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*Civ. Rev.  
D. Puritz*

**DECISION**



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

**FILE: B-190643**

**DATE: July 6, 1978**

**MATTER OF: Vivian J. Lucas - Waiver of overpayment**

**DIGEST:** Employee who received excess salary payments for a year following her reinstatement to career position may not be granted waiver of debt on the basis of her contention that she thought the excess pay somehow properly represented "saved" pay or continued severance payments made incident to her previous employment and involuntary separation, since upon reinstatement she was given written notification of her pay entitlements and was at fault in failing to make prompt inquiry concerning the correctness of her pay after she began receiving a salary which exceeded those entitlements.

This action concerns the appeal of Ms. Vivian J. Lucas of the disallowance by our Claims Division of her application for waiver of the claim by the United States against her resulting from an overpayment of basic compensation in the amount of \$662.75. The overpayment was made to Ms. Lucas during the period from February 19, 1974, through February 1, 1975, while she was an employee of the Department of Health, Education, and Welfare (HEW). She requested waiver of the claim under the provisions of 5 U. S. C. § 5584.

The records submitted in this matter indicate that Ms. Lucas began her career as a Federal civil servant in the year 1950 and that in 1973 she was serving as a Statistical Assistant, grade GS-11, step 6, with the HEW Tuberculosis Research Section at Bethesda, Maryland. By letter dated March 14, 1973, Ms. Lucas was notified that the Tuberculosis Research Section was to be relocated in Atlanta, Georgia, on June 10, 1973, and that if she transferred she would be entitled to the same position, series, and grade. However, if she did not transfer and could not be placed in other Federal or private employment she would be entitled to severance pay at grade GS-11, step 6, salary for 26 pay periods beginning June 10, 1973. Ms. Lucas declined the transfer offer and began drawing severance pay in June 1973 following her separation at that time.

Effective February 19, 1974, Ms. Lucas was reinstated to a Career-Appointment as a Statistical Assistant grade GS-9, step 10,

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with the HEW Bureau of Medical Services, Data Systems Branch, at Hyattsville, Maryland. The Standard Form 50 (Notification of Personnel Action) effecting this appointment indicated that this involved a reduction in salary and grade, and the notification also contained the following remarks: "SEVERANCE PAY DISCONTINUED, HAS RECEIVED 35 WEEKS SEVERANCE PAY."

Although her salary was reduced by the reinstatement action, the payroll office continued to pay her at her old salary rate of grade GS-11, step 6. It is reported that the error was discovered by an Equal Employment Opportunity Officer on or about December 6, 1974, during a discussion with Ms. Lucas regarding her interest in obtaining a promotion. Subsequently, an audit of her payroll account was made and the error was corrected in the pay period ending February 15, 1975. It was determined that Ms. Lucas had been overpaid a total of \$662.75.

In the original application for waiver and the accompanying HEW administrative report on the matter, Ms. Lucas indicated that between February 1974 and February 1975 she realized that she was being paid a higher salary than was authorized for an employee in grade GS-3, step 10, but at the time thought she was fully entitled to the additional monies she received. She explained that she had previously been told she would receive severance pay for 2 years. She was not aware that her severance pay would be discontinued upon her reappointment and had not noticed the remarks in the Standard Form 50 concerning the termination of her severance pay. She also assumed that for a 2-year period an employee if reduced in grade would continue to receive an equivalent salary of the higher grade. Ms. Lucas also stated that had she been aware that she would be required to accept a salary less than the amount of her severance pay, she would not have accepted the position; rather she would have waited until the severance pay was discontinued before seeking employment. It was suggested that she was entitled to a waiver for the reason that the administrative error occurred through no fault of her own, and she was not aware that the error had been made.

Our Claims Division denied the application for waiver, however, essentially for the reason that Ms. Lucas had been furnished pay and personnel records enabling her to verify the accuracy of her pay; that employees so situated have a duty to notice and report any errors in their pay; and that Ms. Lucas' failure to examine the

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recross and report the error placed her in the position of being at least partially at fault in the matter.

In the appeal of that determination, it is now contended that prior to Ms. Lucas' separation from the HEW Tuberculosis Research Section in June 1973 she was told that if she failed to relocate to Atlanta, Georgia, she would have two options: (1) she could be placed in another Federal position and would be entitled to 2 years saved pay in the event it involved a lower grade level; or (2) if she could not be placed in other employment she would receive 26 pay periods of severance pay beginning June 10, 1973. She now indicates she realized that her severance pay would cease upon her reemployment, as indicated on the February 1974 Standard Form 50, but she believed upon reinstatement that she was entitled to her former rate of pay in accord with what she thought was previously explained to her as "two-years saved pay." It is suggested that Ms. Lucas' entitlements were never properly and fully explained to her, and she states, "The error would have been detected earlier had anyone been interested in my welfare." It is contended that since Ms. Lucas was misadvised as to her entitlements to "severance" and "saved" pay, she had no reason to suspect she was being overpaid, was in no way at fault in the matter, and is therefore entitled to have the overpayment waived.

Subsection 5584(a) of title 5, United States Code (Supp. IV, 1974), 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 an employee of an agency, the collection of which "would be against equity and good conscience and not in the best interests of the United States," may be waived in whole or in part. Subsection 5584(b) further provides that the Comptroller General or the head of the agency, 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 employee or any other person having an interest in obtaining a waiver of the claim;"

Implementing the statutory provision cited above, section 91.5 of title 4, Code of Federal Regulations (1977), provides in pertinent part, for waiver of an erroneous payment whenever:

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"(c) Collection action under the claim would be against equity and good conscience and not in the best interests of the United States. Generally these criteria will be met by a finding that the erroneous payment of pay or allowances occurred through administrative error and that there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee or member or any other person having an interest in obtaining a waiver of the claim. Any significant unexplained increase in pay or allowances which would require a reasonable person to make inquiry concerning the correctness of his pay or allowances, ordinarily would preclude a waiver when the employee or member fails to bring the matter to the attention of appropriate officials. Waiver of overpayments of pay and allowances under this standard necessarily must depend upon the facts existing in the particular case.  
\* \* \*"

We have held that this standard applies not only to unexplained increases in pay, but also to receipt of an initial salary at a rate higher than expected and to continued receipt of the same salary when a reduction has been effected. Matter of Max R. Walton, B-189691, November 1, 1977. We have also expressed the view that as a general rule an employee is not without fault when, by reason of his position, experience, knowledge, or service history, he should have been aware of an overpayment and taken corrective action. Matter of Jack M. Bernstein, B-187636, March 2, 1977.

In the present case, the employee knew she was being paid more than her authorized GS-9, step 10, salary between February 1974 and February 1975. She explains that at the time she believed that she was entitled to a higher salary as a matter of "saved" pay or continued "severance" pay. The question presented is whether such belief was reasonable under the circumstances, or whether the circumstances would have required a reasonable employee of her experience to make inquiry concerning the correctness of her pay.

Severance pay is authorized by 5 U. S. C. 5595 (1970), which generally provides that an employee who has worked for at least 1 year, who is not eligible for immediate retirement, and who is

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involuntarily separated for reasons other than misconduct, delinquency, or inefficiency is entitled to severance pay in regular pay periods, the total amount not to exceed 1 year's pay at the rate received immediately before separation. If the employee is reemployed by the Federal Government before the end of the period covered by payments of severance pay, the payments are discontinued and the service represented by the unexpired portion of the period is reccredited to the employee for use in any later computations of severance pay.

The authority for salary retention benefits incident to reductions in grade--or for so-called "saved pay"--is contained in 5 U. S. C. 5337 (1970). Under this provision of statute, certain qualified employees who are reduced in grade are entitled to receive basic pay at the rate to which they were entitled immediately before the reduction in grade. A qualified employee remains in this "saved pay" status for a period of 2 years from the effective date of the reduction in grade, provided, among other things, the employee continues in the same agency without a break in service of 1 workday or more. Since Ms. Lucas was separated from her position from HEW for more than 1 workday she was not entitled to saved pay.

When Ms. Lucas initially applied for a waiver in this matter, she in essence explained she did not realize she was being overpaid because she was not aware that her severance pay had been discontinued when she returned to work in February 1974. As was noted by our Claims Division, she received written notice upon returning to work that her severance payments had been discontinued and that she was being reemployed at a reduced salary.

On appeal Ms. Lucas contends that she knew her severance payments would be discontinued when she returned to work in February 1974, but was misled to believe that she would retain her old GS-11, step 6, salary as a matter of "saved" pay to which she was actually not entitled due to her break in service. This is somewhat inconsistent with her earlier explanation and is not supported by the documentary evidence submitted, particularly the February 1974 Standard Form 50 which gave her notice that she was being reinstated at a lower grade and salary. It may be that Ms. Lucas was confused about her pay entitlements when she was reinstated in February 1974, but there is no indication that she was ever actually misled or given

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erroneous information in the matter. If Ms. Lucas was actually confused about or did not fully understand her pay entitlements when she was reinstated, she could easily have made an inquiry purely in the interest of her own welfare. This she did not do.

We find that Ms. Lucas was given written notice of her new grade and salary when she was reemployed in February 1974, and that she was subsequently through administrative error paid at a rate higher than the indicated salary. We find that these circumstances would have required a reasonable employee of her experience to make prompt inquiry concerning the correctness of her pay, but that she failed to make such inquiry. We further find no indication that Ms. Lucas was ever furnished with erroneous information by Government personnel or accounting officers concerning her entitlement to severance or saved pay. We therefore conclude that Ms. Lucas was at fault in accepting excessive salary payments without promptly inquiring as to the correctness of those payments. Hence, we are precluded from giving favorable consideration to her application for waiver.

Accordingly, the application for waiver is denied, and the settlement of our Claims Division is sustained.

  
Deputy Comptroller General  
of the United States