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DECISION



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

FILE: **B-156800**

DATE: **FEB 5 1977**

MATTER OF: **Waiver of Indebtedness - Mr. Larry M. Jeter**

DIGEST:

1. Where Marine Corps member was discharged on January 25, 1971, and undated entry in final pay record stated: "Overpaid on discharge - \$476.07," but correctness of that entry was not confirmed until post-separation audit on June 15, 1971, consideration of member's request for waiver of indebtedness submitted March 5, 1974, is not precluded by the 3-year period contained in 10 U.S.C. 2774(b)(3), since a date of discovery prior to June 15, 1971, cannot be accurately established, therefore, doubts are to be resolved in favor of member.
2. Marine Corps member, who received overpayments and who frustrated efforts by disbursing officers to properly maintain his records by his repeated unauthorized absences, was at least partly at fault in the matter, thus waiver of his indebtedness is precluded by 10 U.S.C. 2774(b)(1), authorizing waiver only if there is no indication of fault on part of member.

This action is in response to a letter from Mr. Larry M. Jeter, which constitutes an appeal from the determination by the Claims Division of this Office, which by letter dated November 6, 1974, denied his request for waiver of collection of a debt to the United States. The debt arose out of overpayments of pay and allowances in the amount of \$476.07, incident to his service in the United States Marine Corps.

The file shows that the member initially enlisted in the Marine Corps on January 17, 1964, and received his final discharge on January 25, 1971. From the time of his enlistment through June 30, 1969, his pay records reflected no significant irregularities. The

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period during which the overpayments occurred was July 1, 1969, thru January 25, 1971.

On July 2, 1969, the member absented himself without authority and remained so absent until December 2, 1969, when he returned to military control. He was subsequently tried by special court-martial on January 16, 1970, and received a sentence of confinement at hard labor for 4 months, reduction to the lowest enlisted grade and partial forfeitures of pay. That portion of the sentence concerning confinement at hard labor was suspended, but the suspension was vacated following another period of unauthorized absence between March 20 and May 18, 1970. The member was thereafter confined until July 21, 1970. He was then restored to duty, but again absented himself without authority between November 1 and December 21, 1970. On January 25, 1971, he was given an undesirable discharge.

These events are reflected in the member's pay records maintained from July 1, 1969, to January 25, 1971. During this time his pay continually fluctuated with no normal pay schedule ever being established. As a result of his repeated unauthorized absences, it is indicated that irregularities occurred in the posting of adjustments in his pay records.

A notation made by a disbursing officer on his final pay record regarding his account was: "Overpaid on discharge - \$476.07." This entry was undated. Following the member's discharge, his pay records were forwarded to the Marine Corps Finance Center (MCFC) for final audit and disposition. A post-separation audit of the member's records conducted by MCFC on June 15, 1971, confirmed the disbursing officer's determination that the member's debt upon discharge was in fact \$476.07.

Collection action was thereafter initiated by MCFC, but this action was unsuccessful since all communications sent to the member at his last known civilian address were returned as undeliverable, and his correct address could not be ascertained. On May 15, 1973, MCFC referred the matter to the Claims Division of this Office as an uncollectible debt.

The Claims Division through previously untried avenues of investigation was able to determine the member's current address on January 14, 1974. By letter dated January 25, 1974, the Claims

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Division succeeded in reaching Mr. Jeter, advised him of his indebtedness and requested payment. We subsequently filed a written application for waiver of indebtedness with the Marine Corps on or about March 5, 1974.

The Claims Division determined that the debt was precluded from consideration for waiver under 10 U. S. C. 2774(b)(2) because the request for waiver was not submitted until over 3 years after discovery, which date was considered to be January 28, 1971, when the member was discharged. In his letter appealing that determination, the member states that the Claims Division letter dated January 28, 1974, was the first notice he received of any possible indebtedness and that he requested waiver within 3 months of that notice. He questions whether the 3-year time limitation contained in 10 U. S. C. 2774(b)(2) can be regarded as having expired under these circumstances. He states further that at the time of his discharge from military service he was advised his pay accounts had been "cleared," and he questions the fairness of being held to account for his indebtedness after receiving such advice.

Subsection 2774(a) of title 10, United States Code, provides in pertinent part that a claim of the United States against a person arising out of an erroneous payment of pay or allowances, to or on behalf of a member or former member of the uniformed services, the collection of which would be against equity and good conscience and not in the best interest of the United States, may be waived in whole or in part. However, subsection (b) provides that the Comptroller General or the Secretary concerned, as the case may be, may not exercise his authority to waive any claim--

"(1) if, in his opinion, there exists, (a) connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member or any other person having an interest in obtaining a waiver of the claim; or

"(2) if application for waiver is received in his office after the expiration of three years immediately following the date on which the erroneous payment of pay or allowances * * * was discovered."

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It is to be observed that subsection 3774(b)(2) clearly requires that in order for an application for waiver to be considered for waiver, it must be "received" within 3 years from the date the erroneous payment "was discovered." We have previously expressed the view that the 3-year limitation period must be considered as beginning to run from the date the erroneous payment "was discovered" by the administrative office. That is, from the date it is definitely determined by an appropriate official that an erroneous payment had been made. The date of notice to the member is not relevant in fixing such date. See B-172088, May 15, 1973; 54 Comp. Gen 138 (1974).

In the present case, while it appears that an entry of indebtedness was made in the member's final pay record at or shortly after the time of his discharge on January 28, 1971, the exact date when his debt was administratively determined to exist is not clear from the record although it was definitely established by June 15, 1971. Since the member's request for waiver was received on March 5, 1974, within 3 years of the later date and since a date of discovery prior to June 15, 1971, cannot be exactly established we will consider that the request for waiver was received within 3 years of that date, and that consideration of the member's request for waiver is not precluded by 10 U.S.C. 3774(b)(2).

However, as previously stated, under the provisions of 10 U.S.C. 3774(b)(1), a claim may not be waived if there exists, in connection with the claim, an indication of fault on the part of the member. "Fault" is not a technical word, but rather one which must be considered in its common and popular signification, and which imports responsibility for error or mistake. Malone v. United States, 5 Ct. Cl. 486 (1869).

In the present case, efforts made by disbursing officers to properly maintain the member's pay records were frustrated by his repeated unauthorized absences. Disarray in the member's records was the inevitable result of his repeated infractions. It is our view that he must bear responsibility for the errors that occurred, and accordingly be considered at least partly at fault in this matter, which under the provisions of 10 U.S.C. 3774(b)(1) precludes waiver of any part of the claim.

Finally, the member asserts he was told his pay accounts had been "cleared" at the time of his discharge, and he contends that because of this he should not be held accountable for his indebtedness.

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Persons receiving money erroneously paid by a Government agency or official thereof, acquire no right to the money. The courts have consistently held that such persons are bound in equity and good conscience to make restitution. In other words, if a benefit is bestowed through mistake, no matter how careless the act of the bestower may have been, the recipient of the benefit must make restitution, the theory being that restitution results in no loss to the recipient. He merely received something for nothing. See Barnes, et al. v. District of Columbia, 23 Ct. Cl. 366 (1887); United States v. Boston Chamberlaine Co., 11 F. 24 24 (1826); and United States v. Metropolitan Nat. Bank & Trust, 25 F. Supp. 374 (1940). See ALSO IN RE CONSTITUTIONAL NAT. BANK v. United States, 96 U.S. 316 (1877); German Bank v. United States, 146 U.S. 373 (1893); Federal Crop Insurance Corporation v. Merrill, 323 U.S. 206 (1947); and Petty v. United States, 428 F. 2d 228, (1971).

Accordingly, the member's request for waiver of indebtedness is hereby denied.

R. F. KELLER

Deputy] Comptroller General
of the United States