



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Chief Warrant Officer Rafael G. Amalbert—Erroneous Retired Pay—
Waiver

File: B-271426

Date: November 4, 1996

DIGEST

A National Guard member applied for reserve retired pay in 1971 upon reaching the required age 60 and having over the required 20 years of service. However, the service denied his application because he did not have certain required active duty service. He disagreed and repeatedly reasserted his position until in 1989 the service established his retired pay retroactive to 1971, but because of the statute of limitations, limited retroactive payment to 6 years. In 1991, due to his inquiries regarding the retroactive limitation, the service discovered that he was not entitled to retired pay and placed him in debt for payments received. Five months later the service erroneously reinstated his retired pay and continued the payments until 1994 when it again discovered its error. The Claims Group waived the debt related to the first period, but declined to waive the second period on the basis that at the time the second period payments began, he should have known they were erroneous. On appeal, we modify the Claims Group's settlement to waive collection of the amounts he received during the first 9 months of the second period since he had a basis then to reasonably believe the payments were proper, but not after he received definitive notice of the erroneous nature of the payments at the end of those 9 months.

DECISION

This is in response to an appeal of Claims Group settlement Z-2927719-025, November 7, 1994, which denied in part the request of Chief Warrant Officer Rafael G. Amalbert for waiver of his debt in the amount of \$53,836.81 which resulted from reserve retired pay being erroneously paid to him by the U.S. Army.¹ The Claims Group waived \$37,167.65 of Mr. Amalbert's debt. As explained below, we modify the Claims Group's settlement to waive an additional \$4,138.41 of the debt.

¹Mr. Amalbert is represented in this matter by Juan Cruz-Cruz, Attorney.

BACKGROUND

Mr. Amalbert was a member of the Puerto Rico National Guard with over 29 years of service when he reached age 60 in January 1971. At that time he applied for retired pay pursuant to 10 U.S.C. §§ 1331-1337, which at that time included the provisions authorizing non-regular retired pay for qualified members of the National Guard. However, in a letter dated September 27, 1971, the U.S. Army Reserve Personnel Center (ARPERCEN) notified Mr. Amalbert that he was not entitled to retired pay because he had not performed active duty during any of the periods of war specified in 10 U.S.C. § 1331(c), a requirement for members in his situation. Mr. Amalbert disputed that determination. He indicates he made several attempts to persuade the service of his entitlement to retired pay at various times but without success until 1989, when in March he again made application for retired pay. As a result of that application, by order dated October 4, 1989, ARPERCEN notified him that he was certified for retired pay effective January 29, 1971, the date of his 60th birthday, and monthly payments to him were begun. He was also paid a lump sum for retired pay retroactive 6 years, and he was advised that the statute of limitations, 31 U.S.C. § 3702(b), prohibited further retroactive payment beyond that 6 years (to January 1971).

Mr. Amalbert disputed the application of the 6-year limitations period to his claim because he had first applied for retired pay in January 1971. Although he was unsuccessful in convincing the service that his claim was not subject to the statute of limitations, his current retired pay continued to be paid monthly through March 1991. As a result of Mr. Amalbert's continuing efforts to recover retired pay for the additional retroactive period, ARPERCEN advised him in April 1991 that their review of his entitlement indicated that he had been erroneously certified to receive retired pay. Accordingly, ARPERCEN advised him that he owed the government \$37,167.65 for the retired pay he had been paid. He also was advised that he could request waiver of the debt.

Mr. Amalbert filed a waiver request dated May 16, 1991, with the Defense Finance and Accounting Service (DFAS) which was responsible for collecting the debt. He also followed up with a letter dated June 27, 1991, pointing out that in view of his age (at that time he was 80 years old), DFAS should expedite a "positive solution" to the matter. Apparently the next communication Mr. Amalbert received from DFAS was notice in September 1991 that his retired pay had been reestablished retroactive to April 1991, when it had been revoked. He received a lump sum payment for the retroactive period, and his current monthly retired pay was paid but with a monthly deduction of \$71 to collect the previous debt. Apparently no further explanation was provided to him at that time. By letter dated November 11, 1991, to DFAS, Mr. Amalbert referred to both the retroactive payment and the current payments he had received and stated that based on the resumption of his retired pay, he assumed that the response to his prior request had been positive and

that he would continue to receive his monthly retired pay. He requested confirmation of this and indicated that he would assume that his position was correct unless he received information to the contrary.

The record does not show that Mr. Amalbert received a direct response to his November 11 letter. However, on December 10, 1991, DFAS responded to his waiver request, stating that he should have questioned his entitlement to retired pay when it was established for him in 1989 since his application for it had been previously denied in 1971. Therefore, DFAS stated, waiver of his debt would not be appropriate since he was not without fault in the matter. However, his retired pay payments continued, as reestablished in September 1991 with the deductions for collection of the prior debt, until February 1994, when DFAS again discovered that he was receiving retired pay erroneously and stopped the payments. DFAS then calculated Mr. Amalbert's total debt for such payments to be \$53,836.81, consisting of the \$37,167.65 he had been paid for the period prior to April 1991, and \$16,669.16 for the period from April 1991 to February 1994.

DFAS submitted the matter to our former Claims Group for waiver consideration. In doing so, DFAS indicated that it had changed its previous position on waiver of the portion of the debt related to the first period of erroneous payments, \$37,167.65, and recommended waiver of that amount. The reason given for this recommendation was that although Mr. Amalbert initially had been advised in 1971 that he was not entitled to retired pay, it appeared that he was convinced at all times he was entitled to it, and when it was established for him in 1989, he had no reason to question the payments he then began to receive. DFAS, however, recommended against waiver of the \$16,669.16 Mr. Amalbert received during the second period of overpayments on the grounds that after being notified in April 1991 that he was not entitled to retired pay, he should have questioned the reestablishment of the payments in September 1991.

The Claims Group accepted the DFAS recommendations, waived the \$37,167.65, and denied waiver of the \$16,669.16.

Mr. Amalbert has appealed the partial denial of waiver, arguing that it is against equity and good conscience to revoke his retired pay at his advanced age, and indicating that he continues to believe that he is entitled to such pay.

ANALYSIS

Under 10 U.S.C. § 2774, we are authorized to waive Mr. Amalbert's debt if collection would be against equity and good conscience and not in the best interests of the United States. We must also conclude that there is no indication of fault, fraud, misrepresentation, or lack of good faith on the part of the member. See the Standards for Waiver, 4 C.F.R. § 91.5(b).

It is a long-standing rule that waiver is not appropriate for erroneous payments received after the member receives notice that an error has occurred. Lieutenant Gary L. Francis, 69 Comp. Gen. 226 (1990). See also, Richard F. Lipke, B-231084, May 10, 1988. In such a case, the payee is expected to hold the erroneous payment for refund when the matter is corrected. Larry C. Brown, B-251935, Feb. 23, 1993. It was under these rules that the Claims Group denied waiver of the overpayments that occurred due to reestablishment of Mr. Amalbert's retired pay after he was advised in April 1991 that he was not entitled to retired pay. However, in light of Mr. Amalbert's persistent efforts to receive retired pay to which he believed he was entitled, it is our view that he did not receive sufficient information to put him on notice that he was receiving payments in error until December 1991.

As noted above, Mr. Amalbert met the age and length of service requirements for reserve retired pay. However, a review of his service records indicated that he had not met the additional requirement applicable to a person such as Mr. Amalbert who was a member before August 16, 1945, because he had not served on active duty during a period of war as required under the applicable statute.² Apparently this latter requirement was overlooked by the service when his retired pay was initially established in March 1989, and again when it was reestablished in September 1991.

Mr. Amalbert's first application for retired pay, made in 1971 when he reached the qualifying age of 60, was denied because he was found not to meet the war service requirement. He repeatedly reargued his entitlement until 1989 when his application was approved. At that time he apparently believed that he finally had convinced the service of the correctness of his position and, as recognized by DFAS and the Claims Group, he had no reason to question the payments he then began receiving. Also, apparently it was because of his appeals of the application of the statute of

²This requirement, now found in 10 U.S.C. § 12731(c), was set out in 10 U.S.C. § 1331(c) at the time Mr. Amalbert initially applied for retired pay. It is not entirely clear on what basis Mr. Amalbert continues to believe he is entitled to retired pay, except that he believes it inequitable to deny such pay to a person who has over 29 years of service. As to the service's authority to revoke payment to him on the basis that he did not meet the statutory requirement, we note that 10 U.S.C. § 12738 (formerly § 1406) provides that after a person is granted such retired pay, his eligibility for such pay may not be revoked "on the basis of any error, miscalculation, misinformation, or administrative determination of years of service performed as required by section 12731(a)(2)," which is the requirement to have performed at least 20 years of service. However, Mr. Amalbert's retired pay was revoked on the basis of not having served during the periods specified by § 12731(c), and not on the basis of an error in determination of the number of years of service under § 12731(a). See also, 51 Comp. Gen. 91 (1971).

limitations to his claim, that the erroneous entitlement was discovered by the service and his initial indebtedness established. While he then requested waiver of the debt, it is apparent that he was still convinced of his entitlement to retired pay. By this time he was 80 years of age, had been disputing with the service for 20 years, and had been successful once. When his retired pay was reinstated in September 1991, but with a deduction for the prior debt, it was not unreasonable for him to have believed that his persistence had paid off, and the service had reconsidered and agreed that he was entitled to retired pay, at least as of April 1991. As noted, he did write to DFAS in November 1991, specifically referring to the fact that his retired pay had been reinstated, that he had received a check for the retroactive period from April through September, and asking for a confirmation of his belief that his retired pay would continue. He apparently never received a direct reply to that letter.

In December, however, he received notice that his waiver request applicable to his debt for the first period of erroneous payments had been denied. While payments continued, subject to the deduction to collect the prior debt, the December letter should have put Mr. Amalbert on notice that his receipt of retired pay was erroneous. At that point he should have made further inquiries and should have begun holding further payments for repayment to the government. See 69 Comp. Gen. at 229; B-231084, supra; and B-251935, supra. Therefore, it appears that he had a basis to reasonably believe the payments he received for the April through December period were proper, but not for payments received thereafter.

Accordingly, we modify the Claims Group's settlement to waive an additional \$4,138.41 of Mr. Amalbert's debt, the amount of retired pay he received from April 1991 through December 1991. This reduces his debt to \$12,530.75, for which we sustain the waiver denial.

Robert P. Murphy
General Counsel