately \$224 per month from Social Security. For these reasons, the Army Finance Support Agency recommends waiver of recovery of the erroneous overpayments.

Since Sergeant [redacted] was retired prior the effective date of the SBP, he was authorized to participate in the Plan by virtue of ^{10 USC} ^{4448 note} subsection 3(b) of Public Law 92-425, enacted September 21, 1972, 86 Stat. 706, 711. Subsection 3(f) of Public Law 92-425 makes section 1453 of title 10, United States Code, applicable to persons covered by section 3.

Section 1453 of title 10, United States Code, provides in part that recovery of any amount erroneously paid is not required if, in the judgment of the Secretary concerned and the Comptroller General, there has been no fault by the person to whom the amount was erroneously paid and recovery would be contrary to the purposes of the SBP or against equity and good conscience.

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In 35 Comp. Gen. 401 (1956), we held that something more than freedom from fault must be shown before a basis exists for exercising the judgment as to whether the collection of a particular overpayment, or erroneous payment under the Uniformed Services Contingency Option Act of 1953 (now named the Retired Serviceman's Family Protection Plan (RSFPP)), should be waived. The view was expressed by this Office that unless it could be established that collection of the overpayment would work an undue hardship, or some other reason could be shown as to why collection should not be made, no proper basis exists for the exercise of the waiver authority.

Because of the similarity between the SBP and the RSFPP and the waiver authority contained therein, this Office held in B-182113, October 1, 1974, 54 Comp. Gen. 249, that the ruling in 35 Comp. Gen. 401, supra, is for application under the provisions of 10 U.S.C. 1453.

In the circumstances, there appears to be no question that Mrs. received the SBP annuity payments in good faith and is entirely without fault in the matter. Since the record shows that she has limited financial means, recovery would cause undue hardship and would be contrary to the purposes of the SBP and against equity and good conscience. Accordingly, we agree that recovery of the overpayment should be waived.

As to the amount of the overpayment to be waived, the waiver authority contained in 10 U.S.C. 1453 relates to "recovery" of overpayments of SBP annuity payments and contains no authority whereby amounts recovered prior to the receipt of a request for waiver may be refunded. In the absence of specific statutory authority so permitting, any monies properly recovered from an annuitant prior to receipt of a request for waiver under 10 U.S.C. 1453, may not be included in such waiver action for the purpose of authorizing repayment of those funds to an annuitant. See B-183863, July 18, 1975.

In the present case, only the amount determined to be due on the date of Mrs. waiver request would be subject to waiver. However, since it is appropriate to suspend further collection action pending disposition of the waiver request, any amount collected or withheld from Mrs. otherwise proper SBP annuity payments subsequent to receipt of the waiver request should be refunded.

R.F. KELLER

Deputy Comptroller General
of the United States