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DECISION



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

FILE: B-197286

DATE: May 20, 1980

MATTER OF: Colonel Frederick H. Mueller, AUS,
Retired

DIGEST: Considering his rank, years of service, the amount of the erroneous overpayments, and the fact that he was aware of a discrepancy in the years of service credited to him for retired pay purposes, a service member who received overpayments of retired pay should have known that the payments were erroneous, and that he would be required to refund them. Therefore, *[Request for* waiver of ~~his~~ indebtedness*]* is not granted.

Colonel Frederick H. Mueller, AUS, Retired, requests reconsideration of our Claims Division's August 13, 1979 denial of his application for waiver of his debt to the United States in the total amount of \$4,419.55. The debt arose from erroneous payments of military retired pay during the period September 25, 1975, through November 30, 1976. The denial of waiver is sustained.

The record shows that the United States Army Finance and Accounting Center sent Colonel Mueller, USAFSA Form 20-101, dated August 15, 1975, relative to the data regarding the computation of his retired pay and he was advised that if he did not agree with the information furnished, to contact the Commander, Reserve Components Personnel and Administration Center (RCPAC), for verification. This document stated that he had 14.28 years' service for percentage purposes and that his retired pay would be computed at a rate equal to 2-1/2 percent of the monthly active duty pay he would receive if serving on active duty, on the effective date of granting of retired pay, in the highest grade satisfactorily held during the entire period of service multiplied by a number equal to the number of years, and any fraction thereof on the basis of 360 days per year. Prior to this, RCPAC had sent him AGUZ Form 249, Chronological Record of Military Service, dated March 5, 1975, which showed that he had 3,490 points creditable for computing years of service for retired pay.

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The 3,490 points divided by 360 amount to 9.69 years of service for percentage purposes in computing his retired pay, per 10 U.S.C. 1333.

Colonel Mueller forwarded a letter dated August 30, 1975, to RCPAC in which he questioned the 14.28 years of service for percentage purposes and suggested that it be verified in order to insure accuracy in computation of retired pay; but, he contends that no response was received. Thereafter, he was paid retired pay for the period September 25, 1975, through February 29, 1976, at the monthly rate of \$936.23 rather than the appropriate monthly rate of \$635.30. Further, he was paid for the period March 1, 1976, through November 30, 1976, at the monthly rate of \$986.79 rather than the appropriate rate of \$669.60.

Another letter of inquiry dated October 14, 1976, was forwarded by Colonel Mueller addressed to the Retired Pay Division, U.S. Army Finance Support Agency, with a copy to RCPAC regarding possible error in his years of service for retired pay purposes and requesting a review of payments and adjustment if found necessary. A reply from RCPAC dated November 16, 1976, informed him that the correct years of service for percentage purposes was 9.69, that he was erroneously credited with 14.28, and that they had no record of his letter dated August 30, 1975. RCPAC then notified the United States Army Finance and Accounting Center of the error and thereafter they informed Colonel Mueller the amount of his indebtedness by letter dated December 21, 1976.

In his original request for waiver Colonel Mueller contended in effect that no knowledge of actual overpayment was available to him prior to receipt of the letter dated November 18, 1976, from RCPAC, that prior information on USAFSA Form 20-101, dated August 15, 1975, was not conclusive as to expected payments, and that when he received no response to his letter of August 30, 1975, he made further inquiries of the Pentagon Office of RCPAC, as well as to the Finance Center by his letter of October 14, 1976. The waiver denial was based upon the member's failing to persist in his inquiries and retaining the excess amounts until his pay was resolved. In his

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appeal; Colonel Mueller also contends that he did pursue the matter until his pay was resolved and that only through his persistence was the error discovered.

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 interests of the United States. However, subsection 2774(b) precludes waiver if, in the opinion of the Comptroller General--

"* * * there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member * * *"

We interpret the word "fault", as used in 10 U.S.C. 2774, as including something more than a proven overt act or omission by the member. Thus, we consider fault to exist if in the 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 we employ is to determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlement. See decisions B-184514, September 10, 1975, and B-193450, February 26, 1979.

In the present situation, Colonel Mueller had doubt from the outset of his entitlement to receive retired pay based upon 14.28 years of service for percentage purposes. Considering his rank, his years of service, and the difference in retired pay based upon 14.28 years of service and the 9.69 years of service that the record shows was his true entitlement, he should have known that he was being overpaid and when he failed to receive a timely reply to his letter of August 30, 1975, he should have requested a complete explanation of his pay. Since he had no basis to believe he was entitled to more years of creditable service than his records showed and the payments received during the period September 25, 1975, through September 30, 1976, were so doubtful, he should have at a minimum, set aside these excessive amounts until a definite determination and statement had been made to him fully explaining his

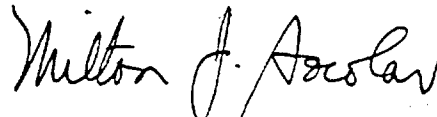
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entitlement. Further, he should have known that if he continued to be overpaid, he would eventually be required to repay the erroneous amounts.

The fact that the overpayments were made through administrative error does not relieve an individual of responsibility to determine the true state of affairs in connection with overpayments. It is fundamental that persons receiving money erroneously paid by a Government agency or official acquire no right to the money; such persons are bound by equity and good conscience to make restitution. See decisions B-188595, June 3, 1977; B-124770, September 16, 1955; and cases cited therein.

Since Colonel Mueller had a duty and a legal obligation to return the excess sums or set aside this amount for refund at such time as the administrative error was corrected, we are unable to conclude that he is free from fault. Therefore, collection action is not against equity and good conscience nor is it 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