

DECISION



18891
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

*PLM-2
Schneider*

FILE: B-200297

DATE: July 24, 1981

MATTER OF: Gregory S. Heenan - Request for Waiver

- DIGEST:** (1) Where former Air Force member was aware of excess leave status request for waiver under 10 U.S.C. § 2774 of the Government's claim for erroneous payments made in connection with his excess leave must be denied; the responsibility for failing to remain within the leave balance lies with the member, and he is, therefore, at least partially at fault for the erroneous payments.
- (2) Pay and allowances received in connection with advanced leave are proper payments when made, even though the advanced leave later becomes excess leave due to early separation, and as a result amount required to be paid back by member may not be considered for waiver under 10 U.S.C. § 2774.

This action is in response to a letter dated May 5, 1980, addressed to the Air Force Accounting and Finance Center, Denver, Colorado, from Mr. Gregory S. Heenan, a former member of the United States Air Force, appealing the settlement dated August 28, 1979, of our Claims Division. Mr. Heenan was denied a waiver of the Government's claim against him for pay and allowances received for periods of excess leave.

The record discloses that Mr. Heenan was granted a hardship discharge on April 25, 1977, due to the illness of his dependent mother-in-law. The dependent's previous illness had caused Mr. Heenan to use extensive emergency leave and as a result he was in an excess leave situation at the time of separation. On that date, he became indebted to the United States Government for a total of \$1,882.97; \$1,266.74 representing 52 1/2 days advance leave which became excess leave on his early discharge and \$616.23 for an additional 25 days excess leave.

Section 2774 of title 10, United States Code (1976), provides authority for the waiver of claims arising out of

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erroneous payments of pay and certain allowances made to members of the uniformed services. Waivers are authorized only if there is no 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 waiver of the claim, and only if collection would be against equity and good conscience and not in the best interest of the United States.

Generally, a member of the uniformed services may be granted advance leave in an amount equal to that which he accrues during the period of his enlistment. Thus, pay and allowances received in connection with the use of advanced leave are proper payments when made. The fact that such advance leave becomes excess leave due to a member's early separation--thus requiring repayment by the member of the value of the leave--does not change the character of the payments to erroneous payments so that they may be considered for waiver under 10 U.S.C. § 2774. See B-186224, August 26, 1976.

However, payments of pay and allowances received for periods of excess leave which is not originally given as advanced leave are erroneous payments and may be considered for waiver under 10 U.S.C. § 2774.

In this case the pay and allowances received for the 52 1/2 days of advanced leave granted Mr. Heenan on the basis of his expiration of service date of January 24, 1979, were proper payments when made and, therefore, may not be considered for waiver. Further waiver of the payments in the amount of \$616.23 received for the 25 days of excess leave, although coming within the purview of the statute, must be denied.

In this regard, we have consistently held that where a member fails to remain reasonably within his leave balance, he should realize that he will be required to repay any amounts received while in an excess leave status, and as a result of accepting the payments he must be considered at least partially at fault in the matter. See B-186022, March 2, 1977.

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Accordingly, the actions of our Claims Group in denying his request for waiver must be sustained.

A handwritten signature in cursive script, reading "Shelton J. Fowler".

Acting Comptroller General
of the United States