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DECISION



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

FILE: B-195558

DATE: January 6, 1981

MATTER OF: [REDACTED], AUS

- DIGEST:
1. When an Army member is involuntarily separated from but later retroactively restored to active duty under the statute authorizing the correction of military records, 10 U.S.C. 1552, the monetary claims settlement to be concluded under that statute depends upon the member's legal entitlements and liabilities based solely upon proper application of the pertinent laws and regulations to the corrected record; thus, in the claims settlement the member is entitled to military backpay but is liable to refund any severance payments previously received under the corrected record showing he was not separated from active duty.
 2. After a claims settlement is concluded in the case of an Army member retroactively restored to active duty status through the correction of his military records, the member may apply for an equitable adjustment of the settlement by requesting waiver under the provisions of 10 U.S.C. 2774 of erroneous severance payments appearing as liabilities in the settlement statement; ordinarily waiver will be favorably considered only to the extent of preventing the member from having a net indebtedness upon his actual return to active duty.
 3. An Army officer who was retroactively restored to active duty through the correction of his military records and who returned to active service with a net backpay award of \$15,710.60 under his claims settlement, was nevertheless

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properly granted a waiver of an erroneous lump-sum leave payment shown as a liability in the settlement statement because the days of leave it represented could not be restored to him; however, in the circumstances of his case no further adjustments to the settlement are warranted.

[REDACTED] requests reconsideration of the action taken by our Office to grant only part of his application for an equitable adjustment of the monetary settlement concluded with him incident to his retroactive promotion and restoration to active duty in the United States Army. In view of the facts presented, we are sustaining that settlement action.

Background

[REDACTED] is one of a large number of Reserve officers who were separated from extended active Army service several years ago for the reason that they had twice been passed over for promotion. It was later determined that the selection boards which had passed them over for promotion had not been legally constituted in that the Department of the Army had not appointed an appropriate number of Army Reserve members to sit on the boards. As a result, the records of many of the officers affected were corrected under the statutory authority of 10 U.S.C. 1552 to give them retroactive promotions and to constructively restore them to active duty status.

The Department of the Army at that time presented our Office with several questions concerning the proper adjustments to be made in the pay accounts of those officers upon their actual return to active duty. In our responding decisions, 56 Comp. Gen. 587 (1977) and 57 Comp. Gen. 554 (1978) we noted that the statute authorizing the correction of military records, 10 U.S.C. 1552, makes

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specific provision for the settlement of claims arising as the result of a correction of a service member's personnel records. We expressed the view that the claims settlement to be concluded under the provisions of ^X10 U.S.C. 1552 in each case would depend upon the legal entitlements and liabilities of the particular officer restored to duty based solely upon a proper application of the pertinent laws and regulations to the facts as shown by the corrected record. Thus, among other things, we concluded that an officer constructively and retroactively restored to active duty would become entitled to retroactive payment of active duty military pay and allowances covering the interim period of his invalid separation from active service. We also concluded that on the basis of the corrected record expunging the fact of the officer's actual separation from service, any severance payments he may have previously received in the form of readjustment pay or a lump-sum leave payment would be rendered erroneous, and he would be liable to refund those erroneous payments in the settlement. In addition, we said that the gross amount of the officer's interim civilian earnings was to be deducted in the settlement from the military active duty backpay award.

In our decisions ^X56 Comp. Gen. 587 and ^X57 Comp. 554 we also said that after this settlement establishing the individual officer's legal entitlements and liabilities was concluded, the officer would then be eligible to request an equitable adjustment of the settlement by applying for a waiver of the erroneous payments shown as liabilities or debits in the settlement statement, under the provisions of ^X10 U.S.C. 2774. That statute authorizes waiver of erroneous payments of military pay and allowances if collection "would be against equity and good conscience and not in the best interests of the United States." In that connection, we noted that in some cases the settlement of an officer's legal entitlements and liabilities would cause him to be in debt to the Government upon his actual return to active duty, and we expressed the view that such a result would

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not serve the primary purpose of a correction of records in cases of this type, i.e., to restore the service member as nearly as possible to the same position he would have had if he had not been separated or relieved from the performance of active duty. We said that while applications for an equitable adjustment of a settlement would be considered on an individual, case-by-case basis, an application for waiver would ordinarily be favorably considered only to an extent which would prevent the individual officer from having a net indebtedness upon his actual return to active military service. However, we also said that waiver of further amounts could properly be granted for an erroneous lump-sum leave payment required to be collected in a settlement but for which, due to statutory leave carryover limits, no restoration could be made of the days of leave represented by that lump-sum payment.

Settlement of [REDACTED] Claims Under 10 U.S.C. 1552

[REDACTED] was involuntarily separated from active Army service in the grade of major on October 31, 1975. In 1978 his military records were corrected to show that he had been promoted to the grade of lieutenant colonel effective December 1, 1973, and that he had not been separated from active duty.

As a result of these corrections of [REDACTED] records, officials of the Army Finance and Accounting Center calculated that, under the guidelines set forth in 56 Comp. Gen. 587 and 57 Comp. Gen. 554, he was to be credited with \$88,001.46 in retroactive active duty military backpay, and that this amount was subject to offsets totalling \$72,290.86. Among other things, the offsets included an erroneous lump-sum leave payment of \$3,894.50; erroneous readjustment pay of \$15,000; and interim civilian earnings of \$49,656.39. The net amount found to be payable to [REDACTED] in the settlement of his claims under 10 U.S.C. 1552 was thus calculated to be \$15,710.60.

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██████████ objected to this proposed settlement. He contended that in addition to the \$88,001.46 in military backpay credited to him, he should have also been credited with further amounts to compensate him on account of his being deprived of the use of military commissaries, exchanges, and entertainment facilities during the period he had been separated from active duty. He also claimed damages to compensate him for civilian job-hunting expenses incurred and hardships experienced in civilian employment. In addition, he claimed reimbursement for state income taxes paid on his interim civilian earnings. He also objected generally to the recoupment of readjustment pay and the deduction of interim civilian earnings in the settlement.

Army authorities referred the matter to our Office for resolution, and in decision B-195558 of December 14, 1979, after a full consideration of the issues involved, we concluded that the settlement statement prepared by the Army Finance and Accounting Center was correct.

Adjustment of ██████████ Settlement Under
10 U.S.C. 2774

Following that final settlement establishing his legal entitlements and liabilities under the records correction statute in December 1979, ██████████ applied for an equitable adjustment of the settlement under the waiver statute, 10 U.S.C. 2774.

The Army Finance and Accounting Center forwarded ██████████ application to our Claims Division, and on January 31, 1980, the Claims Division approved waiver in the amount of \$3,894.50. This was the amount of the lump-sum leave payment ██████████ had received for 60 days of unused accrued leave at the time of his actual separation from active duty on October 31, 1975. The correction of his records to expunge the fact of his separation on that date operated to make the lump-sum leave payment erroneous. Thus, he was liable

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to refund the payment, but he was also entitled to have the 60 days' leave recredited to his leave account. However, because of statutory leave carryover limitations, the 60 days of leave could not be restored to him, and he therefore forfeited that leave. Hence, under the principles set forth in X56 Comp. Gen. 587 and X57 Comp. Gen. 554 the Claims Division determined that collection of the lump-sum leave payment would be inequitable and granted waiver of that erroneous payment.

██████████ later again expressed the belief that he should have been granted waiver under X10 U.S.C. 2774 of further amounts. Specifically, he asked for waiver in the amounts of: (1) \$3,579 for reimbursement of civilian job-hunting expenses incurred following his separation from active military duty in 1975; (2) \$3,943.69 for expenses incurred due to his loss of military commissary, exchange, and other post facilities between 1975 and 1978; and (3) \$2,995.59 as compensation for state income taxes paid on his interim civilian earnings between 1975 and 1978.

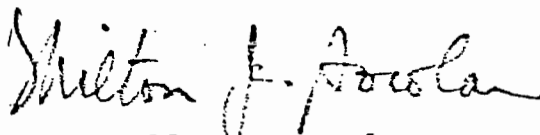
As previously mentioned, the waiver statute, X10 U.S.C. 2774, authorizes the Comptroller General to waive erroneous payments of military pay and allowances received by a service member if collection of those payments from the member "would be against equity and good conscience and not in the best interests of the United States." As also mentioned, in our decisions X56 Comp. Gen. 587 and X57 Comp. Gen. 554, we expressed the view that under that statutory authority applications for waiver of erroneous payments submitted by service members retroactively restored to active duty through the correction of their military records could ordinarily be favorably considered only to an extent which would prevent the individual member from having a net indebtedness upon his actual return to active duty; however, waiver of further amounts would be granted for erroneous leave payments required to be collected but for which, due to the statutory leave limit, restoration of the leave could not be made.

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In the present case, [redacted] did not return to active duty with debts owed to the Government as the result of the correction of his military records. Rather, the settlement of his claims against the Government and the Government's claims against him under the records correction statute resulted in a payment to him in the amount of \$15,710.60. In addition, that settlement has been adjusted under the provisions of 10 U.S.C. 2774 to waive collection of the erroneous lump-sum leave payment shown as a debit in the settlement statement, resulting in a further in-hand payment to him in the amount of \$3,894.50. Thus, he has received all of the equitable relief under 10 U.S.C. 2774 that is ordinarily to be granted to a service member in a case of this nature.

[redacted] application for a grant of waiver in further amounts to compensate him for his loss of military commissary and exchange privileges (the value of which is speculative), his job-hunting expenses, and state income taxes paid on his interim civilian earnings, essentially amounts to a request that he simply be paid damages which are not payable under the records correction statute. See decision B-195558, December 14, 1979. Hence, it is our view that a grant of waiver in this case in any amount greater than that already allowed by our Claims Division would be unwarranted. Compare Craft v. United States, 589 F. 2d 1057, 1068-1069 (Ct. Cl. 1978).

Accordingly, the settlement action previously taken in this case is sustained.



For The Comptroller General
of the United States