Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Thomas S. Miller—Aviator Continuation Pay—Waiver Request

File: B-271951

Date: December 17, 1996

DIGEST

An Air Force officer who was scheduled to be separated in August 1994 was advised by responsible service personnel in late March that his annual installment of aviation continuation pay, due in April, would be limited to a prorated amount covering his remaining service time from April to August. However, when the payment was made in April, it was for the full annual amount, but the day following payment the finance office advised the officer that the excess amount was erroneous and would be collected from him. In these circumstances, collection is not considered to be against equity and good conscience, and waiver of the overpayment under 10 U.S.C. § 2774 is denied. The officer's additional assertion that, under his continuation pay agreement, he was entitled to the full annual installment is in effect a claim, and the authority to settle such claims has been transferred from the General Accounting Office to the Department of Defense where he may pursue that matter.

DECISION

This is in response to Thomas S. Miller's request for waiver of the claim asserted against him by the Defense Finance and Accounting Service (DFAS) for a portion of the aviator continuation pay he received while serving on active duty as a captain in the Air Force. As explained below, we find that the claim does not qualify for waiver under our waiver authority, 10 U.S.C. § 2774.[1]

BACKGROUND

The record shows that in April 1992, Captain Miller entered into an aviator continuation pay agreement with the Air Force, pursuant to 37 U.S.C. § 301b, whereby he agreed to remain on active duty through December 21, 1995, in

[1]The legal issues decided in this case also will be applied in several other pending cases involving similar requests for waiver of repayment of aviation continuation pay previously filed with our former Claims Group by other members.

consideration for which he became entitled to aviator continuation pay, payable in annual installments. It appears that in early 1994, Captain Miller was nonselected for promotion and scheduled to be involuntarily separated from the Air Force on August 31, 1994. Captain Miller states that on March 30, 1994, he contacted the Air Force office that deals with continuation pay to learn how his separation would affect his future payments. He states he was advised that the amount of his upcoming April annual payment would be prorated to cover the remaining period of his service, i.e., through August 31. He also states that he expressed the belief that under the agreement he had signed, he was entitled to the full annual payment for that year, not a prorated amount.

On April 13, 1994, personnel at the Finance Office at Ellsworth Air Force Base, where Captain Miller was then stationed, advised him that it was too late for the Ellsworth office to adjust the payment of his annual installment ($6,527.55), which had been paid to his account in full on April 11, 1994, by the Finance and Accounting Center in Denver, but the amount applicable to the period after his scheduled separation in August was an overpayment which would be collected from him. On April 28, 1994, Captain Miller filed a request for waiver of the overpayment. However, Captain Miller was separated from the Air Force on August 31, 1994, and the amount of the continuation pay installment applicable to the period after that date ($4,152.25) was collected from him by the Air Force, and DFAS forwarded his request for waiver to our office for consideration.

As noted above, Captain Miller acknowledges that he was told in March that he was entitled to only a prorated amount of his annual incentive pay installment and that he was advised the day after the full payment was made on April 11 that the amount applicable to the period after his separation date in August would be collected from him. However, it is his position that under the terms of his continuation pay agreement, he was entitled to receive the full annual payment; and, therefore, the payment he received was not erroneous, and the $4,152.25 collected should be refunded to him. Specifically, he notes that the agreement provides that the specified amount will be paid on each anniversary date and, although entitlement to continuation pay is to "stop immediately" in the event of his being "separated for any reason," recoupment of a previous payment on a pro rata basis is required only if entitlement to such pay stops due to one of five specified reasons, none of which apply to his case.

The record shows that Air Force Headquarters, Military Compensation Division, takes the position that under applicable regulations implementing 37 U.S.C. § 301b for the Air Force, in a situation such as Captain Miller's, where it is known that the officer is scheduled to be separated before completion of the full period for which an annual continuation pay payment is to be made, the payment is to be limited to an amount prorated to cover only the remaining period the officer is scheduled to serve that year. Thus, it is the Air Force's position in a case such as this where the

full annual payment was made, to the extent that it exceeds the proper prorated amount, it is an erroneous payment to be recovered as such. That is, apparently it is the Air Force's position that in such a case, recoupment is not governed by the provisions of the agreement Captain Miller cites which apply to recovery of properly paid installments which later become subject to recovery because for specified reasons the officer does not complete the term for which they were paid.

ANALYSIS AND CONCLUSION

Under the applicable statutory, 37 U.S.C. § 301b, supra, the continuation pay in question 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 interests of the United States.[2] We have 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.

[2]The statute also provides that we may not waive a claim if we find an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member. 10 U.S.C. § 2774(b). We find no such indication on the part of Captain Miller in this case.

In accordance with these decisions, if the installment of Captain Miller's continuation pay in question had been correctly and legally made and its partial recoupment was based on his subsequent failure to complete the term of service for which it was paid, his debt would not be considered to have arisen out of an "erroneous payment" and it would not be subject to consideration for waiver under 10 U.S.C. § 2774. As noted above, however, it is the Air Force's position that under their regulations, the installment payment should have been limited to the prorated amount, and thus to the extent it exceeded that amount, it was an erroneous payment subject to recovery. On that basis, the debt in question is considered as arising out of an erroneous payment and is subject to consideration for waiver under 10 U.S.C. § 2774. See Enomoto, supra.

As the language of the waiver statute indicates, whether to grant waiver is not to be decided simply as a matter of right whenever an individual innocently receives compensation to which he or she is not entitled, but is to be decided on principles of equity and fairness under the circumstances present in each case. Accordingly, we have held that where an agency's prompt notification of an overpayment to an employee precludes the employee from relying on the accuracy of the payment to his or her detriment, waiver is not appropriate since collection would not be against equity and good conscience despite the fact that the employee was without fault in the matter. See Richard C. Clough, 68 Comp. Gen. 326 (1989), and decisions cited therein.[3]

In Captain Miller's case, he was notified before the payment was made that he was entitled to only a prorated amount of the continuation pay, and the day after the overpayment was made, he was advised by the base finance office that an erroneous amount had been paid and the excess would be collected from him. In these circumstances, we do not find collection to be against equity and good conscience. Accordingly, we deny Captain Miller's request for waiver of the $4,152.25 in excess continuation pay he received.

Concerning Captain Miller's argument that under the provisions of his continuation pay agreement he was entitled to the full annual installment he received, that is in effect an assertion of a claim for continuation pay, and such claims are no longer within our jurisdiction to settle. Effective June 30, 1996, our authority to settle claims for military pay and allowances was transferred to the Department of Defense, Office of Hearings and Appeals, Claims Division, which may be addressed

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[3]These decisions concerned requests for waiver by civilian employees under 5 U.S.C. § 5584; however, the same standards apply to waiver requests under 10 U.S.C. § 2774. See 4 C.F.R. Part 91 (1996).

at Post Office Box 3656, Arlington, Virginia 22203.[4] Accordingly, if he wishes to pursue his claim on that basis, he may file it with the Office of Hearings and Appeals at the address above.

/s/Seymour Efros
for Robert P. Murphy
General Counsel

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[4]Pub. L. No. 104-53, § 211, 109 Stat. 535 (1995), transferred our authority under 31 U.S.C. § 3702 to settle such claims to the Office of Management and Budget which delegated this function to the Department of Defense. In addition, our waiver authority under 10 U.S.C. § 2774, will be transferred to the Office of Management and Budget effective December 18, 1996, pursuant to Pub. L. No. 104-316, § 105, 110 Stat. 3826 (1996).