

DECISION



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

FILE: B-184783

DATE: MAY 12 1976

MATTER OF: Mr. David K. Halseth

DIGEST:

1. After the member concerned became medically incapacitated for flying, his flight pay was erroneously continued for almost two years until his separation. Partial waiver of debt for erroneously paid flight pay is authorized based upon fact that member accumulated substantial excess flying time during the month he became incapacitated and, under applicable regulations, he might reasonably have expected to receive continued flight pay for up to five months thereafter based upon this accumulated (banked) flight pay.
2. Where record shows that experienced former Air Force member performed no flying duty from the time of incapacitation in December 1970 through the time of discharge on September 19, 1972, but that he was aware that he received flight pay for this entire period, since member did not bring this matter to the attention of knowledgeable officials, such as the officer in charge of his pay, he is considered to be at fault, thereby precluding waiver under 10 U. S. C. 2774(b)(1).

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This action is in response to a letter dated July 10, 1975, from Mr. David K. Halseth, addressed to the Air Force Accounting and Finance Center, which, in effect, requests reconsideration of our Transportation and Claims Division's denial of waiver of the claim of the United States against him in the amount of \$2,890.16, resulting from an erroneous overpayment of flight pay incident to his service in the United States Air Force. That letter was forwarded to our Office by letter dated July 22, 1975, for response.

The file shows that Mr. Halseth, while serving on active duty as a captain in the Air Force stationed in the Republic of Vietnam, was medically examined on December 29, 1970, at which time he was apparently determined to have "split vision" to the extent that he would be no longer permitted to participate as a crew member in aerial flights. However, this incapacity was determined not to be caused by military aviation accident or the performance of hazardous duty. By Aeronautical Order No. 23, dated April 3, 1971, issued by Headquarters 35th Combat Support Group (PACAF), then Captain Halseth was suspended from flying status effective April 1, 1971, by reason of medical disqualification resulting from incapacitation beginning on December 29, 1970. The authority for issuing that order was stated to be paragraph 2-29(g)(1)(b) of Air Force Manual 35-13. The record shows that, while such order was not rescinded prior to his discharge from the Air Force on September 19, 1972, through administrative error, a copy of that order was not placed in Mr. Halseth's military pay record. As a result, he continued to receive flight pay during the period April 1, 1971, through September 19, 1972, the date of his discharge, creating an erroneous payment to him in the amount of \$2,890.16. On October 17, 1972, the error was discovered by the Air Force and by letter dated August 23, 1973, Mr. Halseth was notified of the claim of the United States against him for erroneous overpayment of flight pay in the amount of \$2,890.16.

By letter dated January 4, 1974, addressed to the Air Force Accounting and Finance Center, Mr. Halseth requested waiver of collection of the indebtedness under the provisions of 10 U. S. C. 2774 (Supp. II, 1972). In that letter Mr. Halseth stated that he was never advised that he was suspended from flying duty; that he never received a copy of the suspension order; and that the only advice he received concerning the matter came from a flight surgeon at Phan Rang Air Base, Vietnam, in March 1971, who advised him that he would not be flying for awhile. Mr. Halseth further stated therein that after he had not flown for several months but noticed that he continued to receive

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flight pay he made inquiries in April or May 1971, at the finance office at Phan Rang Air Base concerning the matter of his entitlement. He states that after several weeks, a sergeant (E-4), in the finance office at the Air Base advised him that he had not yet found the answer, but that he had accumulated quite a bit of extra flying time and that his flying pay would continue for "quite a while." It was also stated that this was the only information obtained at that finance office. Mr. Halseth further states that in October 1971, during in-processing at Travis Air Force Base, California, his new duty station, he again inquired about his continued receipt of flight pay. Apparently, a finance office sergeant, after some research, suggested that Mr. Halseth continued to receive flight pay because he was attached to a rated supplement field or because he had last flown on combat missions. It is indicated that the sergeant advised that if anything was amiss Mr. Halseth would be notified.

By letter dated April 17, 1974, Mr. Halseth's application for waiver of erroneous payments under 10 U.S.C. 2774 (Supp. II, 1972), was forwarded to this Office by the Air Force Accounting and Finance Center along with their administrative report of investigation and recommendation. That report of investigation indicates that while the member may not have received a copy of Aeronautical Order No. 23, he did not perform any flight duties subsequent to the discovery of his incapacity on December 29, 1970. Further, since he regularly received leave and earnings statements during the entire period, he was aware that he was receiving flight pay. It was also noted therein, that while Mr. Halseth claimed having made inquiries at the finance and accounting office at Phan Rang Air Base on four or five occasions concerning his entitlement to receive flight pay and again in October 1971, during in-processing at Travis Air Force Base, California, he offered no explanation for his failure to request the assistance of the officer in charge or the noncommissioned officer in charge of the finance offices involved. The report continued as follows:

"* * * It is inconceivable that a captain with several years of substantial flying experience (sufficient to qualify him as an AC-119K aircraft commander for combat night missions) would not be aware of the precise and exact requirements for entitlement to flight pay. That he could believe he was entitled indefinitely after he stopped flying is, in my opinion, wholly incredible. The record substantiates his

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non-reliance in fact upon the advice allegedly furnished him while in Vietnam. Reliance upon the vague and uncertain advice provided by the finance clerk who processed him into Travis AFB in Oct 1971 was not reasonably placed if it in fact occurred. * * *

The report concluded that the member should have known of his lack of entitlement to flight pay and recommended that waiver of the claim be denied.

By letter dated May 6, 1975, addressed to the Air Force Accounting and Finance Center, our Transportation and Claims Division (now Claims Division), stated that, based on the administrative report, Mr. Halseth was aware that he was receiving flight pay after he was no longer in a flight status and he should have pursued his inquiries until he received satisfactory evidence of his entitlement to receive flight pay. It was concluded therein that since he failed to make inquiries of appropriate officials concerning his entitlement to receive such pay, he was at least partially at fault and waiver must be denied since 10 U.S.C. 2774 specifically precluded favorable consideration where there is an indication of fault on the part of the member.

In his letter dated July 10, 1975, the former member reiterated his previously made statements concerning knowledge and inquiries made to correct the matter, contending that he is totally without fault in the matter.

Section 2774 of title 10, United States Code (Supp. II, 1972), provides in pertinent part as follows:

"(a) A claim of the United States against a person arising out of an erroneous payment of any pay * * * 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 * * *

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* * * * *

"(b) The Comptroller General * * * may not exercise his authority under this section to waive any claim--

"(1) if, in his opinion, there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member * * *."

To implement this waiver authority, this Office has established standards for waiver, which are found in 4 CFR 91 et seq., subsection 91.5(c) of which provides in pertinent part:

"* * * Any significant unexplained increase in pay or allowances which would require a reasonable person to make inquiry concerning the correctness of his pay or allowances, ordinarily would preclude a waiver when the employee or member fails to bring the matter to the attention of appropriate officials. * * *"

As provided in 10 U.S.C. 2774(b)(1), waiver authority may not be exercised if there exists, in connection with the claim, an indication of "fault" on the part of the member. The word "fault" has been interpreted as including something more than a proven overt act or omission by the member. "Fault" is considered to exist if, in light of all the facts, it is determined that the member should have known that an error existed and taken action to have it corrected. The standard employed by this Office is to determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlements.

Section 301 of title 37, United States Code (1970), provides in subsection (a) that, subject to regulations prescribed by the President, a member of the uniformed services who is entitled to basic pay is also entitled to incentive pay for the performance of "hazardous duty" as required by orders. Under subsection (a)(1) of that section, duty as a crewmember involving the participation in frequent and regular aerial flights is included within the meaning of the term "hazardous duty."

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Implementing regulations contained in section 105 of Executive Order No. 11,157, June 22, 1964, and paragraph 20111 of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), change 16, dated April 1, 1970, in effect during the relevant period, provided that members shall not be entitled to receive incentive pay for participation in aerial flights for any period while suspended from such participation. However, paragraph 20107 of the DODPM, provides that:

"The right of a member on flying status to flying pay during incapacity which is not the result of performing hazardous duty depends on fulfillment of flight requirements under para 20103."

Paragraph 20103 provides in pertinent part as follows:

"A member in a flying status must perform the minimum aerial flights in subpara a, below.

"a. Minimum Flying Time Each Month.

"(1) During one calendar month--4 hours of aerial flight. However, if a member does not fly 4 hours in any month, hours flown during the last 5 preceding months, which have not already been used to qualify for flight pay may be applied to meet this 4-hour requirement."

In this connection, we have been advised that Air Force records show that at the time Mr. Halseth was found to be incapacitated on December 29, 1970, he had 31.9 accrued excess hours of flight time and was paid flight pay for the months of January, February and March 1971 on that basis. Notwithstanding the fact that orders suspending him from flight status were issued effective April 1, 1971, under the provisions of table 2-1-5 of the DODPM (change 8, December 20, 1968), it is not unreasonable for Mr. Halseth to believe that he would be entitled to continue to receive flight pay through May 1971.

Accordingly, we hereby waive that portion of the indebtedness representing the overpayment of flight pay for the months of April and May 1971.

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With regard to the period June 1, 1971, through September 19, 1972, we must concur with the recommendations of the Air Force Accounting and Finance Center and the action of our Transportation and Claims Division denying waiver of collection of erroneous overpayments of flight pay. Since Mr. Halseth was an experienced officer in the Air Force, he should have been aware of the maximum period for which he could reasonably expect to receive flight pay after he was no longer flying. Upon receipt of flight pay for the month of June 1971, and each month thereafter, Mr. Halseth had the obligation to bring the matter to the attention of appropriate officials, which would include the officer in charge of his payment issuing activity. In these circumstances, it is our view that his failure to make the appropriate officials aware of the continuing erroneous payments thereafter, places him in the position of being partially at fault in the matter, thereby precluding waiver of such erroneous overpayments for the period from June 1, 1971, through September 19, 1972.

Therefore, our Transportation and Claims Division settlement dated May 6, 1975, is modified accordingly.

R. F. Keller

Deputy Comptroller General
of the United States