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DECISION



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

FILE: B-195129

DATE: April 28, 1980

MATTER OF: Lieutenant Colonel Carl F. Johnston, AUS

USA
PERSONAL
NAME

DIGEST: 1. If an Army officer is separated from active service but is later retroactively restored to active duty under the statute authorizing the correction of military records (10 U.S.C. § 1552), he thereby becomes entitled to credit for active duty military backpay covering the period of his nullified separation from service. However, he is not entitled to credit for uniform allowances authorized for officers newly entering on active duty in connection with his actual return to Army service after his records are corrected to show that he had never been separated from active duty.

AGC 00016
VA

likewise

2. When an Army member is separated from but later retroactively restored to active duty status through administrative military records correction proceedings, and this causes the Veterans Administration (VA) to recompute the VA educational assistance benefits he received during the interim period at reduced "inservice" rates, the member's resulting indebtedness to the VA may properly be collected by setoff of the debt against any military backpay due to him. Any disagreement the member might have concerning the validity or amount of the debt would be a matter for consideration by VA authorities.

3. The Federal and State tax consequences of military records correction proceedings concluded under 10 U.S.C. § 1552 are matters primarily for consideration by the concerned revenue authorities; hence, if a retired Army member's records are corrected nullifying his retirement and retroactively restoring him to active duty status, his application for a tax refund believed due for Social Security (FICA) taxes debited against the active duty military

[ERRONEOUS OVERPAYMENTS]

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backpay credited to him in the settlement of his military pay accounts would be a matter for submission to the United States Internal Revenue Service.

- In addition*
4. When an Army member is separated from but later retroactively restored to active duty through the correction of his military records under 10 U.S.C. § 1552, he is entitled to credit for his interim active duty military pay and allowances; ~~however, his interim civilian earnings must be deducted from the net amount of military backpay found to be due to him in the settlement of his military pay accounts incident to the records correction proceedings.~~
 5. Provisions of statutory law contained in 10 U.S.C. § 1552 governing military records correction proceedings contain no authority for the payment of interest on backpay awards; hence, ~~interest does not accrue on military backpay due to a service member on account of a correction of his records under 10 U.S.C. § 1552, since interest on unpaid accounts may not be assessed against the United States in the absence of express statutory authority.~~
 6. If an erroneous overpayment of military pay and allowances is made to an Army member at the time of his separation from active duty, and that separation from service is later nullified through the correction of his records under the authority of 10 U.S.C. § 1552, the erroneous overpayment should be included as a debit to be set off against credits for military backpay due the member in the monetary settlement concluded under 10 U.S.C. § 1552, and it should not be collected through deductions from the member's current pay and allowances.

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This action is in response to correspondence received from the Chief of the Field Services Office, United States Army Finance and Accounting Center, concerning Lieutenant Colonel Carl F. Johnston, AUS, 472-28-1152, who was retroactively promoted

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and restored to active duty by the Army Board for Correction of Military Records. The Army Finance and Accounting Center offered Colonel Johnston a monetary settlement based on the records correction proceedings, but Colonel Johnston has expressed disagreement with that proposed settlement and has declined to accept it.

Background

Colonel Johnston was born in 1930 and first entered military service at the age of 17 in 1948. He served on active duty in the Armed Forces between June 1948 and July 1956, and also between October 1961 and August 1974. He was separated from active Army service in the grade of major on August 31, 1974; placed on the Army's retired list effective September 1, 1974; and then began drawing monthly retired pay from the Army. Between September 1974 and June 1975 he was a full-time university student, and thereafter he took private flying lessons on a part-time basis until January 1977. He received Veterans Administration (VA) educational assistance benefits based on these activities. Also, between June 1975 and January 1977 he was engaged in full-time employment with a private electronics firm. He received earnings from that employment totalling \$31,536.25.

Colonel Johnston was apparently dissatisfied with the circumstances that had led to his military retirement and applied to the Army Board for Correction of Military Records for relief. On December 22, 1976, and June 28, 1978, the correction board, pursuant to its authority under 10 U.S.C. § 1552 (1976), amended Colonel Johnston's records to show that his September 1, 1974 retirement was null and void, and that he had been promoted from the grade of major (O-4) to that of lieutenant colonel (O-5) effective December 1, 1973.

As a result of these corrections in his records, Colonel Johnston returned to active service with the Army in March 1977, and he has remained on active duty continuously ever since then.

The Army Finance and Accounting Center determined that because of those corrections in his records, Colonel Johnston had become entitled to monetary credits totalling \$65,561.44.

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These credits included his active duty military pay and allowances in the grade of lieutenant colonel covering the period of his invalid retirement between 1974 and 1977. Finance and accounting officials then determined that these credits were subject to debits totalling \$38,458.47. Included among the debits were amounts of military retired pay received by Colonel Johnston during his invalid retirement between 1974 and 1977; excess VA educational assistance benefits paid him during that period; and Social Security (FICA) taxes on the active duty backpay which accrued to his credit for that period. The net amount of military backpay due Colonel Johnston, after the total debits were subtracted from the total credits, amounted to \$27,102.97. However, it was further determined that the amount of his interim civilian earnings, \$31,536.25, was deductible from the military backpay due to him, so that the net amount found to be payable to Colonel Johnston was nothing. On August 17, 1978, the Army Finance and Accounting Center sent Colonel Johnston a proposed settlement certificate showing an itemized listing of the credits and debits (and the deduction of interim civilian earnings), together with an accompanying letter of explanation.

In a responding letter dated September 18, 1978, and in other correspondence addressed to the Army Finance and Accounting Center and our Office since then, Colonel Johnston has expressed disagreement with the proposed settlement that has been offered to him.

First, with respect to the credits shown in the proposed settlement, Colonel Johnston agrees that he is entitled to active duty backpay and allowances for the period of his invalid retirement between 1974 and 1977 in the amount of \$65,561.44. However, he suggests that he should, in addition, also be credited with a uniform allowance in the amount of \$300 incident to his actual return to active duty in 1977.

Second, with respect to the debits shown in the proposed settlement, Colonel Johnston agrees that the Army retired pay he received during the period of his invalid retirement between 1974 and 1977 should be collected from him in the full amount. However, he does not agree that excess VA educational assistance benefits, shown as an itemized debit of \$1,106.15, should be included. In that connection, he indicates that he disagrees with the VA's statement of his debt and says that by his calculations the VA instead owes him \$510.88.

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Third, Colonel Johnston also objects to the 1975 and 1976 FICA taxes on the active duty military backpay shown as debits in the proposed settlement. He says that he already paid FICA taxes on his interim civilian earnings in 1975 and 1976 and should not be subjected to further FICA taxes for those years.

Fourth, with respect to the matter of the deduction of his \$31,536.25 interim civilian earnings in the proposed settlement, Colonel Johnston expresses the belief that such deduction would be improper in that it is not authorized by the statute governing records correction proceedings, 10 U.S.C. § 1552, and is therefore not sanctioned by law. In that connection, he notes that the Comptroller General some years ago recommended that the Congress amend 10 U.S.C. § 1552 to provide a specific statutory requirement for such deductions, but the statute was not so amended. He therefore suggests that any administrative regulation or Comptroller General decision which would purport to authorize the deduction of interim civilian earnings in a monetary settlement concluded under 10 U.S.C. § 1552, would be in conflict with provisions of statutory law and hence invalid.

Fifth, Colonel Johnston claims interest on the net amount believed due to him as the result of the records correction proceedings in his case. By his own calculations--through his proposed adjustments of the credits and debits and elimination of any deduction of interim civilian earnings in the settlement--Colonel Johnston has arrived at the conclusion that the net amount due to him should be \$32,982.09. He suggests that he should also properly be paid interest on that amount at the rate of 8 percent per year.

In addition, after the disagreement initially arose concerning the proposed settlement, it appears that Army authorities through an audit of Colonel Johnston's pay accounts discovered that erroneous overpayments were made to him in September 1974 amounting to \$1,271.34. That error apparently was made incident to Colonel Johnston's invalid retirement on September 1, 1974. Army authorities have proposed that this overpayment not be included as a debit in the settlement of Colonel Johnston's pay accounts under the records correction proceedings, but rather that it be collected separately from his current pay and allowances. Colonel Johnston, in response, has not disputed either the fact or the amount of the September 1974 overpayment, but

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he has suggested that this item of indebtedness should now be included as a debit in the settlement and should not be collected from his current pay.

Since the proposed settlement produced irreconcilable differences of opinion between Colonel Johnston and Army finance and accounting officials, and the issues involved were becoming somewhat complex, the Army Finance and Accounting Center forwarded the matter to our Office for resolution.

I. Settlement Credits--Claim for Uniform Allowance

Sections 415 and 416 of title 37, United States Code (1976), generally provide that an Army officer is entitled to an initial uniform allowance of not more than \$200 upon first reporting for active duty and an additional uniform allowance of not more than \$100 each time he is called or recalled to active duty for a period of more than 90 days.

In the present case, the Army Board for Correction of Military Records expunged the fact of Colonel Johnston's retirement between 1974 and 1977 from his records, and this produced a result showing that he has been serving on active duty with the Armed Forces continuously ever since October 1961. It is indicated that he was already previously paid an initial and an additional uniform allowance incident to his active service. Consequently, under the provisions of 37 U.S.C. §§ 415 and 416, he is not entitled to any further uniform allowances incident to his return to active Army service in March 1977 after the correction of his records to delete his earlier separation and retirement.

Accordingly, we deny Colonel Johnston's claim for a \$300 uniform allowance in the settlement of his accounts under the records correction proceedings.

II. Settlement Debits--VA Claims

Subsection 211(a) of title 38, United States Code (1976), specifically directs that determinations of the Administrator of Veterans Affairs on any question of law or fact concerning a claim for VA benefits is final and conclusive and no other official, agency, or court of the United States shall have the power or jurisdiction to review such determinations. This

Office, therefore, has no authority to change or reverse any determination made by the VA pertaining to the payment of VA benefits. If the VA makes a determination, based on an individual's status, that he was erroneously paid VA benefits, such erroneous payments became a debt to the United States which must be recovered either directly from the individual or, if the individual is due other sums from the United States, by setoff from such sums (including setoff in settlements concluded under 10 U.S.C. § 1552). See 56 Comp. Gen. 587, 591 (1977).

In the present case, the VA has issued a bill for collection of \$1,106.15 from Colonel Johnston. Documentation contained in the file indicates that the VA's claim arose as the result of the correction of his records to show that he was on active duty between 1974 and 1977, and that consequently the amounts of his VA educational assistance benefits were retroactively reduced to "inservice" rates for the educational activities he participated in during that period. . If Colonel Johnston disagrees with the validity or the amount of the VA's claim, it is a matter that he should address to the concerned VA authorities; in the meantime, as long as the VA's claim for \$1,106.15 is outstanding, it is an item that should be included as a debit in the settlement of Colonel Johnston's accounts under 10 U.S.C. § 1552.

III. Settlement Debits--FICA Taxes

The Federal and State tax consequences of a correction of military records under 10 U.S.C. § 1552 are matters primarily for consideration by the concerned revenue authorities, and not this Office. 58 Comp. Gen. 528 (1979); B-195558, December 14, 1979. If Colonel Johnston has reason to believe that he should have a refund of any FICA taxes imposed on the military backpay credited to him, it is a matter he should submit to the United States Internal Revenue Service.

IV. Deduction of Interim Civilian Earnings

Provisions of statutory law governing the correction of military records and the settlement of resulting claims are contained in section 1552 of title 10, United States Code. Under 10 U.S.C. § 1552(c), the Secretary of a military department is authorized to pay a claim for "the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits" to a

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service member whose records are corrected. Thus, an Army member who is separated from but later retroactively restored to active duty status through records correction proceedings under 10 U.S.C. § 1552, may properly claim interim active duty pay and allowances covering the period of the invalid separation from active service. See 57 Comp. Gen. 554 (1978). The provisions of 10 U.S.C. § 1552 neither expressly require nor prohibit the deduction of interim civilian earnings from such awards of interim active duty military pay and allowances.

Administrative procedures established for the correction of military records and payment of claims under the statutory authority of 10 U.S.C. § 1552 which apply to members of the United States Army are contained in Army Regulation (AR) 15-185, dated May 18, 1977. Paragraph 25, AR 15-185, does specifically require that when any Army member is retroactively restored to active duty through records correction proceedings, "Earnings received from civilian employment during any period for which active duty pay and allowances are payable will be deducted from the settlement." This requirement is also contained in earlier versions of the regulation. See para. 25, AR 15-185, dated June 4, 1974.

The requirement imposed by regulation that interim civilian earnings from private sources be deducted from an award of military backpay and allowances in a settlement under 10 U.S.C. § 1552 is not, as indicated, mandated by express statutory language; rather, it is founded upon the judicial rule long recognized by the Court of Claims that the member has a duty to mitigate the Government's monetary obligations in such circumstances. See, for example, Motto v. United States, 175 Ct. Cl. 862 (1966); Clackum v. United States, 161 Ct. Cl. 34 (1963); Egan v. United States, 141 Ct. Cl. 1 (1958); and opinions cited therein.

Some years ago, as Colonel Johnston has noted, our Office did recommend to the Congress that the provisions of 10 U.S.C. § 1552 be amended to provide a specific statutory requirement for the deduction of interim civilian earnings in claims settlements, but the statute has not been so amended. Nevertheless, we subsequently expressed the view that the judicial rule recognized by the Court of Claims should be administratively adopted in service regulations. See 48 Comp. Gen. 580 (1969). Thus, that rule requiring the deduction of interim civilian earnings in

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settlements concluded under 10 U.S.C. § 1552 is now uniformly recognized and applied by the courts, our Office, and the military departments. While 10 U.S.C. § 1552 does not specifically provide for deduction of civilian earnings, neither does it prohibit the application of that rule provided for in applicable regulations. Hence, it is our view that the fact that Congress did not act upon our recommendation to make the deduction of interim civilian earnings an express statutory requirement does not preclude the deduction of such earnings. Compare United States v. Southwestern Cable Co., 392 U.S. 157, 169-175 (1968).

Interim private civilian earnings that a service member may have received during a period of an invalid separation from active duty do not constitute a debt he owes to the Government. Those civilian earnings are, however, deductible from the net amount of military backpay due the member for the reason that, as mentioned, the member has an equitable responsibility to mitigate the Government's monetary obligations in such circumstances. See Craft v. United States, 589 F.2d 1057, 1068-1069 (1978); 56 Comp. Gen. 587 (1977); 49 Comp. Gen. 656, 662 (1970).

Accordingly, Colonel Johnston's civilian earnings during the period of his invalid separation from active military service between 1974 and 1977 must be deducted from the net amount of military backpay found to be due to him in any settlement concluded with him under the provisions of 10 U.S.C. § 1552.

V. Claim for Interest

In this case, the net amount of military backpay due Colonel Johnston is exceeded by the interim civilian earnings he received during the period of his invalid separation from active duty between 1974 and 1977. Consequently, he is entitled to no payment of military backpay incident to his restoration to active duty status, and his claim for interest therefore appears to be moot. We note in passing, however, that interest on unpaid accounts may not be assessed against the Government in the absence of express statutory authority. B-191921, October 4, 1978 (58 Comp. Gen. 5); B-165072, May 13, 1969. Since 10 U.S.C. § 1552 does not authorize the assessment of interest on military backpay awards, Colonel Johnston would not have been entitled to interest even if some net amount of backpay were payable to him. 58 Comp. Gen. 528, 530 (1979).

VI. Erroneous Overpayments Discovered After
Preparation of Settlement Certificate

As previously indicated, after Colonel Johnston expressed disagreement with the proposed settlement certificate offered him in August 1978, Army authorities audited his pay accounts and discovered that he had received erroneous overpayments amounting to \$1,271.34 at the time of his retirement in September 1974. Although Army authorities have proposed that this amount be collected from Colonel Johnston's current pay and allowances, in our view this item of indebtedness should properly be included as a debit in the settlement with him under 10 U.S.C. § 1552. In that connection, it is to be noted that the overpayments were made incident to the retirement of Colonel Johnston which was later determined to be invalid in the records correction proceedings, so that those overpayments are related to the correction of records.

Conclusion

The settlement offered to Colonel Johnston in August 1978 appears to have been correctly prepared. However, the erroneous overpayment later discovered through the audit of his pay accounts should now be included as a debit in the settlement, and the amount of interim civilian earnings to be deducted in the settlement should be adjusted accordingly. The settlement certificate and related documents are being returned to the Army Finance and Accounting Center for final processing.



For the Comptroller General
of the United States