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OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 81-418
of	:	OCTOBER 7, 1981
GEORGE DEUKMEJIAN Attorney General	:	
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THE HONORABLE FRANK J. SCHOBER, JR., COMMANDING GENERAL OF THE STATE MILITARY FORCES, has requested an opinion on the following question:

Does state law or does federal military pay policy govern the consideration of claims for relief from repayment of a salary overpayment received by a member of the Military Department employed on state active duty?

CONCLUSION

State law, and not federal military pay policy, governs the consideration of claims for relief from repayment of a salary overpayment received by a member of the Military Department employed on state active duty.

ANALYSIS

The present question concerning a salary overpayment to a National Guard officer has arisen out of the following factual situation: An Air National Guard officer on state active duty with the Office of the Commanding General of the State Military Forces (see Mil. & Vet. Code §§ 52, 160, 160.5) had occasion to fly military aircraft in the course of his duties and received flight pay for such activities pursuant to the pertinent United States Air Force pay schedules. (Mil. & Vet. Code § 320 provides that "[o]fficers . . . on active duty in the service of the State shall receive the same pay and allowances as officers of similar grade in the United States [armed forces]. . . .") In 1974, the federal government modified the flight pay rates to provide for periodic reductions in the rate of flight pay after one had completed 18 years of service and for the termination of such pay after 25 years of service. The state personnel responsible for the calculation and payment of the officers salary failed to notice this change in the federal regulations governing flight pay rates and, thus, erroneously continued the officer's flight pay at the full rate, even though the officer had completed 19 years of service at the time of the change in rates and had completed 25 years of service a few months before the error was discovered.

During the six-year period between the change in the flight pay rates and the discovery of such change, the overpayments had accumulated to ever $3,000.00. The state now seeks to recover from the officer the amount of such overpayment. ("[A] public officer may only collect and retain such compensation as is specifically provided by law, and that any money paid by a governmental agency without authority of law may be recovered from such officer," (*County of San Diego* v. *Milotz* (1956) 46 Cal. 2d 761,767; see also *Aebli* v. *Board of Education* (1944) 62 Cal. App. 2d 706, 752–729).

Federal Statutes and regulations specifically provide that where the federal government has a claim against a member of the armed forces arising our of an erroneous overpayment of salary or allowances, such claim may be waived by the appropriate official in situations where the collection of such claim "would be against equity and good conscience and not in the best interest of the United States," and where there is no indication of "fraud, misrepresentation, fault, or lack of good faith" on the part of the member receiving the overpayment. (10 U.S.C.A. § 2774; 32 U.S.C.A. § 716; 4 C.F.R. § 91.4, 91.5 (1981).)

Under state law the test is different. The factors of "equity and good conscience are not specified in connection with the determination of whether the state may waive a claim. With respect to the writing off of claims possessed by the state, Government Code section 13940 provides:

"Any state agency or employee charged by law with the collection of any state taxes, licenses, fees, or money owing to the state for any reason, which is due and payable, may be discharged by the board [of Control] from accountability for the collection of the taxes, licenses, fees, or money if it is uncollectible or the amount does not justify the cost of collection."

In Government Code section 13942 it is further provided that:

"The controller shall audit the applications [for discharge from accountability] and recommend to the board an order discharging the applicant from further accountability for collection, and authorizing the applicant to close its books on that item, if it determines:

"(a) That the matters contained in the application are correct.

"(b) That no credit exists against which the debt can be offset.

"(c) That collection is improbable for any reason.

"(d) That the cost of recovery does not justify the collection.

"(e) For items which exceed the monetary jurisdiction of the small claims court, the Attorney General has advised in writing that collection is not justified by the cost or is improbable for any reason.

Thus the controlling factors under state law are basically the probability and the cost of collection. For purposes of this opinion we assume the overpayment in question gives rise to a claim that satisfies the standards of "equity and good conscience" required for a waiver under the federal statutes and regulations, but does not satisfy the criteria of uncollectibility or excessive cost of collection required for a discharge from accountability under state law. Thus the question is: which law controls with respect to the relief from the state's claim for a refund of a National Guard wage overpayment, the federal law or the state law?

Of primary relevance to this question is section 101 of the Military and Veterans Code which provides:

"All acts of the Congress of the United States relating to the control, administration, and government of the Army of the United States and the United States Air Force and relating to the control, administration, and

> government of the United States Navy, and all rules and regulations adopted by the United States for the government of the National Guard and Naval Reserve or Naval Militia, *so far as the same are not inconsistent with the rights reserved to this State and guaranteed under the Constitution of this State*, constitute the rules and regulations for the government of the militia." (Emphasis added; see also Mil. & Vet. Code § 100 which provides: "The intent of [the Military and Veterans] code is to conform to all acts and regulations of the United States affecting the same subjects, and all provisions of this code shall be construed to effect this purpose.")

Thus, to the extent consistent with the rights of this state, Military and Veterans Code section 101 purports to incorporate into state law federal law relating to the control of the military forces. (58 Ops. Cal. Atty. Gen. 144, 145 (1975).) This provision, however, was given a somewhat circumscribed construction in 22 Ops. Cal. Atty. Gen. 15 (1953). In that opinion we viewed Military and Veterans Code section 101 as generally being applicable to "federal statutes dealing with such matters as functions of command, military organization and administration" and that federal laws "pertaining to the individual rights, privileges and benefits of members of the regular military establishment and of reserve components on federal duty, are (nod part of the laws for the control and administration of the Armed Forces which section 101 intends to import into California law and to make applicable to National Guardsmen who are in State service." (*Id*. at p. 16; see also Atty. Gen. Unpub. Opn. IL 65–124 (1965).) So viewed, section 101 of the Military and Veterans Code would not engender an incorporation of federal law relating to the government's waiver of claims arising from the overpayment of pay or allowances to servicemen since such federal law relates merely to individual rights and benefits of servicemen as opposed to matters affecting the function of the military organization generally However, such a limiting construction of section 101 of the Military and Veterans Code is subject to some question in view of *Santin* v. *Cranston* (1967) 250 Cal. App. 2d 438, where the court considered that section to be one of the statutes pertinent to the inquiry of whether federal statutes governing military retirement pensions are applicable to the retirement rights of individual members of the National Guard (*Id*. at pp. 440–441 fn. 2, 442.) Similarly, in 49 Ops. Cal. Atty. Gen. 13, 15 (1967), this office found that section and section 100 of the Military and Veterans Code to be determinative regarding the question of whether federal law governing the computation of military service retirement credits is applicable to the computation of such credits in connection with retirement from active state military service. (See also 6 Ops. Cal. Atty. Gen. 272, 273 (1945) citing section 101 of the Military and Veterans Code in connection with the conclusion that travel allowances for State Guard personnel must conform to federal standards.)

In view of these authorities applying Military and Veterans Code section 101 to situations involving individual rights and interests, we can no longer conclude that merely because a federal law delineates individual rights and interests of military personnel such a federal law is beyond the scope of section 101 of the Military and Veterans Code. It is thus our view that relief from a claim for a refund of overpayment of military pay is a matter "relating to the control, administration, and government" of the armed forces within the meaning of Military and Veterans Code section 101. But we note that, by its terms, section 101 is operative only as to federal laws that "are not inconsistent with the rights reserved to this State and guaranteed under the Constitution of this State. . . ." Thus, even though relief from salary overpayment claims would be within the subject matter of section 101, that section would incorporate the federal law governing such claims only if such federal law is "not inconsistent" with pertinent state law.

Here we note that while federal military pay rates are expressly incorporated into state law (see Mil & Vet. Code § 320), there is no such express incorporation of federal provisions relating to relief from claims based upon overpayment of military pay. Accordingly, it must be ascertained whether there is an inconsistency between the federal and state laws concerning relief from overpayment claims before it can be determined if Military and Veterans Code section 101 incorporates such federal law into state law. (See 58 Ops. Cal. Atty. Gen. 144, *supra*, at p. 145; 11 Ops. Cal. Atty. Gen. 253, 262 (1948).) We thus examine the applicable state law in this light.

We have noted above that the authorization to forego the collection of money owed to the state is conditioned by the pertinent state statutes upon several specifically enumerated criteria relating to the ability to collect upon the claim, and to the cost effectiveness of such collection. (Gov. Code §§ 13940, 13942.) As already indicated, "equity and good conscience" are not, as they are in the federal law, among such enumerated criteria. The implication that ordinarily arises from such a specific enumeration is that criteria not included in that enumeration were not intended to give rise to the statute's operation. As stated in *Capistrano Union High School Dist.* v. *Capistrano Beach Acreage Co.* (1961) 188 Cal. App. 2d 612, 617: "A 'familiar rule of construction is that where a statute enumerates things upon which it is to operate it is to be construed as excluding from its effect all those not expressly mentioned." ' (*Accord*, *People* v. *Mancha* (1974) 39 Cal. App. 3d 703, 713.)

The implication that the Legislature did not intend to include "equity and good conscience" as a basis for the writing off of state claims arising from wage or benefit overpayments is intensified by the fact that in two analogous situations, the overpayment of unemployment compensation and the overpayment of disability compensation, the Legislature has expressly included "equity and good conscience" as a basis for excusing

the obligation to repay the overpayment. (*Gilles* v. *Department of Human Resources Development* (1974) 11 Cal. 3d 313, 322–323.) With respect to unemployment compensation, section 1375 of the Unemployment Insurance Code provides:

> "Any person who is overpaid any amount as benefits under this part is liable for the amount overpaid unless:
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> "(a) The overpayment was not due to fraud, misrepresentation or wilful nondisclosure on the part of the recipient, and
>
> "(b) The overpayment was received without fault on the part of the recipient, and its recovery would be against *equity and good conscience*."

(Emphasis added. Section 2735 of the Unemployment Insurance Code contains the identical provisions in reference to disability compensation.)

"Where a statute on a particular subject omits a particular provision, the inclusion of such a provision in another statute concerning a related matter indicates an intent that the provision is not applicable to the statute from which it was omitted." (*Marsh* v. *Edwards Theatres Circuit, Inc.* (1976) 64 Cal. App. 3d 881, 891; *accord*, *Fogarty* v. *Superior Court* (1981) 117 Cal. App. 3d 316, 320.)

Consequently, because "equity and good conscience" were expressly included by the Legislature among the criteria applicable to waiving recovery of both unemployment and disability compensation overpayments, but were omitted from those criteria applicable to waiving recovery of wage overpayments, it can reasonably be concluded that if the collection of a state claim based upon a salary overpayment is not improbable and the cost of such collection is not excessive then Government Code sections 13940 and 13942 do not permit the state to refrain from recovering such over-payments even though collection might be "against equity and good conscience."

This construction of state law is consistent with the congressional interpretation of federal law governing the recovery of salary overpayments to members of the armed forces as it was prior to the enactment of the two statutes authorizing the consideration of "equity and good conscience" in connection with such recovery claims. (10 U.S.C.A. § 2774 and 32 U.S.C.A. § 716.) Such congressional interpretation is reflected in Senate Report No. 92-1165 (1972 U.S. Code Cong. & Admin. News, at pp. 3453 *et seq*.) submitted to Congress by the Senate Judiciary Committee in connection with Congress consideration of those two statutes. In this committee report in support of the proposed legislation it was stated:

"The committee recognizes that as a practical matter, erroneous payments cannot be eliminated entirely. The problem is that under current laws and regulations, with limited exceptions, the head of an agency is required to collect all claims arising from erroneous payments made to members of the uniformed services *regardless of the circumstances or equities of the matter*.

"Under current law, the Secretary concerned may remit indebtedness of an enlisted member of a uniformed service on active duty when he considers it to be in the best interest of the United States (10 U.S.C. §§ 4837(d), 6161, 9837(d), qnd [sic] 14 U.S.C. § 461). The Secretaries concerned may also waive the recovery of erroneous payments made under the Dependents Assistance Act of 1950 (50 U.S.C. App. § 2213), and erroneous payments made in the administration of the pay account of members in a missing status (37 U.S.C. § 556(g)). The authority vested in the Secretaries concerned by these statutes is exercised with extreme care, each case being considered on its own merits. The Secretarial authority in these laws is limited, generally, to erroneous payments made to enlisted members on active duty. This represents a small small [sic] percentage of the uniformed services population who may be administratively relieved of liability to repay erroneous payments. For as has been noted, the majority of members, former members, and retired members, as well as members of the reserve components and members of the National Guard, *there is no authority to administratively relieve them of liability to repay erroneous payments regardless of the circumstances involved*." (Emphasis added; 1972 U.S. Code Cong. & Admin. News, at pp. 3460–3461.)

Thus, prior to the enactment of those federal statutes which expressly permitted the waiver of claims on the basis of "equity and good conscience," a waiver on such basis was considered to be unauthorized.

Similarly, it is our opinion that, absent state legislation expressly designating "equity and good conscience" as a basis for refraining from the recovery of salary overpayments, state law does not permit the state to relinquish its right of recovery on that basis. For this reason federal law is inconsistent with "the rights reserved to this State and guaranteed under the Constitution of this State."[1] Accordingly, by virtue of the limiting

[1]The right of the state to limit the authority of its agents to refrain from recovering money erroneously paid by the state, a right which the Legislature has reserved by the provisions of Government Code sections 13940 and 13942, is guaranteed by article IV, section 12(e) of the state constitution which vests in the Legislature the authority to "control the submission, approval, and enforcement of budgets and the filing of

clause in Military and Veterans Code section 505, the federal rules governing recovery of salary overpayments from members of the military would not be operative as part of the state law governing this matter.

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claims for all State agencies." (See 54 Ops. Cal. Atty. Gen. 259, 260–261 (1971) noting that state military pay is financed by appropriations in the state budget. See also 14 Ops. Cal. Atty. Gen. 194, 195 (1949) and see *Stanson* v. *Mott* (1976) 17 Cal. 3d 206, 213, declaring "the general principle that expenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment.")