
In Re:

[redacted]

Claimant

DATE: May 13, 1997

Claims Case No. 97030302

CLAIMS APPEALS BOARD DECISION

DIGEST

This Office cannot waive an erroneous payment of military pay and allowances to the extent that the service member is at fault for the overpayment. Where a lieutenant colonel in the United States Army Reserve served a three-month tour of active duty and should have reasonably expected to receive a net payment of \$5,000 per month for basic pay and allowances, and he received two payments which totaled less \$15,000 without also receiving the appropriate Leave and Earnings Statement, it is reasonable for him to expect the difference plus any unpaid accrued leave. But to the extent that a third payment clearly exceeded these expectations, it is not appropriate for waiver.

DECISION

An officer in the United States Army Reserve appeals the Settlement Certificate this Office issued on February 10, 1997, in DOHA Claim No. 97020305, in which we denied his application for waiver of an erroneous payment of pay and allowances totaling \$4,438 for October 1994, but granted waiver of an erroneous overpayment of \$16.11 for September 1994. [\(1\)](#)

Pursuant to Public Law 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 and allowances, was transferred to the Director, Office of Management and 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. [\(2\)](#)

In relevant part, the record indicates that the service member received orders for a temporary tour of active duty overseas in Kathmandu, Nepal, and reported for duty in Washington, DC on June 20, 1994. He received a travel advance of \$11,980 on June 22, 1994. He departed the United States on June 25, 1994, and returned to the United States on September 22, 1994. He was released from active duty on September 23, 1994. The service member states, and it is uncontested, that he did not receive any Leave and Earnings Statement (DFAS Form 702), nor pay and allowances, through September 30, 1994. The service member submitted his travel voucher (DD Form 1351) on October 2, 1994. On October 4, 1994, the member received \$6,284 without an LES, and an additional \$8,660 on October 11, 1994. At the end of October the member received a third payment for \$4,438, the amount now in dispute. Payments were received for November and December 1994, but the service member returned them. On appeal, the service member also contends that he "never received a proper LES." The service member provided the LES involving a 13-day period of ADT from February 19 to March 3, 1995, which he asks us to consider as an example of a proper leave and earnings statement with respect to him. The service member's pay entry basic date is June 1971.

Discussion

Claims arising from erroneous payments may be waived under 10 U.S.C. 2774 if collection would be against equity and good conscience and not in the best interest of the United States. Generally, these criteria are met if the overpayment occurred through administrative error and there is no indication of fraud, misrepresentation, fault or lack faith on the

member's part. See 4 C.F.R. 91.5(b). In this regard, the only relevant issue here is whether the member was at fault in some manner.

The sample LES provided by the service member indicates that he should have reasonably expected to receive approximately \$5,000 per month as a net payment. In the sample LES, for 13 days of ADT, the net amount remitted was \$2,181.94 based on \$2,107.17 in gross basic pay, \$63.31 in subsistence and \$346.97 in BAQ, as reduced by Federal income tax withholding and FICA. On a daily basis the net amount would be \$167.84, or \$5,035.25 for 30 days. Over three months, this amount would be \$15,105.75. The first two checks in October 1994 amounted to \$14,944. In addition, the record suggests that the service member may have reasonably expected to receive a cash payment for 8 days of accrued leave. Using again the daily rate of \$167.84 for 8 days of accrued leave, the total would be no more than \$ 1,342.73. Thus, the most that the service member should have reasonably expected was \$16,448.47⁽³⁾, and the difference between this amount and the \$14,944 already paid was about \$1,500, not \$4,438. It is not clear what, if anything, the service member had claimed in his travel voucher, but there was an outstanding advance of \$11,980, and his travel voucher had been returned on October 18, 1994, presumably for corrections or clarification, and he did not resubmit it until after the \$4,438 payment was received. Thus there was no reasonable expectation in late October of additional travel compensation.

The standard we employ in determining fault for the purpose of waiver under 10 U.S.C. 2774 is whether a reasonable person should have been aware that he was receiving a payment in excess of his proper entitlement. See 4 C.F.R. 91.5(b). The Comptroller General applied this long-standing rule in various decisions, including George S. Winfield, 66 Comp. Gen. 124 (1986); Petty Officer First Class Bruce F. Jenkins, USN, B-220792, Nov. 14, 1985; 56 Comp. Gen. 943, 951 (1977). The service member was a senior Reserve component officer with substantial USAR service. In our view, he knew or had reason to know the approximate amount he would receive for the three-month period he was on active duty, whether or not he had an LES. He is, at the least, partially at fault in that he should have not reasonably expected any more than an additional \$1,500, in unpaid compensation after the second October 1994 payment.

Conclusion

We modify the prior settlement by allowing waiver of an additional \$1,500.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Joyce N. Maguire

Member, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

1. The service member's February 25, 1997, letter states that this Office did not have a complete record when we settled the member's claim. He offered clarification. On March 22, 1997, the service member requested that we provide him appropriate procedures and forms to formally appeal the February 10, 1997 settlement. However, there are no special forms involved, and we considered the service member's February 25th letter as the basis of appeal. The procedures governing our consideration of waiver applications are contained in 4 C.F.R. Parts 91 through 93.

2. The legal basis of the transfer is further described in B-275605, Mar. 17, 1997.

3. This is an overstatement in the member's favor because he served the duty during the year prior to the sample LES when pay and allowances were lower and because BAQ and subsistence are not components of a cash payment for accrued leave. Eventually, the service member actually was credited with \$1,263.84 for his accrued leave.