

**DOCUMENT RESUME**

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**Reserve Members Restored to Duty. B-187865. May 5, 1977. 8 pp.**

**Decision by Paul G. Dembling (for Elmer B. Staats, Comptroller General).**

**Issue Area: Personnel Management and Compensation: Compensation (305).**

**Contact: Office of the General Counsel: Military Personnel.**

**Budget Function: General Government: Central Personnel Management (805).**

**Organizations Concerned: Department of the Army; Veterans Administration.**

**Authority: (70 Stat. 517; 10 U.S.C. 687, 687(d)). 10 U.S.C. 1552. 10 U.S.C. 2774 (Supp. II). 37 U.S.C. 501. 37 U.S.C. 501(a) (B). 10 U.S.C. 501(f). 38 U.S.C. 211(a). 37 U.S.C. 206(a). 43 Comp. Gen. 235. 43 Comp. Gen. 237. 42 Comp. Gen. 617. 53 Comp. Gen. 299. 49 Comp. Gen. 656. 49 Comp. Gen. 662. 34 Comp. Gen. 235. 40 Comp. Gen. 502. 34 Comp. Gen. 7. 55 Comp. Gen. 113. B-177924 (1975). B-180028 (1974).**

The Assistant Secretary of the Army, Manpower and Reserve Affairs, requested a decision concerning readjustment payments to reservists separated from active duty but restored by administrative record correction. Readjustment pay is not waivable. Unused annual leave pay and interim reserve pay must be repaid. If separation was involuntary, repayments were waivable. These reservists were entitled to active pay and allowances. The Veterans Administration decides whether disability compensation and educational benefits are debts to be recovered. (DJM)

Donald Guritz  
Mil. Pers/



**DECISION**

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

FILE: B-187865

DATE: May 5, 1977

MATTER OF: Reserve Members Restored to Duty

- DIGEST:
1. Army Reserve officers involuntarily separated from active duty, with readjustment payments computed under 10 U.S.C. 687 (1970), whose military records are subsequently corrected to show continuation on active duty, are liable to repay such readjustment payments to the United States.
  2. Reservists who receive payments for unused accrued leave under 37 U.S.C. 501 (1970) upon separation from active duty, but whose records are corrected to expunge the fact of such separation, are liable to repay amounts received for unused leave; however, they are entitled to be reccredited for days of unused leave up to the 60-day maximum prescribed by 37 U.S.C. 501(f) (1970).
  3. Army members separated from extended active duty, who thereafter earn military pay and allowances as members of Reserve components, but whose records are corrected to reflect continued active duty with no break in service, are liable to repay such interim Reserve pay and allowances.
  4. Whether or not erroneous or excessive Veterans Administration disability compensation and educational assistance payments which constitute debts to the United States must be collected is a matter for submission to the Veterans Administration, which has exclusive jurisdiction in such matters.

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5. Army members separated from but later retroactively restored to active duty by administrative record correction action (10 U.S.C. 1552 (1970)) thereby become entitled to retroactive payment of military pay and allowances; and while interim civilian earnings may properly be set off against amounts due members, such civilian earnings are deductible only from net balance due members after setoff of their debts to the Government and are not recoupable in excess of that net balance.
6. Where Army officers involuntarily separated from active duty, subsequently obtain records correction to show continuation on active duty, readjustment payments made upon separation under 10 U.S.C. 687 (together with payments received for accrued leave on separation and for interim Reserve duty) are thereby rendered erroneous, and such payments may therefore be considered for waiver under 10 U.S.C. 2774.

This action is in response to a letter dated November 16, 1976, from the Assistant Secretary of the Army (Manpower and Reserve Affairs), requesting a decision as to whether there is a requirement to recoup readjustment payments made to Reserve officers separated from but later restored to active duty, and whether such payments, if recoverable, and other monies received incident to separation are proper for consideration for waiver.

It is indicated that a number of Reserve officers were involuntarily separated from extended active duty in the Army after being passed over for promotion by selection boards convened in 1974 and 1975. Upon separation, the Reserve officers received lump-sum readjustment payments computed under 10 U.S.C. 687 (1970). They applied to the Army Board for

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Correction of Military Records (ABCMR) for relief, alleging violations of statutes and regulations regarding the composition of their promotion boards; and the ABCMR concluded that the failure of the Department of the Army to appoint an appropriate number of Reserve officers as members of the 1974 and 1975 selection boards resulted in an injustice to them in that they were deprived of consideration for promotion by selection boards containing Reserve officers. New selection boards with an appropriate number of Reserve officers were then convened to reconsider their promotions.

It is further indicated that when the new selection boards select for promotion members who had been separated following their previous nonselection, it is necessary to correct their records under the provisions of 10 U.S.C. 1552 (1970) to show that they were not separated. When this principle is applied, it is stated that a substantial indebtedness may occur because accrued leave settlement, readjustment payments, and interim civilian earnings are included in the amount to be set off against the monies due the members as active duty pay and allowances for the period when they were not on active duty during the time the correction action was pending.

In a sample, and apparently hypothetical computation included with the submission, the following items are set out as being subject to collection action: (1) readjustment pay; (2) payment for unused accrued leave; (3) military pay and allowances earned while a member of a Reserve component; (4) Veterans Administration disability compensation/excess educational assistance benefits; and (5) earnings from civilian sources. The question is raised as to whether there is a necessity to recoup the monies received by a member for each of these items, and if so, whether claims for such amounts would be proper for consideration for waiver under 10 U.S.C. 2774 (Supp. II, 1972).

With regard to the recoupment of these items, it is first of all questioned whether there is a necessity to recoup the readjustment payments made under 10 U.S.C. 687, since it is said the purpose of the statute is to provide a monetary cushion to soften the transition to civilian life for those reservists who are involuntarily released. It is suggested that since the affected reservists did in fact perform the transition to civilian life and

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bore the expense incident thereto, recoupment action may work an inequity and may in many instances place the officers in a reduced pay status for the remainder of their active military careers.

Section 687 of title 10, United States Code, provides generally that a Reserve member who is released from active duty involuntarily, and who has completed, immediately before his release, at least 5 years of continuous active duty, is entitled to a readjustment payment computed in accordance with the formula there provided not to exceed 2 years' basic pay of the grade in which he is serving at the time of his release or \$15,000, whichever amount is the lesser.

Subsection 687(d) specifically provides:

"(d) Any readjustment payment to which a member becomes entitled under this section shall be reduced by the amount of any previous payment made to him under this section that he has not repaid to the United States. If he has repaid that amount to the United States, the period covered by it shall be treated as a period for which a payment has not been made under this section."

The source of 10 U.S.C. 687 is the act of July 9, 1956, ch. 534, 70 Stat. 517. The legislative history of that act indicates that 10 U.S.C. 687(d) was specifically designed to cover the cases of reservists involuntarily separated from but subsequently recalled to active duty. The stated purpose of subsection 687(d) is to "prevent dual payments of readjustment pay in the remote possibility that a reservist might receive readjustment pay after having served for at least 5 years and at some time in the future be recalled to active duty and again qualify for readjustment pay after serving 5 more years. Only one such payment could be made in these circumstances." See S. Rept. No. 2288, 84th Cong., 2d Sess. (1956), at page 5. Moreover, the terms of subsection 687(d) clearly contemplate that readjustment payments given to Reserve members be "repaid to the United States" in the event of their recall to active duty.

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Furthermore, we have previously expressed the view that a Regular officer who receives severance pay upon involuntary separation from active duty (similar to a Reserve officer receiving readjustment pay), but who later by Correction Board action has his records changed to expunge the fact of such involuntary separation, is then subject to recoupment action for the "received severance pay not payable in such circumstances." See 43 Comp. Gen. 235, 237 (1963). See also 42 Comp. Gen. 617 (1963). Accordingly, it is our view that the Reserve officers restored to active duty upon their own application in the circumstances described are indebted to the United States for the amounts received as readjustment payments under 10 U.S.C. 687, and are liable to make restitution of such amounts.

Regarding the matter of payments received for unused accrued leave, it appears the payments were authorized on the basis of separation from active duty as set forth in 37 U.S.C. 501(a)(1)(B) (1970). The correction of records expunging the fact of such separation rendered the payments improper and made the amounts received subject to recoupment action. However, it further appears that the members affected are entitled to be recredited for the days of unused leave for which payments were made, up to the 60-day limit prescribed by 37 U.S.C. 501(f). See Schmidt v. United States, 192 Ct. Cl. 420 (1970).

With respect to the question of the recoupment of interim pay received for inactive Reserve duty, 37 U.S.C. 206(a) (1970) expressly provides that inactive-duty training pay is authorized only for a member "who is not entitled to basic pay." Since the records of the members in question were corrected to reflect continued entitlement to basic pay, interim pay received for inactive-duty training was rendered contrary to statute and therefore erroneous. Also, any pay and allowances received for special tours of active duty or active duty for training during such interim period became erroneous overpayments by the correction of records to show continuation on extended active duty. Thus, all interim military pay and allowances earned as a member of a Reserve component would be subject to recoupment.

Concerning the recoupment of benefit and compensation payments received from the Veterans Administration (VA), 38 U.S.C. 211(a)

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(1970), expressly provides that decisions of the Administrator on any question of law or fact concerning a claim for benefits is final and conclusive and no other official or court of the United States shall have the power or jurisdiction to review such decision. This Office, therefore, has no authority to change or reverse any decision of the VA pertaining to the entitlement to or payment of benefits to any member or former member. If the VA makes a determination, based on an individual's status, that he was erroneously paid benefits from that agency, such erroneous payments become 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. See 53 Comp. Gen. 299 (1973); B-177924, January 27, 1975.

As to the matter of interim civilian earnings, paragraph 25 of Army Regulation 15-185 (June 4, 1974) provides that in the settlement of claims following ABCMR action, earnings received from civilian employment during any period for which active duty pay and allowances are payable will be deducted from such settlement. We have previously expressed the view, however, that in the adjustment of accounts in such situations, Government pay and other monetary benefits required to be recovered by reason of the correction of records should be set off first, with civilian earnings to be deducted from the remaining balance due the member, if any. See 49 Comp. Gen. 656, 662 (1970). Thus, if the amount of the readjustment payment and other Government benefits subject to recoupment equals or exceeds the amount due the member for backpay and allowances, there would be no further setoff or deduction for interim civilian earnings, since such earnings are not recoupable but are merely deductible from any remaining amount which may be owed to the member.

With regard to the question concerning the possibility of waiver, 10 U.S.C. 2774(a) (Supp. II, 1972) 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.

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The primary purpose of a correction of records under 10 U.S.C. 1552 in cases of the type described is to restore the member or former member to the same position that he would have had if he had not been separated or relieved from the performance of active military service. The resulting benefits and liabilities depend solely upon a proper application of the statutes to the facts as shown by the corrected record in each particular case, from the effective dates mentioned in the correction rather than from the date of the approval of the action by the Secretary of the Service concerned. See 34 Comp. Gen. 7 (1954); 40 Comp. Gen. 502 (1961); 43 Comp. Gen. 235, supra.

The readjustment payments, unused accrued leave payments, and interim military pay for inactive duty Reserve service paid to the members in question were apparently correct and proper when made. Ordinarily, debts which result from payments proper when made are not considered as arising out of "erroneous payments" so as to be subject to consideration for waiver under 10 U.S.C. 2774. Compare B-180028, July 9, 1974. However, when a member's records are corrected under 10 U.S.C. 1552, to show that he was not separated from active duty, such correction relates back to retroactively change the factual situation, and renders the readjustment payment received a payment that should not have been made. Compare 42 Comp. Gen. 617, supra. Accordingly, it is our view that claims against the officers in question arising out of such readjustment, leave and Reserve service payments may be given consideration for waiver in whole or in part under 10 U.S.C. 2774, on an individual, case-by-case basis. See 55 Comp. Gen. 113 (1975). In doing so it seems proper to consider that the purpose of the correction of the members' records and the payments which become due upon such correction are to restore the members, as nearly as possible, to the position they would have been in if the error had not been made. In such circumstances it may not be in the best interest of the United States nor in keeping with equity and good conscience to waive the total amount of the erroneous payments but only such part of the erroneous payments which would prevent the member from having a net indebtedness upon restoration to duty.

Overpayments of VA compensation and benefits do not involve military pay and allowances and may not be considered for waiver

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under 10 U.S.C. 2774; rather, whether or not those amounts need  
be collected is a matter for consideration by the VA.

The questions are answered accordingly.

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of the United States