



FILE: B-192380

DATE: November 8, 1978

MATTER OF: Petty Officer Ronald H. Frayo, USN

DIGEST: Service member receiving erroneous payments of BAQ due to administrative error during a period he and his dependents occupied Government quarters, who failed to question the accuracy of his pay after being alerted by information on his Leave and Earnings Statements (LES's), is not without fault in the matter so as to permit waiver of the indebtedness. Waiver may be granted for period prior to such information regarding BAQ payment being included on his LES. Further, financial hardship, alone, resulting from collection is not a sufficient reason for a member to retain the payments that he should have known did not belong to him.

This action is in response to a letter dated February 23, 1978, from Petty Officer Ronald H. Frayo, USN, [REDACTED] which constitutes an appeal to action by our Claims Division dated September 2, 1977, which denied his request for waiver of the claim of the United States against him in the gross amount of \$2,994.66. The debt arose from erroneous payments of Basic Allowance for Quarters (BAQ), at the with dependent rate, he received during a period he was not entitled to BAQ because he and his dependents occupied Government quarters.

The record shows that the member occupied Government quarters on September 28, 1973. Due to administrative error, credit for BAQ at the with dependent rate continued through June 30, 1975, resulting in the overpayment.

Petty Officer Frayo's request for waiver was denied because he was found to be at least partially at fault in the matter since his pay record for the second half of 1973 shows fluctuating amounts but a much smaller decrease than the amount he should have expected as attributable to loss of BAQ. Therefore, it was determined that he knew or could be expected to know that he was receiving pay to which he was not entitled. In such a case he has a duty to retain the erroneous amounts for refund to the

Government and to make prompt inquiry to appropriate officials concerning his pay, which he did not do.

Petty Officer Frayo contends that since his Leave and Earnings Statements (LES's) were often in error, he paid little attention to them, that errors in the LES's continued even after deductions from his pay were initiated to recoup the overpayment of BAQ, that his financial situation has deteriorated since his original application for waiver, and that his failure to notice the error in his pay was due to his not being "financially minded."

Section 2774 of title 10, United States Code (1976), provides our authority to waive certain debts when collection would be against equity and good conscience and not in the best interest of the United States. However, subsection 2774(b) is in part as follows:

"(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
* * *

The word "fault", as used in 10 U.S.C. 2774 has been interpreted as including something more than a proven overt act or omission by the member. Thus, fault is considered to exist if in light of all of 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 entitlement. See B-184514, September 10, 1975, and B-185127, March 8, 1976.

In the present situation, while the record indicates that the BAQ credits were made to the member through administrative error, failure to question the accuracy of his pay when he first should have known that it did not reflect a reduction of \$138.60 per month for the use of Government housing is viewed as fault on

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his part. When Petty Officer Frayo discovered what he considered errors in his LES's, he should have notified appropriate officials. In this regard, we have held that a person is at least partially at fault for his failure to examine LES's furnished him which, had they been examined, would have alerted the recipient to the fact that erroneous payments were being made. B-185127, March 8, 1976, B-185359, March 17, 1976, and B-178042, May 19, 1977. In the present situation, it does not appear that the member was furnished LES's showing credit for BAQ for the period from September 28, 1973 (when he first occupied Government quarters) until he received the February 1974 LES. However, item 18 of the February LES shows BAQ credit of \$138.60 and contained a statement that "item 18 does not consider occupancy of Government quarters or single personnel who are drawing BAQ."

After reviewing the matter we believe that the payments for BAQ to Petty Officer Frayo for the period September 1973 through January 1974 should be waived, since on the record before us it appears that his LES's for this period did not refer to BAQ and he may have reasonably considered that he was properly entitled to the net amount of pay he received. However, after being alerted by his LES for February 1974 that occupancy of Government quarters was not being considered, he had no reason to believe that his pay which included payment of BAQ for the period he occupied Government quarters was correct. While, as he indicates, his LES's may have been incomplete, the LES's for February 1974 and subsequent months clearly show that he was being paid BAQ.

Therefore, Petty Officer Frayo should have known beginning in February 1974 and each time thereafter he received his pay for each pay period he occupied Government quarters that he was receiving monies allocated for BAQ to which he was not entitled. Such knowledge on his part carried with it a duty and legal obligation to bring it to the attention of appropriate officials and to return the excess sums or set aside this amount for refund at such time as the administrative error was corrected. Since he did not do so, it is our view that he did not accept such payments in good faith, he is not free from fault, and collection action is not against equity and good conscience nor contrary to the best interests of the United States. Further, financial hardship resulting from collection is not a sufficient reason to retain the payments that he should have known did not belong to him. B-183460, May 28, 1975.

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Accordingly, waiver is granted for BAQ payments made for the period September 28, 1973, through January 1974 but the action taken by our Claims Division denying waiver for BAQ payment made for the period February 1974 through June 1975 is sustained.

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