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DECISION

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

FILE: B-195472

DATE: February 1, 1980

MATTER OF: Herbert H. Frye - [Waiver of Overpayment of Pay]

DIGEST: Employee was erroneously granted step increase to step 7 prior to completion of 104 weeks of service in step 6. Request for waiver under 5 U.S.C. § 5584 (1976) is denied since employee is not without fault in failing to question the increase under the circumstances.

This decision is in response to the appeal by Mr. Herbert H. Frye of our Claims Division determination denying his request for waiver of an erroneous overpayment of pay in the amount of \$1,060.80. The overpayment resulted from Mr. Frye being granted a within-grade increase prior to the completion of the prescribed waiting period between step increases.

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Mr. Frye, an employee of the U.S. Information Agency (now International Communication Agency), received a within-grade increase to grade GS-12, step 6, effective January 23, 1972, and subsequently received a within-grade increase to grade GS-12, step 7, effective January 21, 1973. This latter action was erroneous since the minimum waiting period for increases from step 6 to step 7 is 104 weeks rather than 52 weeks. See 5 U.S.C. § 5335(a)(2) (1970). This error was not discovered until 1976, and the resulting overpayment totaled \$1,060.80.

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By letter dated February 28, 1979, our Claims Division denied Mr. Frye's request for waiver of the overpayment on the grounds that as a reasonable employee, Mr. Frye should have questioned this within-grade increase. The Claims Division held that since Mr. Frye did not question the increase, he is at least partially at fault in the matter, and therefore is not entitled to waiver of the overpayment.

On appeal Mr. Frye argues that our Office is, in effect, holding him responsible for the proper and correct performance of duties by his agency's personnel office. He also argues that in his 38 years of civilian and military service he never knew anyone who questioned the legality of a promotion or raise in pay. Mr. Frye contends that if our Office had rendered its decision in

overpay

take out military pay

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Payroll records

employee promotion Administrator errors

Overpayment collection was via salary increase

a more timely manner, he could have repaid the overpayment from his salary instead of his limited retirement annuity. Finally, Mr. Frye requests that, if full waiver cannot be granted, the amount of the overpayment be reduced by \$250 or \$300, an amount representing withholding for Federal income taxes.

Under the authority of 5 U.S.C. § 5584 (1976) a claim arising out of an erroneous payment of pay or allowances may be waived if collection would be against equity and good conscience and not in the best interests of the United States. This authority may not be exercised if 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. 5 U.S.C. § 5584(b)(1). The standards for waiver, which are contained in 4 C.F.R. Part 91, provide, in pertinent part, that a claim may be waived whenever:

"(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.* * *" 4 C.F.R. § 91.5(c).

In the present case, we note that Mr. Frye accepted a step increase to step 7 after a 1-year waiting period even though his two prior step increases to step 5 and 6 occurred after 2-year intervals. The agency report in this case states that Mr. Frye had a long service history in responsible positions with the Government and that he was provided copies of pay change slips which

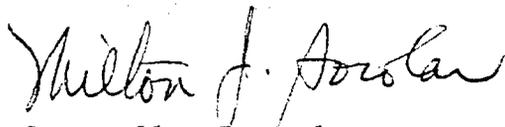
indicated the nature of the action taken. The agency report concludes, and we agree, that a reasonable and prudent employee should be aware of the waiting periods between step increases and should make an inquiry about an increase not in accord with those waiting periods. In this connection, we have long held that if under the circumstances a reasonable person would have made inquiry as to the correctness of a payment, but the employee did not, then the employee is not free from fault and the claim against him may not be waived. See L. Mitchell Dick, B-192283, November 15, 1978, and decisions cited therein.

We have also held that the employing agency has a responsibility to prepare proper payrolls and the duty to take steps to insure that this responsibility is properly carried out. The employee, on the other hand, has the responsibility of verifying through the payroll documents he receives the correctness of the payments and mitigating an agency's error by making an inquiry with the appropriate officials. See Dick, supra. Thus, we cannot say that under the circumstances of the present case collection of the claim would be against equity and good conscience.

Although Mr. Frye's financial circumstances may have changed during the lengthy time taken to decide the matter of his request for waiver, that in itself cannot serve as a basis for waiver of his indebtedness. His current financial situation can, however, be taken into consideration in arranging a reasonable repayment schedule for the amount due.

Finally, Mr. Frye requests that, if we cannot waive the entire debt, we reduce the amount of the overpayment by that amount attributable to Federal income tax withholding. However, under the provisions of Part 3 of the Treasury Fiscal Requirements Manual, section 4020.20, any withholding errors which occur in a prior calendar year or which are discovered after the employee is no longer on the payroll are to be settled by the employee filing a tax return. Thus, Mr. Frye may pursue this matter further with the Internal Revenue Service.

Accordingly, we sustain the Claims Division denial of waiver of the overpayment.



For The Comptroller General
of the United States