

DECISION

17520
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-200919

DATE: March 27, 1981

MATTER OF: Staff Sergeant James S. Gannon, USA,
Retired

DIGEST: Retired member of the Army who waived entitlement to retired pay in order to receive Veterans Administration compensation as required by 38 U.S.C. § 3105, continued to receive retired pay due to an administrative error. Although he allegedly received verbal assurances that the payments were correct, he is not without fault. Where amount was substantial, he should have known he was being overpaid and pursued inquiries. Financial hardship resulting from collection is not in itself a basis to authorize waiver.

Staff Sergeant James S. Gannon, USA, Retired, requests reconsideration of our Claims Division's denial of his request for waiver of his debt to the United States in the amount of \$6,795.55. The debt arose from erroneous payments of retired pay made to him after he waived his entitlement in order to receive compensation from the Veterans Administration (VA), as is required by 38 U.S.C. § 3105 (1976). The denial of waiver is sustained.

In order to receive compensation from the VA for his service incurred disability, Mr. Gannon waived his entitlement to retired pay, effective March 1, 1973. The waiver was a statutory prerequisite to receiving the compensation. However, Mr. Gannon continued to receive retired pay until May 31, 1974. As a result, the record shows that some \$6,795.55 in retired pay was erroneously paid to him while he was being fully compensated by the VA.

Mr. Gannon maintains that he called the Army Finance and Accounting Center in Indianapolis, Indiana, on four separate occasions to inquire concerning his continued receipt of retired pay. Each time, he allegedly received verbal assurances that the payments were proper. The record shows that after some 4 years elapsed, on April 21, 1978, a letter from the Finance Center was sent to Mr. Gannon advising him of his indebtedness to the United States for the amounts paid him in retired pay while he was receiving veterans benefits.

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Mr. Gannon requested that his indebtedness be waived. However, the Finance Center recommended that his request for waiver be denied when they forwarded the matter to our Claims Division on June 27, 1978. On August 21, 1979, our Claims Division denied the application for waiver. Essentially, it was concluded that Mr. Gannon knew he was not entitled to retired pay when he waived his right to it in order to receive the VA compensation. The Claims Division concluded that he should have been aware of the erroneous payment and should have retained the amount and promptly pursued resolution of the administrative error with appropriate officials. Thus he was determined to be partially at fault, which statutorily precludes favorable action on an application for waiver.

Mr. Gannon now requests reconsideration of the determination made by our Claims Division. He states that although the Finance Center has no written record of his telephone inquiries, he did in fact make four inquiries regarding the payments, and that he received assurances as to the propriety of the receipts. Any fault, according to Mr. Gannon, rests entirely with the Army. Additionally, he states that the collection schedule recommended to him by the Finance Center would pose financial hardship to him, especially since several years have now elapsed since the payments were originally made.

The Comptroller General may waive a claim of the United States if its collection would be against equity and good conscience and not be in the best interest of the United States. 10 U.S.C. § 2774 (1976). This authority may not be exercised if there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the claimant. 10 U.S.C. § 2774(b)(1).

"Fault," as used in this section, has been interpreted as including something more than a proven overt act or omission by the member. Thus, we consider fault to exist if in light of all the facts it is determined that the member should have known that an error existed and taken action to have it corrected. The standard we use is to determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper

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entitlement. Petty Officer John R. Neely, USN, B-197108, October 10, 1980; Petty Officer Douglas S. Feisler, USN, Retired, B-197117, August 21, 1980.

[It appears from the record that the erroneous payments of retired pay were made due to administrative error. However, Mr. Gannon should have been aware at the time he received them that they were erroneous, especially due to the substantial amounts involved (over \$400 per month). Even assuming that Mr. Gannon was in fact told the payments were proper, it is our view that he should have pursued the matter until a definite determination and complete explanation of the entitlement had been made. Petty Officer Henry T. Howard, USN, B-196637, February 27, 1980.

While his telephone inquiries indicate good faith effort on his part, we have held that such action is required of a reasonably prudent person. Mr. Gannon should have promptly pursued the matter with appropriate persons, and set aside the amounts, erroneously paid. We have held that one so situated may not rely on incomplete verbal assurances when the size of payment alone indicates an error has been made. Neely, supra; Feisler, supra; see also our Standards for Waiver of Claims for Erroneous Payment contained in 4 C.F.R. § 91.5(c) (1980). Additionally, the fact that Mr. Gannon signed a waiver of his entitlement to retired pay requires the view that he had knowledge that the payments were erroneously made. Consequently, he must be considered partially at fault in the matter.

While recoupment of the payments after several years have elapsed may cause personal hardship, such hardship is not a factor we may properly consider in determining whether an individual is without "fault" and eligible for waiver under 10 U.S.C. § 2774. See Feisler, supra, and cases cited therein.

Accordingly, we sustain the settlement of the Claims Division which denied Mr. Gannon's request for waiver.

Milton J. Arosow

Acting Comptroller General
of the United States