

15164 *Revised*
PLM2

DECISION



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

[Request for Waiver of Debt]
October 10, 1980

FILE: B-197108

DATE:

*R, J
PN*

MATTER OF: Petty Officer John R. Neely, USN

DIGEST: Navy enlisted member married to another enlisted member erroneously received BAQ at with-dependents rate on the basis of his spouse being his dependent. Although he made some inquiries about his BAQ entitlement, he is not without fault since the amount was substantial and he should have known he was being overpaid and pursued his inquiries. Further, financial hardship alone resulting from collection is not sufficient reason for a member to retain payments that he should have known did not belong to him.

Petty Officer John R. Neely, USN, requests reconsideration of our Claims Division's denial of his request for waiver of his debt to the United States in the amount of \$1,585. The debt arose from erroneous payments of basic allowance for quarters (BAQ) at the with-dependents rate made to him based on his wife being his dependent although she was also an enlisted member of the Navy. The denial of waiver is sustained.

Under the pay and allowance system applicable to members of the uniformed services a member may not receive BAQ at the with-dependents rate, on account of his spouse, for any period during which that spouse is a member who is entitled to basic pay. 37 U.S.C. § 420.

The record shows that Mr. Neely was married to an enlisted member in the Navy on September 6, 1977. Subsequently, he submitted a Dependency Application/Record of Emergency Data indicating that his spouse was not his dependent. The form does not state that his wife was a Navy member, although it does show her address as WEQ (Women's Enlisted Quarters). Mr. Neely states he updated his Dependency Application on or about September 9, 1977, and was directed to mark "1"

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in the box marked "Number of Dependents;" however, there is no Dependency Application in the file which supports this statement. Thus, through administrative error, Mr. Neely was paid BAQ at the with-dependents rate from the date of his marriage through May 15, 1978, when the error was discovered. No entitlement to BAQ existed at either the with- or without-dependents rate since his spouse was also on active duty in the Navy, and he was assigned Government quarters. 37 U.S.C. § 403(b) and § 420.

Two or 3 months after his marriage Mr. Neely noticed that the BAQ was not being entered on his leave and earnings statement (LES). He brought this to the attention of the disbursing clerk who said it would show up eventually. Mr. Neely contends he also questioned the head personnel man who told him he was entitled to full BAQ as long as his wife was not drawing BAQ of any kind. He says he subsequently questioned two more persons in disbursing and a Judge Advocate General officer (at a social function) who all assured him he was entitled to full BAQ. Thus, although the BAQ never appeared on his LES, Mr. Neely continued to accept the increased allowance.

The Navy Family Allowance Activity recommended that Mr. Neely's request for waiver be denied when they forwarded the matter to our Claims Division for resolution. On August 2, 1979, our Claims Division denied the application for waiver. Essentially, [it was concluded that since Mr. Neely did not claim his wife as a dependent when he completed the Dependency Application following his marriage, he was aware that he would not be entitled to BAQ on behalf of his wife. In addition, his normal semimonthly pay increased from \$202 to \$317 which should have put him on notice that an erroneous BAQ credit was being made.] Thus, it was determined that Mr. Neely's failure to make prompt inquiry to the appropriate officials concerning his pay caused him to be partially at fault, which statutorily precludes favorable action on an application for waiver.

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Mr. Neely has questioned the correctness of the conclusions reached by our Claims Division. In his request for reconsideration he states that he obtained all the expertise anyone could reasonably ask for in trying to determine his eligibility for BAQ. In addition, he states that collection of the overpayment would pose an extreme financial hardship.]

The Comptroller General may waive a claim of the United States if its collection would be against equity and good conscience and not be in the best interest of the United States. 10 U.S.C. § 2774 (1976). This authority may not be exercised if there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the claimant. 10 U.S.C. § 2774(b)(1) (1976).

"Fault," as used in this section, has been interpreted as including something more than a proven overt act or omission by the member. Thus, we consider fault 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 we use is to determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlement. See B-195257, August 17, 1979.

Although the erroneous payments in the case appear to have been made as the result of administrative error, it is clear that the member had reason to know, and did suspect, that erroneous payments were being made. While he inquired about the correctness of his BAQ, this indicates an initial good faith effort on his part, but it is also the action expected of a reasonably prudent person.

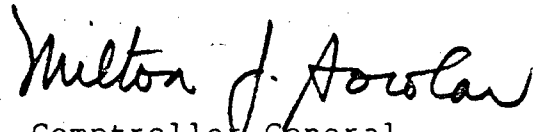
In view of the consistent overpayments which did not reconcile with his LES, and the lack of a satisfactory explanation as to what basis a member assigned to Government quarters where his wife was also a member could be entitled to full BAQ, it is our view that Mr. Neely should have requested a complete explanation

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of his pay rather than verbal assurances that it was accurate. Since the correctness of the BAQ was so doubtful, he should have, as a minimum, set aside these excessive amounts until a definite determination and statement had been made to him fully explaining the entitlement. See B-196637, February 27, 1980; B-194233, September 12, 1979; and B-193020, December 7, 1978. This would prevent any later hardship involved in making restitution. Financial hardship alone, resulting from collection, is not a sufficient reason to retain the payments he should have known did not belong to him. See B-196637, above, and B-195649, February 22, 1980.

In these circumstances we are unable to conclude that Mr. Neely is free from fault, and collection action is not against equity and good conscience nor contrary to the best interests of the United States.

Accordingly, the action of our Claims Division denying waiver is sustained.



For the Comptroller General
of the United States