
In Re:

[Redacted]

Claimant

DATE: June 26, 1997

Claims Case No. 97041401

CLAIMS APPEALS BOARD DECISION

DIGEST

An Air Force officer, who had an Aviation Continuation Agreement to serve through May 1997, but who decided in October 1995 not to voluntarily continue on active duty and to separate in February 1996, received an annual installment of aviation continuation pay (ACP) due in December 1995. While the member contends that he did not know until mid-January 1996 that he was not entitled to the whole amount of that payment, prior to that time he stated that he suspected that he might have to refund a portion of the payment prorated to the period after February 1996. While the service member alleges that he sought advice from installation pay officials concerning possible recoupment by the government, and that the figures he obtained from them indicated that the government would not recoup any part of his ACP, he did not document the information he provided and what he was told by these officials. In these circumstances, to the extent that Air Force policy recognizes that it is erroneous to pay a member for the portion of the annual ACP installment prorated to the period after scheduled separation, recoupment of that portion of ACP is not against equity and good conscience, and waiver of any overpayment under 10 U.S.C. 2774 is improper. ACP payments received by the service member prior to his decision not to continue his service, and prorated to the period after his separation, were not erroneous payments and are not subject to 10 U.S.C. 2774.

DECISION

, a former officer in the United States Air Force (the service member) , appeals the Defense Office of Hearings and Appeals' (DOHA) January 31, 1997, denial of his request under 10 U.S.C. 2774 for waiver of a debt of \$11,551.68 he incurred to the government for recoupment of a pro rata portion of his aviator continuation pay (ACP) because he did not remain on active duty in accordance with an Aviation Continuation Pay Agreement. [\(1\)](#)

Background

The Agreement, effective December 6, 1990, provided among other things that in exchange for remaining in the Air Force until at least May 31, 1997, the service member would receive a total of \$77,833.33, \$38,911.67 on the effective date, and \$6,486.11 on December 6 of each year thereafter until December 6, 1996 when he would receive a final payment of \$6,486.11. The Agreement also stated in paragraph 2d that "any unearned portion of ACP paid me is considered a debt to the United States government and will be recouped on a pro rata basis should my ACP entitlement stop because I am: (1) permanently disqualified from aviation service due to misconduct or wilful neglect; (2) dismissed; (3) discharged for cause; (4) separated after declining selective continuation; or (5) voluntarily retired or separated However, should my ACP entitlement stop for any other reasons, previous payments will not be recouped."

In additional correspondence received by this Board in May 1997, the member contends that he was erroneously paid \$38,916.66 instead of \$38,911.67 for the initial payment, and that he received \$7,093.67 instead of \$6,484.11 for each of the annual payments. Documentary evidence provided by the service member supports the fact that he received the amounts indicated in excess of those outlined in the Agreement.

The record indicates that the service member was twice non-selected for promotion to the rank of major, but correspondence from the Air Education and Training Command (AETC) which advised the service member of the

second non-selection also advised him that the CY95 Captain Selective Continuation Board did select him for continuation on active duty for three years starting on February 1, 1996. The service member had until October 13, 1995, to sign a statement in which he would accept or decline continuation. An officer from the AETC spoke to the service member on October 12, 1995, and reminded him about the deadline for accepting continuation. While there is some difference of opinion about what the service member told the AETC officer about a possible non-response⁽²⁾

, the service member was advised that he would be separated on February 29, 1996, if he did not accept continuation. Earlier, on October 12, 1995, an officer in the 47th Operations Support Squadron had also advised the service member that he would be separated if he did not sign the continuation agreement. The service member chose not to respond. Prior to his release from active duty, the service member was advised that he would have to repay \$11,551.68, and the service member applied for waiver of the debt.

The service member raises numerous objections to the collection of the debt. While we considered each one of them as explained in the correspondence the service member provided, we will describe only the major ones here. Although he applied for a debt waiver, the service member's main recurring argument is a legal defense against the debt. The service member believes that he is not liable because he did not affirmatively "decline" selective continuation. He interprets his ACP Agreement to mean that anything less than affirmative declination is not a declination. He supports this interpretation by arguing that Wing-level instructions clearly outlined three options: acceptance, declination, or failure to submit either an acceptance or declination. By falling within the third category, the service member argues that the Air Force, in effect, withdrew its offer to continue him, and therefore, he should be treated like any officer who was not offered selective retention: he is entitled to keep all of the ACP. The service member also argues that it is unfair to punish him just because he was "good enough" to be offered selective retention, while those who were not "good enough" got to keep all of their ACP. The service member also argues that his involuntarily departure from the Air Force produced economic hardship for his family.

In an effort to address the "erroneous payment" aspect of the waiver request, the service member states he did not know for certain that he had to repay ACP until mid-January 1996. He admits that he "suspected" he may have to repay some of the ACP from the December 1995 installment, but he seeks to avoid liability by arguing that he contacted the pay office at Laughlin Air Force Base to verify his separation pay. He states that the Laughlin AFB pay office had given him a figure which "suggested" no recoupment. He also says that he had conversations with certain named individuals whom he considered to be in the same situation as him, and the Air Force did not recoup anything from them. He contends that the final ACP payment he received in December 1995 was erroneous because the Air Force knew by then that he would be separated in February 1996. To rebut DOHA's finding that the Air Force had no reason to know whether the service member would elect continuation when the December 1995 installment payment was made, the service member points to his conversation with the officer from AETC on October 12.

Discussion

Under the applicable statute, 37 U.S.C. 301b, ACP is payable to aviation officers who execute a written agreement to remain on active duty in an aviation service for at least 1 year, upon acceptance of the agreement by the Secretary concerned (in this case the Secretary of the Air Force) (301b(a)). The term of the agreement and the amount payable may be prorated

(301b(d)). The total amount payable pursuant to the agreement becomes fixed and may be paid in either a lump sum or in installments (301b(e)). And, if an officer who has received such pay fails to complete the period of active duty specified in the agreement, the Secretary concerned may require the officer to repay, on a pro rata basis and to the extent the Secretary determines conditions and circumstances warrant, all sums paid under these provisions (301b(g)). The Secretaries concerned are to prescribe regulations, subject to the approval of the Secretary of Defense, to carry out these provisions (301b(h)). Therefore, an officer's entitlement to such payments is subject to these statutory provisions, the service's implementing regulations, and the provisions of the applicable agreement.

Our waiver authority applicable to military pay and allowances, 10 U.S.C. 2774, applies to a claim against a service member "arising out of an erroneous payment" the collection of which would be against equity and good conscience and not in the best interest of the United States. The statute further provides that waiver cannot be granted if there is any

indication of fraud, fault, misrepresentation, or lack of good faith on the part of the member or former member. See Standards for Waiver, 4 C.F.R. 91.5(b). The standard employed to determine whether a member was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person should have known or suspected that he was receiving more than his entitlement. See Petty Officer Ricky Johnson, USN, B-256417, July 22, 1994; Captain Douglas K. Basiger, USAF, B-256600, July 14, 1994.

The Comptroller General has long held that an amount correctly and legally paid to a member in the form of a bonus as an incentive for him to remain on active duty may not be later

considered an "erroneous payment" within the meaning of the waiver statute where the member becomes legally obligated to refund all or part of the amount received because he does not complete the active duty commitment for which the payment was made. See e.g., Spc. Wayne Susumu Enomoto, B-180028, July 9, 1974; Eugene M. Edynak, M.D., B-200113, February 13, 1981; and James W. Parker, B-259696, January 25, 1995. In a recent decision, the Comptroller General reiterated this longstanding rule, but he also noted that the Air Force may have initiated a practice that limits the annual ACP payment to an amount prorated to cover only the remaining period the officer is scheduled to serve for that year where it is known that the officer is scheduled to be separated before completion of the full period for which an annual ACP payment is to be made. See Thomas S. Miller, B-271951, Dec. 17, 1996. Thus, with respect to the recoupment of the portion of the annual ACP payment beyond February 29, 1996, we will assume that to the extent that it exceeds the proper prorated amount, it may be an erroneous payment. (3)

However, we find that none of the amounts involved may be waived. The member admits that he suspected that he might have a problem in keeping all of the final ACP payment. His allegation that he contacted pay officials at the Laughlin AFB and that they had given him a figure which "suggested" no recoupment, is not a sufficient basis to grant a waiver. As in Petty Officer Ricky Johnson, *supra*, there is nothing in the record to corroborate the member's version of the events; there are no statements from any of the pay and disbursing officials to whom the service member says he directed his questions; and there is no proof of what he told them and what they told him. Compare also James A. Jamiel, B-235158, Feb. 6, 1990. From the Comptroller General's discussion in Thomas S. Miller, B-271951, *supra*, it is clear in any event that the portion of the \$11,551.68 not attributable to the December 1995 annual ACP payment was not erroneous; therefore, it cannot be waived. Personal or family financial hardships are not basis for waiver. See Major James P. Burton, USAF, B-265873, Feb. 29, 1996; Timothy Piekarski, B-261958, Nov. 8, 1995.

The service member's longstanding legal argument that he did not decline selective continuation is frivolous. His conversation with the AETC officer just one day before the deadline for accepting selective continuation reveals his knowledge of the consequences of non-action, whether or not his version or that of the AETC officer is correct. As the service member says, whether or not he had signed a declination of selective continuation, the result was the same, and that result was that by his own action the service member prevented himself from completing the ACP Agreement. The service member believes that his position is supported by paragraph 1505 of Volume 7A of the DoD Financial Management Regulation; *i.e.*, recoupment is not required if an officer is unable to complete the full contractual period because he was separated by operation of law or action of the service or DoD. But the direct cause of the service member's separation was his failure to accept continuation, not his non-selection for promotion. We must assume that persons intend the natural consequences of their actions. Moreover, as we interpret the ACP Agreement, the service member squarely fits into paragraph 2d (4): he was separated after declining selective continuation. Nothing in the ACP agreement required that the declination had to be in writing. In fact, option 2 in the Statement of Acceptance/Declination for continuation on active duty that the service member refused to sign, lumps written declinations with non-responses within 60 calendar days. There was no third option as the service member contends; a declination could have arisen by written declination or non-action. The policy behind 37 U.S.C. 301b(g), the regulation, and the ACP Agreement was to recoup ACP whenever the service member by his own action placed himself in a position where he could not complete the agreed service.

The service member's argument that the Statement of Acceptance/Declination contained an incorrect January 31, 1996, separation date instead of February 29, 1996, is not helpful to his position. It is not disputed that the service member was verbally informed of the correct date on October 12, 1995, and, in fact, he was separated on February 29, 1996. There is no indication that the Air Force would not have corrected this matter when brought to the attention of proper officials, and if he had decided to continue on active duty, we see no reason why the service member himself could not

have corrected and initialed the proper dates both for the 3-year extension in paragraph 1b and the involuntary separation date in paragraph 2.

The new arguments that the service member raised with the Board in May 1997, which among other things first questioned the amount of his indebtedness, are too late for our consideration at this time. Because the service member had not raised these issues with the Air Force or DFAS, they were not adjudicated or discussed in the administrative report. We cannot decide these issues without a complete record. Moreover, the service member now contends that he was paid more than the amounts to which he was entitled in the ACP Agreement. Therefore, we remand this matter to DFAS for further review of the service member's account. At that time, the service member may present a new or revised claim if otherwise timely.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Joyce N. Maguire

Joyce N. Maguire

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. See Settlement Certificate on DOHA Claim No. 97016126, January 31, 1997.
2. The AETC officer stated that the service member told him that he did not need to return the statement accepting or declining selective continuation because a letter from the Air Force Personnel Center (AFPC) stated that a non-response was the same as a declination statement. The service member denies that he said this; he says that he told the AETC officer that the results were the same whether he signed the statement or not. Both agree that the service member remarked that the separation date of January 31, 1996, noted in the letter, was incorrect and that the service member would not sign the statement for that reason.
3. The service member had not raised an issue concerning the proper calculation of his indebtedness until his May 1997 correspondence to us. Thus, it is not clear how DFAS calculated the \$11,551.68 it seeks to recoup. But even under the theory that some of the annual ACP payment of December 1995 was erroneously paid to the service member because the Air Force knew by then that the service member would be released from active duty on February 29, 1996, it also appears that part of the \$11,551.68 represents an amount advanced to the service member under the ACP program which was due and payable to the member before the Air Force had knowledge that he would separate.