

February 10, 1999

In Re:

[Redacted]

Claimant

)

Claims Case No. 98031914

CLAIMS APPEALS BOARD DECISION

DIGEST

A member who had been living in government quarters while stationed at Wright-Patterson AFB was allowed to continue living in the quarters while he attended law school nearby under the Excess Leave Legal Education Program. Housing personnel retroactively determined that the member owed rent in the amount of BAQ for a member of his rank for the period when he occupied the quarters while not receiving basic pay. Since the member's debt involves no erroneous payments of pay or allowances, the debt cannot be considered for waiver under 10 U.S.C. § 2774. However, due to uncertainty regarding the debt, we do not believe it should be collected from the member.

DECISION

We have been asked to render a decision regarding the request of an Air Force member for waiver of a debt which arose when he occupied government quarters during a period when he was not entitled to basic pay.

Background

The member states that he was assigned to Wright-Patterson Air Force Base in 1992 and moved into base housing in 1993. In August 1995, he entered the Excess Leave Legal Education Program (ELLEP).⁽¹⁾ He indicates that he was advised that he could remain in the same government quarters if he attended law school in the area, but that the Air Force would pay for the movement of his household goods if he chose to attend law school elsewhere. Based in part on this advice, he chose to attend the University of Dayton, which is in the vicinity of Wright-Patterson. The orders under which he entered the ELLEP did not authorize him to move his household goods from his government quarters. The record indicates that the member worked part-time in the Air Force Contract Law Office while in law school and full-time during school breaks. In March 1996, when his records were examined due to a pay question, Air Force personnel determined that the member was not authorized to live in government quarters while he was not in a pay status and that he owed rent totaling \$4,763.36 for the period from August 22, 1995, through May, 14, 1996.⁽²⁾ The member requested waiver of the debt under 10 U.S.C. § 2774.

Discussion

Under 10 U.S.C. § 2774, we may waive a claim of the United States against a member of the uniformed services for erroneous payments of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States and if the member meets the other requirements of the statute. Since we must give effect to every word in the waiver statute, we cannot consider a debt for waiver unless it arose from an erroneous payment of pay or allowances. *See MSG Delbert G. Armstrong, USA (Retired)*, B-244596, July 22, 1991; and B-242195, June 14, 1991.⁽³⁾ In the present situation, the member is being charged for rent retroactively. Since no erroneous payments were made to the member, we cannot consider the member's debt for waiver. *Id.* However, as discussed below, it is our view that the debt is at least questionable and should not be collected from the member.

Students attending law school under the ELLEP are not entitled to pay and allowances except during school breaks when they perform legal internships or other full-time legal duties. *See* Air Force Instruction (AFI) 51-101, Chapter 3 (August 25, 1994).⁽⁴⁾ The member indicates that he worked full-time during school breaks and part-time during school terms. The record states that he was not charged rent for the periods when he worked full-time.

While the factual situation is different, we see an analogy between the case before us and that addressed in Comptroller General memo B-196173, Dec. 30, 1980. In that case, as here, the employee had a debt which could not be waived. However, the Comptroller General stated that he did not think the debt should be collected because at the time the payments were made the parties involved (the claimant and finance personnel) were uncertain of the rights and obligations involved. Therefore, he said, the ends of justice would be best served by leaving the parties in their positions before the dispute. In other words, the debt ought not to be collected. In reaching that conclusion the Comptroller General cited *Ahearn v. United States*, 151 Ct. Cl. 21 (1960). That case involved a dispute over overtime pay. Since there was uncertainty in that case as to the rights and obligations of the employees and the government, the court left the parties in their positions before the dispute.

We view the case before us as similar to the Comptroller General's memo and *Ahearn*, 151 Ct. Cl. 21, *supra*. There was apparently confusion as to the member's status regarding housing at the time he was accepted into the ELLEP and his orders were issued, and there is still disagreement on the matter between housing and finance personnel.⁽⁵⁾

In light of that confusion and disagreement, it is our view that the debt ought not to be collected from the member.

Conclusion

The debt cannot be considered for waiver, but in our view should not be collected from the member.

_____/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

_____/s/_____

Christine M. Kopocis

Member, Claims Appeals Board

_____/s/_____

Jean E. Smallin

Member, Claims Appeals Board

1. Under the Air Force's ELLEP the Secretary of the Air Force may authorize up to 36 months of excess leave for an active duty officer to attend law school full-time. The member does not receive pay and allowances, but he remains eligible for some military benefits. He returns to pay status and may accrue leave while performing internships and other full-time legal duties--*e.g.*, during summer and holiday breaks. See Air Force Instruction 51-101, Chapter 3 (August 25, 1994).

2. The debt was apparently calculated by multiplying the member's rate of Basic Allowance for Quarters (BAQ) by the number of months, minus the number of days the member worked full-time for the Air Force Contract Law Office during school breaks.

3. While these cases involve situations very different from the one before us, they stand for the principle that our waiver authority extends only to claims arising out of erroneous payments of pay or allowances, including travel allowances.

4. Under 37 U.S.C. § 403(a), a member who is entitled to basic pay is entitled to BAQ. However, he is not entitled to BAQ if he is assigned military quarters appropriate to his rank and adequate for himself and his dependents if he has dependents. *See* 37 U.S.C. § 403(b).

5. A submission from finance personnel indicates doubt as to whether rent can be assessed in such a situation. The submission notes that finance personnel have been unable to find an Air Force Instruction which allows such an assessment or to document any instances where rent has been assessed against a member who ceased to be in a pay status--*e.g.*, a member who is absent without leave or in excess leave status.