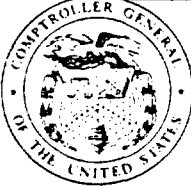


DECISION



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

FILE: B-182704

DATE: JUL 2 1976

MATTER OF: Mrs. Kathryn H. Vandegrift

98355

- DIGEST:
1. Overpayments resulting from erroneous annuity payments under Survivor Benefit Plan (SBP) made to member's widow may not be considered for waiver under 10 U.S.C. 2774, which relates to pay and allowances but are for consideration under 10 U.S.C. 1453, which is applicable specifically to SBP payments.
 2. Criteria for waiver of erroneous payments under the Survivor Benefit Plan pursuant to 10 U.S.C. 1453 should be similar to the criteria for waiver under 5 U.S.C. 5584; 10 U.S.C. 2774 and 32 U.S.C. 716, and therefore although waiver may not be granted unless collection would be contrary to the purpose of the plan and against equity and good conscience proof of financial hardship will not be required if waiver is otherwise in order.

This action is in response to a letter dated January 24, 1975 (file reference FDD-wdd 7202/3) with enclosures, from the Fiscal Director of the U.S. Marine Corps, recommending waiver of recovery of \$2,111, representing annuity payments erroneously paid under the Survivor Benefit Plan (SBP), to Mrs. Kathryn H. Vandegrift, widow of the late General Alexander A. Vandegrift who died May 8, 1973.

According to the submission the member elected to provide SBP coverage for his wife on the full amount of his retired pay. On April 30, 1974, Mrs. Vandegrift was entitled to an SBP annuity in the monthly amount of \$847.45. She was also entitled to a Dependency and Indemnity Compensation (DIC) payment of \$503 per month from the Veterans Administration, which amount was required to be offset against her annuity entitlement. Effective May 1, 1974, her DIC payment was increased to \$589. On July 1, 1974,

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her SBP entitlement increased to \$901.69, less the \$589 DIC offset. However, through administrative error, her DIC offset was continued in the \$503 amount from May 1 through August 31, 1974, with the result that she received excess SBP payments of \$86 a month, a total of \$344, for the period. Beginning September 1 and continuing through November 30, 1974, the error was compounded by a failure to make any DIC offset, with the result that she received excess SBP payments of \$589 a month, a total of \$1,767, for this period. The total erroneous payments thus amounted to \$2,111.

Although it is recognized that the payment of the full SBP together with DIC for the period September through November 1974 normally should have been recognized as an overpayment by the recipient, it is indicated that there had been an effort to secure increased pay for General Vandegrift for some time prior to his death. The submission asserts that when Mrs. Vandegrift received the \$503 annuity increase in September 1974, she assumed the efforts on her husband's behalf had finally been successful and that the increase in her annuity was a result. The possibility of error therefore did not occur to her.

It is reported in the submission that there is no indication of fault on the part of Mrs. Vandegrift and that she accepted the erroneous payments in good faith. It is recommended that the amount of the claim be waived. Waiver is requested under authority of 10 U.S.C. 2774.

Section 2774 of title 10, United States Code, provides authority under which recovery by the United States of erroneous payments of pay and allowances (including retired pay) of military personnel may be waived. However, the overpayment of an SBP annuity is neither retired military pay nor a portion of active duty military pay and allowances. Therefore 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 erroneous payment under the SBP should be waived. The view was expressed that unless it can be established that collection of the erroneous payments 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. The 54 Comp. Gen. 249 decision applies the rules which were previously applied under the waiver provision of the Retired Servicemen's Family Protection Plan, as stated in 35 Comp. Gen. 401 (1956), to the waiver provision of the SBP law.

There is nothing in the submission to show the present state of Mrs. Vandegrift's finances or any other facts which could support a determination that collection of the overpayment would work an undue hardship.

We note that the statutory authority for waiver of other erroneous payments made by the United States Government contain language very similar to that of 10 U.S.C. 1453, namely that recovery would be "against equity and good conscience", but a showing of financial hardship is not required in connection with waivers under those provisions. See, for example: 5 U.S.C. 4108(c) (obligation for training received as a civil servant); 5 U.S.C. 5522(c) (advance payment of civilian pay and allowances in emergency circumstances); 5 U.S.C. 5534 (erroneous pay and allowances of Civil Service employees); 5 U.S.C. 5922(b) (overseas differential and allowances paid to Civil Service employees); 5 U.S.C. 8129(b) (compensation for injuries of Civil Service employees); 5 U.S.C. 8346(b) (erroneous Civil Service retirement benefits); 10 U.S.C. 2774 (erroneous payments of military pay and allowances); 32 U.S.C. 716 (erroneous pay and allowances of members of the National Guard). The standards for waiver of claims for erroneous payment of pay and allowances under 5 U.S.C. 5584, 10 U.S.C. 2774 and 32 U.S.C. 716 are set forth in subchapter G of title 4 CFR, part 91-93. In spite of the similarity of those statutory provisions to 10 U.S.C. 1453 there is no provision in the regulations thereunder requiring a specific showing of undue hardship.

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It is also noted that in processing a request for waiver under 5 U.S.C. 8346(b)--the authority for waiver of erroneous payments made to survivors of Civil Service employees--there is no general requirement that the one requesting waiver demonstrate lack of ability to pay. Waiver under this statute is administered by the Civil Service Commission and, we understand that when overpayments do occur no greater standard is required of the survivor in a request for waiver than that which would be required in the case of overpayment of pay and allowances under 5 U.S.C. 5584.

In the circumstances we believe that the rule being applied under 10 U.S.C. 1453 is unnecessarily restrictive to the extent that it is interpreted as requiring a showing of undue hardship on the debtor in each case. Accordingly, we will no longer require a showing that collection of the erroneous payment would work a financial hardship. To the extent that 54 Comp. Gen. 249 and 35 Comp. Gen. 401 are inconsistent with the above these will no longer be followed.

Under the facts in this case, it appears that the erroneous payment of SBP annuities to Mrs. Vandegrift was an administrative error and that there is no indication of fraud, misrepresentation, fault or lack of good faith on her part or any other person having an interest in obtaining a waiver of the claim. It may be concluded that recovery would be contrary to the purpose of the Plan and against equity and good conscience. We agree that recovery of the erroneous payments in the amount of \$2,111 in this case should be waived.

R. P. KELLER

Deputy Comptroller General
of the United States