

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**FILE: B-152040 ✓
B-158422

DATE: JUL 25 1975

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MATTER OF:

Department of Defense Military Pay and
Allowance Committee Action No. 502

DIGEST:

1. Amount of claim of United States against a member of uniformed services arising out of overpayments of pay and allowances, which is subject to consideration for waiver under 10 U.S.C. 2774, is total amount of erroneous payments made, even where audit of member's pay account reveals underpayment of pay and allowances, whether that underpayment involves the same item of pay and allowances or a different item than was involved in the overpayment or was in the same or a different period.
2. Where member requests waiver of claim under 10 U.S.C. 2774, which is less than the total erroneous payment, and he does not know that an accounting setoff for underpayment which was otherwise due him has been made or of his right to request waiver for that amount, or that erroneous payment was actually determined to be for greater amount, we would act on entire erroneous payment in view of beneficial nature of law. However, where member knows of the proper total erroneous payment, accounting setoff for an underpayment and his right to request waiver in such amount, but requested waiver of amount less than total, we would act only on amount of waiver request.

This action is in response to a letter from the Assistant Secretary of Defense (Comptroller) requesting a decision by this Office on several questions relating to the indebtedness to be considered for waiver under the provisions of 10 U.S.C. 2774 in the circumstances described in Department of Defense Military Pay and Allowance Committee Action No. 502, enclosed with the request.

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The discussions contained in the Committee Action states that the primary purpose for the submission was to question and obtain a review of the interpretation and application of 10 U.S.C. 2774 and the implementing Standards for Waiver contained in 4 C.F.R. 91, et seq., made by the Transportation and Claims Division (TCD) of this Office, with particular reference made to the case of Lieutenant Colonel Robert S. Hopkins, II.

The pertinent facts of that case as set forth in the discussion were:

"On 14 September 1973, AFAPC sent to the Comptroller General an application by LtCol Robert S. Hopkins II for waiver pursuant to Pub. L. 92-453 of a claim arising out of erroneous payments of basic pay and flight pay because of use of an erroneous pay date. The error was discovered during a pay date reconciliation examination conducted by AFAPC in April 1973. The examination revealed that the member had been overpaid a total of \$791.67 during the period 1953-1958, and that he had been underpaid \$26 during 1960. A claim was made against the member for the net indebtedness of \$765.67, and the member requested waiver of the claim. These facts were set forth in a Review of Findings prepared by AFAPC/JA, it was determined that the conditions for waiver in the case had been met, and it was recommended in the aforementioned letter to the Comptroller General that the claim against LtCol Hopkins in the amount of \$765.67 be waived.

"In a 17 October 1973 letter to AFAPC signed by the Deputy Director of the GAO Transportation and Claims Division, the claim against LtCol Hopkins was waived, however, the amount waived was \$791.67. The letter stated that: 'Since the amount of the overpayment and the amount of the underpayment may not properly be set off against one another for the purposes of considering waiver under the cited act, we are considering the amount of the overpayment subject to waiver consideration to be \$791.67.'"

With regard to the above, the discussion makes reference to decision B-177377, December 29, 1972, also involving waiver by

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this Office. In that case, the indebtedness in question was also identified to this Office as a net indebtedness. We held therein that the amount which must be considered for waiver was the gross amount of indebtedness and the deductions for FICA and Federal income withholding tax were to be included.

The discussion goes on to state that as a result of that decision it has become the practice of the services not to exclude those items from the amount being considered for waiver and indicates agreement that such withholding items were those which this Office was referring to in the Comptroller General's report to Congress on "Operation of the Law Permitting Waiver of Erroneous Payments of Pay", B-152040, B-158422, September 15, 1972. However, the Committee Action discussion goes on to state that the before-mentioned letter in Colonel Hopkins' case, indicates that our policy regarding the amount of money to be waived is at variance with that which the services believe the policy should be and that which the services believe the statute requires.

In this regard, the Committee Action points out that waiver authority under 10 U.S.C. 2771 relates to a "claim" of the United States rather than an "indebtedness" as does the remission authority contained in 10 U.S.C. 9837(d). Further, it applies to a "claim arising out of an erroneous payment" rather than an "erroneous payment" itself and that such focus is continued by the implementing regulations set forth in 4 C.F.R. 91, et seq.

The Committee Action goes on to state that if it is determined that the total erroneous payment is the amount to be considered for waiver, then it would appear to be necessary, at least in some instances, to change the method of establishing the amount of indebtedness, citing as examples, indebtednesses which arise from excess leave taken and where the total amount actually paid a member for his period of service exceeds his statutory entitlements.

Based on the above, the following questions are asked:

"1. Is the amount to be considered for waiver under Public Law 92-453 in each case the total erroneous payment or the amount of claim asserted by the Government?

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"2. Would the answer to question 1 be the same if the same audit or re-examination that discovered the overpayment had also detected an underpayment, and both overpayment and underpayment had occurred in a prior pay period?

"3. Would the answer to question 2 be the same if both the overpayment and underpayment were for the same type of pay and allowance; e.g., basic pay or flight pay?

"4. If the answer to question 1 is that the total erroneous payment is to be considered for waiver, is such answer the same if the individual specifically requests waiver of an amount less than the total erroneous payment?

"5. Is the answer to question 4 the same if it is clear that the individual is aware of the amount of total erroneous payment and his right to request waiver thereof, but nevertheless requests waiver of less than that amount?

Section 2774 of title 10, United States Code, provides in pertinent part:

"(a) A claim of the United States against a person 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 * * * the collection of which would be against equity and good conscience and not in the best interest of the United States, may be waived in whole or in part by—

"(1) The Comptroller General; or

"(2) the Secretary concerned * * * when—

"(A) the claim is in an amount aggregating not more than \$500;

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"(c) A person who has repaid to the United States all or part of the amount of the claim, with respect to which a waiver is granted under this section, is entitled, to the extent of the waiver, to refund * * *

"(e) An erroneous payment, the collection of which is waived under this section, is considered a valid payment for all purposes."

While the words "A claim * * * arising out of an erroneous payment" are used in 10 U.S.C. 2774(a), we believe that such language should not be interpreted in the restrictive sense as suggested by the submission. A review of the legislative history of 10 U.S.C. 2774 (Public Law 92-453), shows that the act was the culmination of a long recognized need to provide authority to relieve administratively members of the uniformed services of liability to repay erroneous payments of pay and allowances which arose as the result of administrative errors. It was recognized that other than the remission of indebtedness provisions of 10 U.S.C. 9837(d) and other similar provisions, no authority existed to relieve administratively such members of liability to repay erroneous payments of pay and allowances regardless of the circumstances under which payments were made or received.

The purpose of H.R. 7614, which became Public Law 92-453, as stated in H.R. Rep. No. 92-195, 92d Cong., 1st Sess. 1 (1971), was "to provide uniform authority to relieve members * * * of erroneous payments of pay and allowances * * *." A similar statement of purpose is contained in S. Rep. No. 92-1165, 92d Cong., 1st Sess. 1 (1971). In this connection, these reports and the hearings are replete with references to the concept that the subject matter for consideration for waiver is "erroneous payments" rather than a claim which might ultimately be made by the Government after various interim accounting setoffs are taken.

Basically, entitlement to pay and allowances accrues to members of the military service on a monthly basis. See 5 U.S.C. 5505. Should there be an overpayment of an otherwise proper item of pay and allowances or payment of an item to which the member is not properly entitled, such payments are clearly erroneous payments and the United States is authorized to make collection of all such payments.

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Prior to enactment of Public Law 92-453, setoffs due to underpayments of pay and allowances in subsequent pay periods or cash payments by a member only served the purpose of reducing or possibly eliminating the indebtedness altogether. In such circumstances, while it could be argued that the member is no longer indebted to the United States to the extent of the recovery made, in light of the refund provision contained in 10 U.S.C. 2774(c), we do not believe that it was congressionally intended that, to the extent that any setoff or cash repayment was made, such portion of the indebtedness never existed. Since authority to make collection from a military member's pay account for a specific reason is limited by law, one reason being improper payments, it is our view that when an indebtedness is discovered, the total amount of such erroneous payments finally computed to be due, without credit for cash recovery or setoff, would constitute the erroneous payment and the measure of the member's indebtedness subject to consideration for waiver under 10 U.S.C. 2774, which indebtedness may be waived in whole or in part under the Standards for Waiver promulgated by this Office. The first question is answered accordingly.

As previously stated, payments of military pay and allowances basically accrue on a month-to-month basis. Where payment is made to a member which contains an overpayment of an otherwise proper entitlement or payment of an item of pay and allowances to which the member was not entitled, such excessive payments would constitute erroneous payments. If, in the post-audit or reexamination of such a member's account, it was discovered that as a result of another administrative error, an underpayment of an otherwise proper entitlement was made either in the same pay period or in a subsequent period covered by the audit, it is our view that such amount which is otherwise properly due the member should not be set off from the overpayment prior to establishing the member's indebtedness to be considered for waiver under 10 U.S.C. 2774, even where the overpayments are for the same item of pay or allowance. Questions 2 and 3 are answered accordingly.

With regard to the last two questions, we assume that at the time a member or former member requests waiver of the overpayment of a specified indebtedness in an amount less than the total debt he was either unaware that any setoffs had already been made or if made, that he had a right to receive such payment, or that upon

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a reexamination of his account the erroneous payment was actually determined to be for a greater amount. If that is the case, then where the individual specifically requested waiver of such reduced amount or the examination revealed a larger erroneous payment, we would act on the entire erroneous payment and not limit our actions to the requested sum in view of the beneficial nature of 10 U.S.C. 2774. If however, the member or former member knew of the total erroneous payment and his right to request waiver thereof, but nevertheless requested waiver of an amount less than the total erroneous payment, and this Office became aware of the foregoing, we would consider only the lesser amount for waiver. Questions 4 and 5 are answered accordingly.

With regard to the foregoing, nothing contained therein should be construed as limiting authority to take into account underpayments of pay and allowances when the question of whether to waive or not to waive is being resolved in the individual case under the Standards for Waiver. The fact that the individual concerned has in his pay account underpayments which may offset part or all of the overpayments being considered for waiver may well influence the determination of the Department concerned or this Office as to whether full or partial collection "would be against equity and good conscience and not in the interest of the United States", a stated condition of waiver in 10 U.S.C. 2774. See also 4 C.F.R. 91.5(c).

On review of the matter of our Transportation and Claims Division action in the case of Colonel Hopkins, it is our view that such action was consistent with the above and the equitable principles contained in the Standards for Waiver and was correct.

R.F. KELLER

Deputy Comptroller General
of the United States