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DECISION



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

FILE: B-199800

DATE: August 12, 1981

MATTER OF: Clyde A. Finnell - Waiver of Erroneous
Overpayments - Living Quarters Allowances

DIGEST:

Employee received excess foreign living quarters allowances through administrative error. Though allowances owed the employee fluctuated, the employee should have been on notice of possible overpayment when he received allowance approximately 4 times the amount he had been receiving. Request for waiver is denied for all overpayments received after large overpayment since his failure to make an inquiry indicates that he was partially at fault. Waiver is granted for smaller overpayments made prior to large overpayment.

Mr. Clyde A. Finnell requests reconsideration of our Claims Group settlement dated May 2, 1980, (Z-2821533), concerning his request for waiver of erroneous payments of Living Quarters Allowance.

Mr. Finnell, a civilian employee, Department of the Army, Bremerhaven, Germany, received a Living Quarters Allowance (LQA) in addition to his compensation. The amount of LQA in which an employee is entitled to fluctuates due to changes in the value of the dollar and other cost of living factors.

The record in this case reveals that from May 1977 to May 1979 Mr. Finnell never received the correct amount for LQA. For some of the pay periods he received overpayments, and on other occasions, underpayments. From the pay period ending May 28, 1977, until October 29, 1977, Mr. Finnell received overpayments totalling \$173.88, an average of about \$14 a pay period. The next pay period he received an overpayment of \$104.37. The next 6 pay periods, ending February 4, 1978, he received overpayments totalling \$90.30, which averages out to \$15 per pay period. For the next 7 pay periods Mr. Finnell was underpaid a total of \$160.30. Then for the pay

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periods ending May 27 and June 10, 1978, Mr. Finnell received large overpayments of \$654.44 each pay period. The next 15 pay periods, until January 6, 1979, Mr. Finnell received overpayments totalling \$730.87 which comes to an average of \$48.72 per pay period. However in one of those pay periods, ending August 5, 1978, he received an overpayment of \$276.52 and for the period ending September 30, 1978, he was overpaid \$84.71. For the next 9 pay periods, Mr. Finnell was underpaid LQA a total of \$806.17, an average of \$89.57 per pay period. From May 1977 to May 12, 1979, Mr. Finnell was erroneously paid a total of \$2,408.30. During the same time period he was underpaid a total of \$966.47.

Mr. Finnell requested waiver of \$1,441.83 which is the difference of his underpayments subtracted from his overpayments. The U.S. Army Finance Center recommended that we grant waiver for the amount Mr. Finnell requested. Our Claims Group granted waiver of \$174.88 (should be \$173.88), which represented overpayments from May 28, 1977, to October 29, 1977. Our Claims Group refused to waive other overpayments because in the next pay period Mr. Finnell had received an overpayment of \$104.37 and our Claims Group held that the employee should have questioned his entitlement to that amount. Our Claims Group then reasoned that the Department of the Army presumably would have immediately discovered and corrected the errors.

The provision of law authorizing the waiver of claims of the United States against employees arising out of erroneous payments of pay, 5 U.S.C. § 5584 (1976), permits such waivers only when the collection of the erroneous payments would be against equity and good conscience and not in the best interests of the United States and only when there is no 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 the waiver. The regulations implementing 5 U.S.C. § 5584, contained in 4 C.F.R., chapter I, subchapter G, state in pertinent part:

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"* * * 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. * * *"

4 C.F.R. § 91.5(c). (1981).

We have consistently held that an employee has the responsibility to verify the correctness of the payments he receives, and where a reasonable person would have made an inquiry but the employee did not, then he is not free from fault, and the claim may not be waived. Edward A. Mike, B-191772, December 19, 1978; Cathy R. Mattingly, B-188804, July 1, 1977.

We have previously waived overpayment in cases where an employee's pay has fluctuated. However, the overpayments have been considerably less than those involved here. In Mrs. Norma E. Bisk, B-180454, October 18, 1974, we waived a series of overpayments in part because the employee's pay had fluctuated as a result of overtime work and the overpayments could have been reasonably attributed to overtime compensation. The overpayments had been \$8.65 per pay period. In B-172975, October 27, 1971, we waived total overpayment because the employee's pay had been erratic in the period just preceding that of the overpayments due to night differential hours, a general pay raise and Sunday premium pay. The overpayment had accumulated at a gross rate of \$14.89 per pay period. In Max R. Walton, B-189691, November 1, 1977, we waived overpayment because the employee's pay varied so greatly from one pay period to the next. The employee was a consultant who worked irregular hours. Nothing in the record before us

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indicates that Mr. Finnell worked on an irregular basis, and his failure to make inquiry about such large discrepancies indicates that he was partially at fault.

In Lee A. Kirsch, B-200295, April 28, 1981, we denied waiver since an employee was on notice of possible overpayment when he received foreign allowances approximately 3-1/2 times the amounts he had been receiving. The Kirsch case is similar to this case since both employees were receiving overseas allowances which fluctuated along with the value of the dollar.

Based on these cases, we agree with our Claims Group settlement granting waiver for overpayments received through the pay period ending October 29, 1977. However, we disagree with the Claims Group denial of waiver beginning with the pay period ending November 12, 1977, when Mr. Finnell received an overpayment of \$104.37. Although this overpayment was larger than the previous overpayments, based on the standards developed in the Kirsch case for fluctuating pay, we do not believe that it was sufficiently large to put the employee on notice that he received erroneous pay. In this regard, we also make note of the fact that when Mr. Finnell was later underpaid \$128.38, an amount greater than this overpayment, he did not inquire about his underpayment. We also must consider the fact that Mr. Finnell received the wrong payments every week. Therefore, we grant waiver for the \$104.37 overpayment made for the pay period ending November 12, 1977, and for overpayments received the next 6 pay periods totalling \$90.30.

For the pay period ending May 27, 1978, Mr. Finnell received an overpayment of \$654.44, which means he received an allowance which was approximately 4 times the amount he had been receiving. Clearly under these circumstances a reasonable person would make an inquiry concerning the correctness of his allowance. Since

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Mr. Finnell failed to make such inquiry, he was partially at fault and his request for waiver of this overpayment is denied. Also Mr. Finnell's request for waiver of overpayments made after May 27, 1978, is denied since he was partially at fault for not inquiring about the overpayments at that time.

In his appeal, Mr. Finnell argues that another employee, Ronald R. Hendrickson, also received overpayments during the same time period as he did and Mr. Hendrickson's request for waiver was granted for all the overpayments. An examination of Mr. Hendrickson's waiver application shows that the facts concerning the overpayment were different from Mr. Finnell's request for waiver. For example, Mr. Hendrickson did not receive any foreign allowance payment for 2 pay periods prior to receipt of 2 large overpayments. Thus, it was reasonable for him to assume that the payments were made to correct this error. Therefore, the decision concerning Mr. Hendrickson's request for waiver has no bearing on this decision.

Accordingly, we grant Mr. Finnell's request for waiver for overpayments made up to the pay period ending May 13, 1978, totalling \$368.55 under the authority of 5 U.S.C. § 5584. We deny his request for waiver for all overpayments made after May 13, 1978, totalling \$2,039.75.

Milton J. Fowler

Acting Comptroller General
of the United States