

DATE: June 6, 1997

In Re:

[Redacted]

Claims Case No. 97011402

CLAIMS APPEALS BOARD DECISION

DIGEST

1. A member received a proper payment of advance pay. Payments which are proper when made may not be considered for waiver under 10 U.S.C. 2774, which deals with erroneous payments.
2. A Correction Board directed that a valid payment which a member received be deemed erroneous. When a Correction Board does not change a fact in a member's record, but merely reaches a legal conclusion, the Board's action is not effective to change the character of the payment, so as to allow the payment to be considered for waiver.

DECISION

This is in response to a request by an Air Force member for waiver of a debt which arose when he received advance pay in the amount of \$6,400. The Defense Finance and Accounting Service, Denver Center, submitted the request to the U.S. General Accounting Office. Pursuant to Public Law No. 104-316, October 19, 1996, the authority of the Comptroller General to waive a claim of the United States against a person arising out of an erroneous payment of pay (salary) or allowances, including travel, transportation, or relocation expenses was transferred to the Director, Office of Management of Budget (OMB). The Director of OMB delegated his waiver authority involving all uniformed service members and civilian employees of the Department of Defense to the Secretary of Defense. The Defense Office of Hearings and Appeals exercises the authority of the Secretary.

Background

On April 2, 1990, the member received orders transferring him from Ft. McNair, Virginia, to Kuwait. His household goods arrived in Kuwait on July 26, 1990, and were apparently looted or destroyed when Iraq invaded Kuwait on August 2, 1990. The member filed a claim for his household goods in the amount of \$90,288.95 under the Military Personnel and Civilian Employees' Claims Act. The Air Force determined that the adjudicated value of the claim was \$68,330.14, but of that amount the member received \$40,000, the maximum amount payable under the Act for a claim arising out of a single incident. [\(1\)](#)

The member and his family had not yet left the United States when Iraq invaded Kuwait. They were diverted to Naples, Italy, by orders dated August 24, 1990. In conjunction with those orders, the member received advance pay in the amount of \$6,400 to help him establish a home at his new duty station. The member repaid that amount through deductions from his pay. In an effort to reimburse the member for the loss of his household goods, a request was made to the Air Force Board for Correction of Military Records (Board) to correct the member's record to indicate that the \$6,400 payment of advance pay was erroneous travel pay. The Board directed that the member's record be corrected to indicate that on January 1, 1991, he received \$6,400 in advance pay for travel expenses rather than advance pay in October for a permanent change of station move. The Board further directed that on January 10, 1991, the travel pay was determined to be erroneous and that he requested waiver at that time. If waiver of the \$6,400 debt were not approved, the Board further directed that \$2,500 of the debt be canceled as of January 1, 1991, in accordance with the 1992 National Defense Appropriation Act.

Discussion

The provisions of 10 U.S.C 2774 permit waiver of claims of the United States arising from erroneous payments of pay

and allowances to a member. In order to be considered for waiver, a payment must be erroneous at the time it is made. Payments which are valid when made are not erroneous payments for the purposes of 10 U.S.C. 2774. Steven G. Dodge, B-244977, Mar. 23, 1992.

Under 10 U.S.C. 1552, the Secretary of a military department, acting through a board of civilians, has the authority to correct a member's record when he considers it necessary to correct an error or remove an injustice. The courts and the Comptroller General have ruled that if a Correction Board action is to give rise to a right to the payment of money, the Board must change a fact and thereby create a right which the member did not have before. The Board has the authority to change facts, but not to direct that a legal conclusion has been reached. Haislip v. United States, 152 Ct. Cl. 339 (1961); Chief Warrant Officer Joseph E. Kelly, B-186322, Aug. 20, 1976.

In the situation before us, the member received an advance of pay, and there is no indication that it was erroneous when made. Therefore, it cannot be considered for waiver under 10 U.S.C. 2774. Steven G. Dodge, B-244977, *supra*. The Board's characterization of the \$6,400 the member received as a travel advance rather than advance pay for a permanent change of station move does not change a fact which gives rise to a right which the member did not have before. The Board's conclusion that the advance was an erroneous payment does not change the character of the payment, since the Board merely reached a legal conclusion and did not change a fact. A Board action which reaches a legal conclusion and does not change a fact does not provide the basis for the payment of a claim or the granting of a waiver request. *See* Chief Warrant Officer Joseph E. Kelly, B-186322, *supra*, at 2. *See also* Haislip v. United States, 152 Ct. Cl. at 339, *supra*. Since the \$6,400 payment was correct when made, it may not be considered for waiver under 10 U.S.C. 2774.

With regard to the Board's alternative action of canceling \$2,500 of the member's advance under the 1992 National Defense Appropriation Act, this Office makes no decision. Under section 8138 of the Act (Pub. L. No. 102-172, Nov. 26, 1991, 105 Stat. 1150 at 1212), the Secretary of Defense has the authority to cancel any part of an indebtedness, up to \$2,500, owed to the United States by a member of a uniformed service if, as determined by the Secretary, the debt was incurred in connection with Operation Desert Shield/Storm. We have no responsibility or authority under this provision, and make no comment as to its application here. Lieutenant Commander Michael S. Schwartz, USN, B-245773, May 14, 1992.

Conclusion

Waiver of collection of the member's advance of \$6,400 is not appropriate under 10 U.S.C. 2774.

_____/s/ _____

Christine M. Kopocis

Member, Claims Appeals Board

_____/s/ _____

Joyce N. Maguire

Member, Claims Appeals Board

_____/s/ _____

Jean E. Smallin

Member, Claims Appeals Board

1. The member has submitted a claim for the remainder of his loss with the United Nations Compensation and Claims Committee, but has been advised that he cannot expect any payment until after sanctions against Iraq have been lifted. The claim he filed with his insurance company was denied because of an exclusion for losses caused by war, undeclared war, or a warlike act.

