

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

27399

FILE: B-212361**DATE:** February 13, 1984**MATTER OF:** Alfred P. Feldman - Waiver of Overpayment
of Pay - Erroneous Within-Grade Increase**DIGEST:**

Employee was twice reduced in grade, due to several reductions in force, from a GS-13, step 8, to a GS-11, step 10. He was granted a retained salary rate at GS-13, step 8, for 2 years with a further extension due to a subsequent downgrade. Agency erroneously granted employee a within-grade increase at the end of the 3-year waiting period between GS-13, steps 8 and 9, although 5 C.F.R. § 531.515 (1976), provides that an employee with a retained rate is eligible for a within-grade increase only in the grade in which he is serving and only on the rate selected at the time of demotion. Employee was not at fault in accepting and retaining the overpayment of pay and collection is waived under the provisions of 5 U.S.C. § 5584 (1976), since employee may not reasonably be expected to have been aware of the regulation and effect of a reduction in force on the waiting period between step increases.

This decision is in response to an appeal by Mr. Alfred P. Feldman, a former civilian employee of the Walter Reed Army Medical Center, Department of the Army, from the settlement action by our Claims Group, Settlement Certificate Z-2805214, issued on January 11, 1980, which denied his request for waiver of the claim against him by the United States in the amount of \$655.20. The claim represents an overpayment of pay made to him by the granting of a within-grade increase after he was reduced in grade during a reduction in force. The basis for the settlement action was that, although Mr. Feldman may reasonably have been confused as to his entitlement to a periodic step increase after his reduction to a lower grade, by virtue of

his grade and experience he should have questioned his entitlement to such increase which occurred less than one year after he had accepted a reduction in grade to GS-11, step 10. Had he done so, presumably the error would have been discovered and corrected, thereby preventing the overpayment. Our Claims Group concluded that since Mr. Feldman failed to question the increase, he is at least partially at fault, which statutorily precludes waiver of the claim.

After review of the evidence of record, including the employee's letter of appeal, and based upon additional information obtained from officials at Walter Reed, we conclude that Mr. Feldman's waiver request may be granted.

Under the authority of 5 U.S.C. § 5584 (1976), a claim arising out of an erroneous payment of pay may be waived if collection would be against equity and good conscience and not in the best interests of the United States. However, 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. See also 4 C.F.R. Part 91. Our examination of the record does not disclose any indication of fraud, misrepresentation, or lack of good faith on the part of Mr. Feldman. The resolution of this claim therefore turns on the question of whether, as a reasonable person and as an employee of his grade, position, and experience, Mr. Feldman knew, or should have known, that he was not entitled to a within-grade increase less than a year after his reduction in grade.

The record discloses that Mr. Feldman's service computation date was October 10, 1960. He received a within-grade increase to GS-13, step 8, on June 23, 1974. Mr. Feldman was initially involved in a reduction in force on November 3, 1975, when he was reduced in position and grade from a Research Chemist, GS-13, step 8, to a Chemist, GS-12, step 10. He was granted a retained rate of pay of \$28,254 for 2 years under the provisions of 5 U.S.C. § 5337 (1970).

As the result of a second reduction in force at Walter Reed, effective July 11, 1976, he was reduced in grade from a Chemist, GS-12, step 10, to a Computer Specialist, GS-11, step 10. He was granted a retained salary rate of \$28,254 for an additional 2 year period, until July 1978. See 41 Comp. Gen. 764 (1962). However, the agency erroneously

granted Mr. Feldman a within-grade increase effective June 26, 1977, at the end of the normal 3-year waiting period between GS-13, steps 8 and 9. The overpayment occurred during the period from July 1977 to April 1978. The erroneous payments were first discovered in March 1978. Mr. Feldman was aware of the increase in his salary but assumed it to be a normal within-grade increase.

Section 5335, Title 5, United States Code, 1976, in effect during the period under consideration, provided that an employee, who has not reached the maximum rate of pay for the grade in which his position is placed, is entitled to a periodic step increase. The applicable regulatory provision, 5 C.F.R. § 531.515 (1976), provided that an employee with a retained rate was eligible for within-grade increases only in the grade in which he was serving and only on the rate selected at the time of demotion.

In regard to the requirement that there be no indication of fault on the part of the employee, our decisions have held that whether an employee who receives an erroneous payment is free from fault in the matter can only be determined by a careful analysis of all pertinent facts; not only those giving rise to the overpayment, but those indicating whether the employee reasonably could have been expected to have been aware that an error had been made. If under the circumstances involved, a reasonable person would have made inquiry as to the correctness of the payment and the employee involved did not, then, in our opinion, the employee could not be said to be free from fault in the matter and the claim against him should not be waived. 58 Comp. Gen. 721 (1979).

As a general rule, the decisions of this Office have held that an employee should be aware of the waiting periods between step increases and should make inquiry about an increase not in accord with those waiting periods. Herbert H. Frye, B-195472, February 1, 1980. However, we are unable to conclude that Mr. Feldman was at fault in accepting and retaining the overpayments of salary resulting from the erroneous within-grade increase. The record shows that the claimant received a step increase to GS-13, step 8, on June 23, 1974. Under normal circumstances he would have been entitled to a within-grade increase to GS-13, step 9, on June 26, 1977. Further, his retained pay was based on his GS-13, step 8, salary, and he received a pay increase on this amount on October 10, 1976. Thus, it was reasonable

for him to assume that he would also be entitled to a step increase, based on his retained pay, to GS-13, step 9.

Based upon the evidence of record, it appears that officials at Walter Reed, presumably knowledgeable of this area of personnel law, were not aware of the rule stated in 5 C.F.R. § 531.515, that an employee is eligible for within-grade increases only in the grade in which he is serving. Therefore, a within-grade increase was erroneously granted to Mr. Feldman on June 26, 1977, at the end of the normal 3-year interval between GS-13, steps 8 and 9. The question then arises: Should the employee be held to a higher standard of knowledge of the Federal pay structure, personnel laws and regulations, and the effect of a reduction in force on waiting periods than agency officials? The reply is in the negative.

While we are aware of Mr. Feldman's length of service and occupancy of positions of responsibility with the Federal Government, we are unable to conclude that he had any specialized knowledge of the Federal pay structure, personnel laws and regulations, and the effect of a reduction in force on waiting periods between within-grade increases, particularly the rule contained in 5 C.F.R. § 531.515, stated above. Therefore, Mr. Feldman could not reasonably be expected to have been aware of the effect of a reduction in force on the waiting period between step increases. Dominick A. Galante, B-198570, November 19, 1980; Robert L. Morton, 57 Comp. Gen. 646 (1978).

Accordingly, since there is no indication of fault on the part of Mr. Feldman in accepting and retaining the overpayment of salary in the amount of \$655.20, collection is waived under the provisions of 5 U.S.C. § 5584 (1976). The Settlement Certificate of January 11, 1980, issued by our Claims Group, which denied waiver of the overpayment of salary, is overruled.

Milton J. Acosta
for Comptroller General
of the United States