

DECISION

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

FILE: B-198573

DATE: February 13, 1981

MATTER OF: Bobby R. Ganus - [Request for Waiver
of Overpayment of Pay]

DIGEST: Employee erroneously repromoted to GS-13, step 7, was subsequently demoted to GS-12, step 10. Thereafter he again was erroneously repromoted to GS-13, step 7. It was determined that initial repromotion should have been to GS-13, step 6, and he was so advised. Agency and Claims Group grant of waiver to date of letter advising employee of error is extended to allow time for knowledge of error to reach employee overseas. However, for overpayments beyond that time, waiver is denied based on record showing employee knew step in grade upon second repromotion was similarly improper.

The issue presented is whether an employee is entitled to a larger waiver of an overpayment of compensation than that previously granted by our Claims Group. For the reasons stated below, another portion may be waived, but the majority of the amount that was overpaid must be refunded.

Mr. Bobby R. Ganus is an employee of the Department of the Army, Corps of Engineers. Prior to August 1975 he was employed with the Corps at Huntsville, Alabama, at grade GS-13, step 6. On August 28, 1975, as part of a reduction in force (RIF), he was demoted to grade GS-12, step 10. On March 27, 1977, he was repromoted to grade GS-13, step 7. On October 16, 1977, he accepted a demotion to grade GS-12, step 10, so that he could transfer to a Corps office in Saudi Arabia. While in Saudi Arabia he was repromoted, on March 4, 1978, to grade GS-13. Because his pay had previously been set at step 7 of that grade, his pay was set at GS-13, step 7, at the time of his second repromotion.

By letter of August 4, 1978, which was received by Mr. Ganus in Saudi Arabia late the same month, he was advised that an error had been made in setting the step of the grade he held. The relevant parts of that letter are set out below:

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"1. This is to notify you that an error was made in setting your pay for a within grade increase that was given to you by the Huntsville Division either at the time of your repromotion or subsequent thereto. This resulted in an overpayment in salary to you by the US Government.

"2. Your within grade increase was given as if you had never been downgraded with retained pay and repromoted. It has been brought to our attention that, based on 43 CG Decisions 507 and 701, your repromotion should have been construed as an equivalent increase in compensation (regardless of whether there was any actual monetary increase) and a new waiting period for a within grade increase must begin upon the date of repromotion."

On January 8, 1979, he formally requested waiver of the overpayments. The overpayment for the first repromotion, from March 27 to October 16, 1977, in the amount of \$421.84 was waived by the Department of the Army. The overpayment for the second repromotion ran from the effective date of that promotion, March 4, 1978, to the date the error was finally corrected, March 31, 1979. The overpayment was in the gross amount of \$985.33 and net amount of \$928.04.

By letter Z-2711873-121 of January 21, 1980, our Claims Group granted waiver in the amount of \$129.12 out of the gross amount of \$985.33. The remainder was not waived on the grounds that as of August 4, 1978, Mr. Ganus knew that his pay was improper, that he had a duty to inquire and resolve the problems, and that, since he did not, he was partially at fault, which bars waiver.

In his request that the partial waiver be reconsidered, he details his efforts to ascertain his correct status. He then notes that the amount considered for waiver should be \$928.04, not \$985.33. We

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do not agree. Waiver is granted or denied as to the gross amount paid, not the net. Therefore, \$985.33 is the correct amount for consideration.

He next contends that August 4, 1978, was not an appropriate cut-off date since he did not receive the August 4 letter until near the end of that month. We concur on that point, and we will discuss exact dates below.

Finally, he contends that the Claims Group letter was incorrect in stating that he should have known that his pay was improper, because the August 4 letter only applied to the first repromotion. Mr. Ganus is correct in his statement that the August 4 letter had reference to the first repromotion. However, the file indicates that he, nonetheless, understood that both repromotions were tainted. In a letter of August 29, 1978, to our Claims Group, Mr. Ganus requested that the finding of improper step placement be overturned. That request was denied by Settlement Certificate Z-2711873, of October 16, 1978. In Mr. Ganus' letter, the scope of his apparent knowledge is set out:

"8. I did not want to leave the Huntsville Division but if I had been told that all my time spent in GS-13, Step 6 and in GS-12, Step 10 was wasted time, I would have accepted a position with the Mid East Division, in Berryville, Va. (in Italy at that time) or would have made every effort to transfer somewhere else prior to being demoted. I would now be in Step 8 instead of the Step 6 that I have been put back to. However, since not being told correctly, no effort was made to find a new position."

We believe that a fair reading of the above-quoted paragraph demonstrates that in August of 1978 Mr. Ganus knew that his second repromotion was also faulty, and that he had been overpaid since the date of that repromotion.

The authority to waive erroneous overpayments of pay and allowances is found in 5 U.S.C. § 5584.

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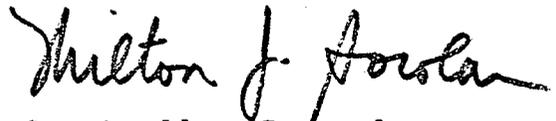
Subsection (b) of that section prohibits the exercise of waiver authority by the Comptroller General:

"(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. * * *"

Although there is no indication of fraud or misrepresentation on Mr. Ganus' part, we have consistently held that where the employee was aware of the overpayment when it occurred, a request for waiver will be denied. Acceptance of the overpayments with knowledge of their erroneous nature constitutes "lack of good faith" and waiver is prohibited by law. Matter of Marvin L. Peek, B-188803, June 15, 1977. This is true even when the employee raises questions concerning the correctness of his pay with the proper authorities and they fail to correct the error. Matter of John J. McCann, B-188181, June 24, 1977.

We believe that in this case Mr. Ganus must be held to have known that, at least beginning on the date of his letter quoted above, August 29, 1978, his pay was improper.

Since the August 4, 1978 letter was sent to Mr. Ganus at his duty station in Saudi Arabia we believe that the waiver granted by our Claims Group must be extended beyond August 4. Mr. Ganus states that he received the letter in late August. His letter to this Office is dated August 29, 1978. Since reference is made to the August 4 letter in his correspondence to us, we will extend waiver to payments made through August 29, 1978.



For the Comptroller General
of the United States