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**DECISION**



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

**FILE:** B-203213

**DATE:** December 21, 1981

**MATTER OF:** Petty Officer First Class Shelby W. Miller, USN

- DIGEST:**
1. A Navy petty officer receiving erroneous payments of a Basic Allowance for Quarters due to administrative error during a period when he was occupying Government family quarters, who failed to properly question the accuracy of his pay when he received unexplained significant increases in his normal net pay, was not without fault in the matter. By statute, such fault precludes waiver of the Government's claim against him for a refund of the overpayments. 10 U.S.C. 2774.
  2. Neither a Navy petty officer's exemplary conduct and duty performance, nor his circumstances of personal financial hardship, are factors which may properly be considered in determining whether he is without "fault" and, therefore, eligible under the statutory provisions of 10 U.S.C. 2774 for a waiver of the Government's claim against him arising out of erroneous payments of military pay and allowances.

Petty Officer First Class (FTM1) Shelby W. Miller, USN, requests reconsideration of our Claims Division's denial of his application for waiver of his debt to the United States in the net amount of \$2,973.55. The debt arose from erroneous payments of a Basic Allowance for Quarters (BAQ) that he received during the period from January 1, 1977, through April 30, 1978, when at the same time he and his family were residing in Government quarters. In light of

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the facts presented, and the applicable provisions of law, we are sustaining our Claims Division's action in this matter.

Under the pay and allowance system applicable to members of the uniformed services either Government living quarters are provided or a BAQ is paid. A service member who is provided with Government quarters adequate for himself and his dependents "is not entitled to a basic allowance for quarters." 37 U.S.C. 403(b).

On June 21, 1976, Petty Officer Miller moved into Government family quarters at Virginia Beach, Virginia, when he received a new permanent duty assignment to become an instructor at the Naval Guided Missiles School there. Previously, he had been assigned to duty at sea, and his family had resided in private quarters ashore. When they moved into Government quarters in Virginia Beach his entitlement to BAQ ended. A record of the transaction was forwarded to the Navy Family Allowance Activity in Cleveland, but the record was apparently lost. As a result, BAQ continued to be posted to Petty Officer Miller's credit in his automated pay records for periods after July 1, 1976.

In July 1976 Navy disbursing officials at Petty Officer Miller's duty station began withholding payment of BAQ from him even though his records showed continuing credit for the allowance, since they were apparently aware that he was residing in Government quarters. At that time Petty Officer Miller inquired about the correctness of his pay, and those officials assured him that BAQ was being withheld and that the Navy Family Allowance Activity had been notified of his move to Government quarters. The officials continued to withhold payment of BAQ through the end of the year 1976, and Petty Officer Miller's pay records, because of the error that had occurred, showed a credit of unpaid BAQ totalling \$1,136.45 as of December 31, 1976.

In the latter part of 1976 Petty Officer Miller's normal net pay was \$181 each semimonthly payday. In December 1976 he reduced one of his monthly allotments from \$125 to \$40 per month, and he thus had reason to expect his semimonthly net pay to increase by about \$42.50 each payday beginning in January 1977.

However, in January 1977 Petty Officer Miller's semimonthly net pay increased from \$181 to \$313, an increase of more than \$130. The reason for this was apparently that new disbursing officers at his duty station ceased withholding payment of the BAQ which was erroneously being posted to his credit. The error in his pay records was eventually detected through audit in April 1978. It was then determined that he had received erroneous BAQ payments totaling \$2,973.55 during the period from January 1, 1977, through April 30, 1978.

Petty Officer Miller was notified of the audit on May 4, 1978. Thereafter, on May 24, 1978, he received a further erroneous BAQ payment in the lump-sum amount of \$1,136.45. That amount represented the unpaid BAQ erroneously posted to his credit during the period from July 1 through December 31, 1976. He knew this payment was erroneous, and he promptly refunded it.

The total amount of the erroneous BAQ payments made to Petty Officer Miller in this matter is \$4,110. He has requested a waiver of the claim against him in the amount of \$2,973.55 only, and does not question the fairness of his being required to refund the erroneous \$1,136.45 lump-sum payment he received on May 24, 1978. He suggests, however, that it would be inequitable to require him to refund the erroneous BAQ payments totalling \$2,973.55 that he received between January 1977 and April 1978. Essentially, he indicates that he did not actually know he was being overpaid during that time, and that he would never deliberately attempt to defraud the Government. He indicates that in January 1977 he did ask personnel at his local disbursing office about the correctness of his pay records and the higher net pay he had begun to receive. In return, he was assured that everything was in order,

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and that so long as his pay did not fluctuate wildly there was no need for alarm. He indicates that he relied on those assurances since he was not an expert on pay matters. He indicates further that the collection of the \$2,973.55 debt from him through deductions from his pay had caused his family extreme financial hardship. He believes that in these circumstances it would be unfair to hold him responsible for an error he did not cause and did not know about, and he therefore suggests that his \$2,973.55 debt should be waived. His commanders have given his waiver application favorable endorsements, verifying that he has suffered financial hardship, and attesting to his consistently outstanding duty performance and exemplary personal conduct.

Our Claims Division denied Petty Officer Miller's waiver application on grounds that he failed to properly question the correctness of his pay records when he received the large increase in his net pay beginning in January 1977. In requesting reconsideration, Petty Officer Miller suggests that the conclusion reached by the Claims Division is unfair.

Subsection 2774(a) of title 10, United States Code, provides in pertinent part that a claim against a member or former member of the uniformed services arising out of an erroneous payment of pay or allowances, 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. Subsection 2774(b) further provides that the Comptroller General may not exercise his authority 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 or any other person having an interest in obtaining a waiver of the claim \* \* \*."

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We interpret the word "fault" as used in 10 U.S.C. 2774(b) as including something more than a proven overt act or omission by the service member. Thus, we consider fault to exist if in light of all the facts it is determined that the member should have known or suspected that an error existed and taken proper action to have it corrected. Any significant unexplained increase in pay which would require a reasonable person to make inquiry concerning the correctness of his pay therefore ordinarily precludes a waiver when the service member fails to bring the matter to the attention of the proper authorities and make proper inquiry. See 4 C.F.R. 91.5 (1981).

In the present case, Petty Officer Miller's net semi-monthly pay increased by more than \$130, i.e., more than \$260 each month, when he began receiving the erroneous BAQ payments in January 1977. This was a large and significant pay increase which obviously could not have been caused by the action he had taken to reduce one of his allotments by \$85 a month. Although he apparently did inquire about the correctness of his pay at that time, he indicates the matter received only cursory attention at his disbursing office and he was satisfied with the vague assurances he then received. In our view, a reasonably prudent person of Petty Officer Miller's rank and experience should not have been satisfied with such assurances. Had he insisted on an examination of his records and an understandable explanation regarding his pay entitlements, the error would doubtless have been immediately detected and corrected. Since Petty Officer Miller failed to make that reasonably prudent inquiry, we consider him at least partially at fault in the matter, and we are precluded by 10 U.S.C. 2774(b) from granting his application for waiver. Compare Matter of Petty Officer Rodney J. Sharp, USN, B-198170, June 25, 1980; and Price v. United States, 621 F.2d 418 (Ct. Cl. 1980).

While Petty Officer Miller's conduct and duty performance may be exemplary, and recoupment of the overpayments may cause personal financial hardship, those are not factors that we may properly consider in determining whether he was without "fault" and eligible for a waiver under

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the provisions of 10 U.S.C. 2774. See Matter of Chief Petty Officer William F. Seacrest, Jr., USN, B-201814, September 18, 1981.

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

*Harry D. Jan Clevé*  
For Comptroller General  
of the United States