

DECISION

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

929

FILE: B-182704 (2)

DATE: OCT 28 1975

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

DIGEST: Overpayment resulting from erroneous annuity payments under Survivor Benefit Plan made to member's widow may not be considered for waiver under 10 U.S.C. 2774. They may only be considered for waiver under 10 U.S.C. 1453 and waiver may be granted only where there is not only a showing of no fault by widow but also that recovery would result in a financial hardship to the widow or for some other reason that would be contrary to purpose of the Plan and therefore against equity and good conscience. See 54 Comp. Gen. 249 (1974).

This action is in response to a letter received July 29, 1974 (file reference FINCY-AD,) (Retired) (Deceased), with enclosures, from the Chief, Field Services Office, U. S. Army Finance and Accounting Center, recommending waiver of recovery of \$839.37, representing annuity payments erroneously paid under the Survivor Benefit Plan (SBP), to Mrs. widow of the late Staff Sergeant .

According to the submission, it appears that the member elected to provide SBP coverage for his wife on November 29, 1972. The retiree died on September 16, 1973, and his widow's annuity became effective September 17, 1973. In this connection, it is reported that the Veterans Administration advised the Retired Pay Division, Army Finance Center, on March 8, 1974, that Mrs. was receiving Dependency and Indemnity Compensation (DIC) in the amount of \$217 a month effective September 15, 1973, but the notice apparently was not received by the Center in time to prevent the following SBP overpayments: For the period September 17, 1973, to December 31, 1973 --\$438.78; and for the period January 1, 1974, to March 31, 1974 --\$400.59, resulting in total SBP annuity overpayments of \$839.37.

It is reported in the submission that there is no indication of fraud or misrepresentation on the part of Mrs. or any other person having an interest in obtaining a waiver of the claim and it is recommended that recovery of the amount in

djb

E-182704 (2)

question be waived. We note that the administrative recommendation cites Public Law 92-453, effective October 2, 1972, 10 U.S.C. 2774, as possible waiver authority in this case.

Section 2774 of title 10, United States Code, provides authority whereby, under certain circumstances, recovery by the United States of erroneous payments of pay and allowances (including retired pay) may be waived. However, the overpayment of an SBP annuity is neither retired pay nor a portion of active duty pay and allowances. It is our view, therefore, that an SBP annuity overpayment may not be considered for waiver under the provisions of 10 U.S.C. 2774.

However, pursuant to provisions of 10 U.S.C. 1453, recovery of an erroneous payment of an SBP annuity 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 this subchapter or against equity and good conscience."

In 54 Comp. Gen. 249 (1974), 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 SBP should be waived. The view is expressed that unless it can be established that collection of the overpayment would work an undue hardship, or some other reason can be shown as to why collection should not be made, no proper basis exists for the exercise of the waiver authority.

Under the facts and circumstances of this case, Mrs. clearly appears to be without fault with regard to the erroneous payment of annuities which it is indicated she received in good faith under the SBP. Thus, if it is administratively determined that recovery would cause undue financial hardship on Mrs. contrary to the purpose of the Plan and if a determination is made by a properly designated representative of the Secretary of the Army that the recovery of the erroneously made payments should be waived under 10 U.S.C. 1453, we would concur with such determinations.

Deputy R.F. KELLER
Comptroller General
of the United States