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DECISION

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

[Request For Waiver of Debt]

FILE: E-195668

DATE: February 1, 1980

MATTER OF: Master Chief Petty Officer Raymond M. Ernest, USN (Retired)

DIGEST: Service member's request for waiver of his debt to the United States arising out of overpayments of military proficiency pay must be denied, where it appeared that he should have known he was being overpaid and should have taken corrective action. Under the governing provisions of statutory law, waiver is not allowed if the member should have known he was being overpaid at the time, and the collection of the overpayment in this case is therefore not against equity and good conscience. 10 U.S.C. 2774 (1976).

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Master Chief Petty Officer Raymond M. Ernest, USN (Retired), 526-28-5902, requests reconsideration of our Claims Division's denial of his request for waiver of the Government's claim against him resulting from overpayments of military proficiency pay he received during the period from July 1, 1974, through February 29, 1976. In view of the facts presented, and the applicable provisions of law and regulation, we sustain the Claims Division action.

Section 307 of title 37, United States Code (1976), generally provides that an enlisted member of a uniformed service who is designated as being specially proficient in a military skill may, in addition to other pay or allowances to which he is entitled, be paid proficiency pay at a prescribed monthly rate, subject to regulations issued by the designated departmental Secretaries. Prior to July 1, 1974, Petty Officer Ernest was receiving proficiency pay at the rate of \$50 per month in accordance with Navy regulations. Effective July 1, 1974, his proficiency pay was reduced from \$50 to \$25 per month, and effective July 1, 1975, his proficiency pay was completely terminated under amendments to those regulations. Those amendments were apparently based on determinations that the military occupational skill rating he held no longer

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*Administrative errors
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met shortage specialty criteria which warranted continuation of proficiency pay at the rate of \$50 per month.

However, due to administrative error the reduction and termination of Petty Officer Ernest's proficiency pay were not entered on the new pay records which opened for him on July 1, 1974, and at regular 6-month intervals thereafter. Thus, he continued to receive proficiency pay of \$50 per month until the error was discovered and corrected in March 1976. It was then determined that between July 1, 1974, and February 29, 1976, he had received erroneous overpayments of proficiency pay totalling \$700.

When Petty Officer Ernest was notified of the error and his resulting indebtedness to the Government, he requested that the Government's claim against him be waived. However, as previously indicated, our Claims Division denied his request. Essentially, it was determined that a service member of Petty Officer Ernest's rank and years of experience should have been aware of the reduction and termination of his proficiency pay, and should have taken corrective action when his normal pay did not decrease as it should have after July 1, 1974.

Petty Officer Ernest has questioned the correctness of the conclusions reached by our Claims Division in denying his request for waiver. In substance, he indicates that the pay he received from one pay day to the next fluctuated quite a bit after July 1, 1974, and he had no reason to notice whether or not his ordinary pay and allowances had been decreased by \$25 when his proficiency pay was reduced in 1974 and completely discontinued a year later. In that connection, he has submitted copies of the leave and earnings statements he received at the time. Those statements are incomplete and contain no entries concerning proficiency pay, and Petty Officer Ernest therefore suggests that he had no reason to know he was erroneously receiving the special pay, particularly since he was not an expert in the field

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of finance and accounting and did not examine his underlying pay records. He also notes that he was initially advised he was indebted in the amount of \$679 as the result of the erroneous payments but was later advised that the total indebtedness was \$700, and he therefore questions whether anyone has ever really looked at or studied his pay records and whether he was actually overpaid by \$700.

It is well established that a person receiving money erroneously paid by a Government agency or official acquires no right to the money and is liable to make restitution. Restitution results in no loss to the recipient, since he merely received something which he was never entitled to have in the first place. See Barnes, et al. v. District of Columbia, 22 Ct. Cl. 366, 394 (1887); and United States v. Sutton Chemical Co., 11 F. 2d 24 (1926).

In the present case, Petty Officer Ernest's pay records show that he received proficiency pay at the rate of \$50 per month from July 1, 1974, through February 29, 1976. Since he was entitled to proficiency pay of only \$25 per month from July 1, 1974, through June 30, 1975, and to no proficiency pay at all thereafter, the erroneous overpayments to him totalled \$700. The amount of his resulting \$700 debt was reduced to \$679 in March 1976 by pay adjustments to the date of the checkage entry in his pay records. Hence, Petty Officer Ernest became obligated to make restitution in the total amount of \$700 as the result of the erroneous overpayments, and that amount is subject to consideration for waiver regardless of the pay adjustments made to reduce his debt to the \$679 he now owes.

Subsection 2774(a) of title 10, United States Code (1976), provides in pertinent part that a claim against a member or former member of the uniformed services arising out of an erroneous payment of pay or allowances, the collection of which "would be against equity and good conscience and not in the best interest of the United

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States," may be waived in whole or in part. Subsection 2774(b) further 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, in 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 * * *"

"Fault," as used in this subsection is considered to exist if it is determined that the member should have known that an error existed but failed to take action to have it corrected. 4 C.F.R. 91.5 (1978). Thus, if the member's entitlement to a special pay or an allowance is terminated he should reasonably expect to receive pay and allowances at a reduced rate thereafter. If the pay he receives is not reduced, he should bring the possibility of error to the attention of the appropriate disbursing office, and if he fails to take that corrective action, he is not without fault and waiver will be denied. B-192611, November 3, 1978.

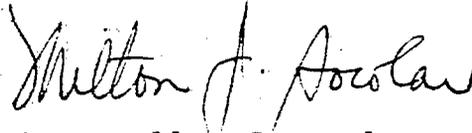
In the present case, the pay records show that Petty Officer Ernest received \$358 on each and every payday between January 1 and June 30, 1974, with a final payment of \$367.83 on June 30, 1974, when that 6-month pay record was cleared. Thereafter, he received \$357 each and every payday from July 1 through September 30, 1974. While his pay subsequently became irregular, it is apparent that he experienced no significant reduction in his norm pay when his proficiency pay entitlement was reduced on July 1, 1974.

It is our view that Petty Officer Ernest, who apparently knew his proficiency pay entitlement was reduced on July 1, 1974, should have expected his norm pay to be reduced accordingly thereafter. When his norm pay was not significantly reduced, he should have

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brought the matter to the attention of his disbursing office. Even though he was not an expert at accounting, and even though his leave and earnings statements were incomplete, a person of his rank and years of experience should have been generally familiar with his pay and allowance entitlements and should have taken corrective action when the pay he was receiving did not decrease at the time his proficiency pay entitlement was reduced. Petty Officer Ernest's failure to take corrective action places him in the position of being at least partially at fault in the matter and precludes us from giving favorable consideration to his application for waiver.

Accordingly, the action taken by our Claims Division in denying waiver in this case is sustained.



FOR THE Comptroller General
of the United States