

DECISION

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

FILE: B-213539

DATE: November 20, 1984

MATTER OF: Angel F. Rivera - Deductions from Backpay -
Waiver of Erroneous Payments

DIGEST:

1. An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Retirement contributions which previously had been refunded to the employee were properly deducted from backpay because his retroactive reinstatement and receipt of backpay removed the legal basis for the refund. Net indebtedness resulting from deduction of the refund from backpay may not be waived by this Office under 5 U.S.C. § 5584, since the refund did not constitute an erroneous payment of "pay or allowances." Under 5 U.S.C. § 8346(b), OPM has sole authority to waive erroneous payments from the Civil Service Retirement Fund.
2. An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Deductions from backpay for payments of severance pay and a lump-sum leave payment resulted in a net indebtedness which is subject to waiver under 5 U.S.C. § 5584. Waiver is appropriate because, at the time the erroneous payments were made, the employee neither knew nor should have known that his separation was improper.

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3. An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. The employee must pay retirement fund contributions for the period of the separation in order to receive service credit for that period. Although backpay awarded to the employee is insufficient to cover the amount of contributions he must pay, collection of that amount is not subject to waiver under 5 U.S.C. § 5584 since there has been no erroneous payment of pay.

Mr. Angel F. Rivera, a former employee of the Community Services Administration and the Department of Health and Human Services, requests waiver of his indebtedness of \$42,038.04. This indebtedness resulted from the reduction of Mr. Rivera's \$21,400 backpay award by deductions of \$34,092 for refunded retirement contributions, \$20,235.60 for payments of severance pay, \$7,612.44 for a lump-sum payment for annual leave, and \$1,497.96 for retirement contributions covering the period of his improper separation from Government service. Our Claims Group forwarded Mr. Rivera's waiver request for our consideration, posing an additional question as to whether refunded retirement contributions were properly deducted from Mr. Rivera's backpay.

We hold that retirement contributions refunded to Mr. Rivera upon his improper separation must be deducted from backpay, since his retroactive reinstatement and receipt of backpay under 5 U.S.C. § 5596 (1982) removed the legal basis for the refund. The amount by which the refunded retirement contributions exceed backpay is subject to waiver by the Office of Personnel Management (OPM) under 5 U.S.C. § 8346(b) (1982), as implemented by 5 C.F.R. Part 831 (1984). Mr. Rivera's indebtedness for severance pay and the lump-sum payment for annual leave may be waived under 5 U.S.C. § 5584 (1982), since there is no indication that he was at fault in accepting the erroneous payments.

Collection of retirement fund contributions covering the period of Mr. Rivera's separation is not subject to waiver under 5 U.S.C. §§ 5584 or 8346(b), since his indebtedness for the contributions did not result from an erroneous payment.

BACKGROUND

Effective September 30, 1981, Mr. Rivera was separated from his position with the Community Services Administration (CSA) through a reduction-in-force. After his separation he withdrew his retirement contributions in the amount of \$34,092, received a lump-sum payment for annual leave in the amount of \$7,612.44, and began receiving payments of severance pay which eventually amounted to \$20,235.60.

Mr. Rivera was one of approximately 750 employees who were separated from CSA in response to the Omnibus Budget Reconciliation Act of 1981 ("Budget Act"), Public Law 97-35, August 13, 1981, 95 Stat. 357, which abolished CSA effective September 30, 1981. On October 1, 1981, the Department of Health and Human Services (HHS) assumed responsibility for administering the programs which previously had been administered by CSA.

In anticipation of CSA's termination, the National Council of CSA Locals, American Federation of Government Employees, filed suit in the U.S. District Court for the District of Columbia in September 1981. The union argued that the Budget Act transferred the functions of CSA to HHS, and that, pursuant to the Veterans Preference Act of 1944, as amended, 5 U.S.C. § 3503 (1982), employees of CSA should be given preference in HHS' selection of personnel to administer the transferred programs. In National Council of CSA Locals v. Schweiker, 526 F. Supp. 861 (D.D.C. 1981), the district court ordered HHS to determine whether there actually had been a transfer of functions from CSA to HHS. The court stated that, if HHS determined that there had been a transfer of functions, it would be required to afford former CSA employees preference in accordance with the requirements of the Veterans Preference Act.

Pursuant to the district court's order in National Council of CSA Locals v. Schweiker, above, HHS conducted a

review comparing the old functions of CSA and the new functions assumed by HHS. The agency found that the functions of CSA had been transferred to HHS, and that former employees of CSA were eligible for appointment to the transferred positions. Consequently, in November 1981, HHS notified former CSA employees that they would be considered for positions in HHS based on their retention standing and qualifications. Ultimately, HHS hired 150 of the 750 employees who had been separated from CSA, including Mr. Rivera.

Mr. Rivera was reinstated by HHS effective February 26, 1982. Like the other former CSA employees who had been appointed to positions in HHS, his appointment was made retroactive to October 1, 1981, with backpay. The HHS reccredited Mr. Rivera's leave account with annual leave covered by the \$7,612.44 lump-sum payment he had received, and, in accordance with Federal Personnel Manual (FPM) Letter 550-76, July 15, 1982, deducted the following items from his \$21,400 backpay award: (1) retirement contributions which previously had been refunded to Mr. Rivera, in the amount of \$34,092; (2) payments of severance pay amounting to \$20,235.60; (3) the lump-sum leave payment in the amount of \$7,612.44; and (4) unpaid retirement contributions for the period of Mr. Rivera's separation, amounting to \$1,497.96. Based on its backpay computation, HHS determined that Mr. Rivera was indebted to the Government for \$42,038.04.

Shortly after his appointment to a position in HHS, Mr. Rivera suffered a series of heart attacks and used most of the annual leave which had been reccredited to him. Effective November 12, 1982, Mr. Rivera retired from Government service on account of disability. The agency collected Mr. Rivera's last two paychecks in the respective amounts of \$1,162.73 and \$1,369.76, and retained a lump-sum payment of \$165.84 for his unused annual leave.

The HHS forwarded Mr. Rivera's request for waiver of his indebtedness for \$42,038.04 to our Claims Group, with the recommendation that it not be waived. Specifically, the agency states that collection of the lump-sum leave payment paid to Mr. Rivera upon his separation would not be against "equity" and "good conscience" within the meaning of 5 U.S.C. § 5584, since he was reccredited with annual

leave covered by the lump-sum payment. Additionally, HHS maintains that our waiver standards set forth in 4 C.F.R. § 91.5(c) (1984) are not appropriate for application where deductions from backpay result in a net indebtedness, since those standards permit waiver if there is no indication that the employee knew or should have known that he was being overpaid.

Our Claims Group questions whether waiver is appropriate in this case, suggesting that Mr. Rivera may have known that he would be reinstated when he withdrew his retirement contributions and received a lump-sum payment for annual leave. In this regard, our Claims Group notes that the action in National Council of CSA Locals v. Schweiker, cited above, was pending at the time of Mr. Rivera's separation from CSA. Additionally, our Claims Group questions whether HHS properly deducted refunded retirement contributions from Mr. Rivera's backpay award.

The two issues presented for our consideration are: (1) whether HHS properly deducted refunded retirement contributions from Mr. Rivera's backpay; and (2) whether Mr. Rivera's indebtedness for the amount by which deductions from backpay exceed his backpay award may be waived under 5 U.S.C. § 5584 (1982). These issues are addressed below.

DEDUCTION OF REFUNDED RETIREMENT
CONTRIBUTIONS FROM BACKPAY

The Back Pay Act of 1966, as amended, 5 U.S.C. § 5596 (1982), entitles an employee to backpay when he undergoes an unjustified or unwarranted personnel action which results in the withdrawal or reduction of all or part of his pay. If, as a result of the application of section 5596, an employee is entitled to backpay, he is, "for all purposes * * * deemed to have performed service for the agency * * *" during the period of wrongful separation. 5 U.S.C. § 5596(b)(1)(B). (Emphasis added.)

Implementing regulations contained in 5 C.F.R. § 550.805(a) (1984) provide that when an appropriate authority corrects an unjustified or unwarranted personnel action, the agency must compute the employee's pay and allowances as if the personnel action had not occurred. Under 5 C.F.R. § 550.805(e)(2), the agency is required to

deduct from backpay, "[a]ny erroneous payments received from the Government as a result of the unjustified or unwarranted personnel action * * *."

The provisions of FPM Letter 550-76, July 15, 1982, explain that the "erroneous payments" which must be deducted from backpay under section 550.805(e)(2) include retirement annuity payments, refunds of retirement contributions, payments of severance pay, and lump-sum payments for annual leave. With respect to refunded retirement contributions, paragraph 5b of FPM Letter 550-76 provides that:

"b. Refunds of retirement contributions.

The retirement law (5 U.S.C. 8342(a)) authorizes the refund of an employee's retirement contributions only upon absolute separation from the service or transfer to a position not subject to the law. Therefore, when a refund of retirement contributions is paid to an employee based on a separation which is subsequently found to be erroneous and is cancelled by restoring the employee to duty retroactively so that there was no break in the service, the restoration to duty removes the legal basis for the refund. A refund that was paid in error represents a debt due the retirement fund that must be deducted from any back pay entitlement. * * *

Although our Claims Group questions the requirement in FPM Letter 550-76 that refunded retirement contributions be deducted from backpay, we believe that this deduction is necessary to achieve the make-whole purposes of the Back Pay Act. As noted previously, 5 U.S.C. § 5596 provides that an employee who is retroactively restored to duty and awarded backpay must, "for all purposes," be regarded as having performed service during the period of the corrective action. Since the employee is regarded as never having been separated, he may not retain retirement contributions which, under 5 U.S.C. § 8342(a), are refundable only upon separation from the service or transfer to a position which is not covered by the Civil Service Retirement System.

We note that the rule requiring the deduction of refunded retirement contributions is consistent with principles governing deductions for lump-sum leave payments and payments of severance pay. Specifically, we have held that an employee who is retroactively restored to duty and awarded backpay under 5 U.S.C. § 5596 may not retain a lump-sum payment for annual leave, since 5 U.S.C. § 5551(a) expressly conditions payment of the lump sum on an employee's separation from Government service. See Vincent T. Oliver, 59 Comp. Gen. 395 (1980); Ernest E. Sargent, 57 Comp. Gen. 464 (1978). Similarly, we have held that payments of severance pay must be offset against backpay because 5 U.S.C. § 5595(b)(2) authorizes severance pay only for an employee who has been separated. Since the employee is regarded, "for all purposes," as having performed service during the period of wrongful separation, he may not simultaneously claim the status of a "separated" employee. See Ernest E. Sargent, 57 Comp. Gen. at 466; Sammy H. Marr, B-178551, January 2, 1976.

Accordingly, in line with the provisions of FPM Letter 550-76, we conclude that a refund of retirement contributions must be offset against backpay awarded under 5 U.S.C. § 5596. On this basis, we hold that HHS properly deducted from Mr. Rivera's backpay the amount of retirement contributions he withdrew at the time of his improper separation.

WAIVER OF NET INDEBTEDNESS

The provisions of FPM Letter 550-76 state that the computation of net backpay is a three-step process. First, the agency must deduct any outside earnings received by the employee during the period of the unjustified or unwarranted personnel action. Second, the agency must deduct erroneous payments the employee received as a result of the improper personnel action. If the net amount of backpay is insufficient to cover all deductions for erroneous payments, these payments must be deducted in the following order: (1) retirement annuity payments; (2) refunds of retirement contributions; (3) payments of severance pay; and (4) lump-sum payments for annual leave. Finally, the agency must deduct from backpay "other authorized deductions," such as unpaid retirement contributions for the period of the separation, Federal and state taxes computed on net backpay, and health benefits premiums, if any.

Applying the provisions of FPM Letter 550-76, Mr. Rivera's backpay award of \$21,400 must first be reduced by refunded retirement contributions in the amount of \$34,092, resulting in a net indebtedness of \$12,692 for those contributions. Added to that indebtedness, in order of precedence, are deductions of \$20,235.60 for payments of severance pay, \$7,612.44 for the lump-sum leave payment, and \$1,497.96 for retirement contributions covering the period of Mr. Rivera's separation. These items of indebtedness are discussed below.

Refunded Retirement Contributions

Mr. Rivera's net indebtedness for refunded retirement contributions is not subject to waiver by this Office, since 5 U.S.C. § 5584 limits our waiver jurisdiction to erroneous payments of "pay or allowances." A refund of an employee's own contributions to the Civil Service Retirement and Disability Fund does not constitute "pay" or an "allowance" within the meaning of 5 U.S.C. § 5584. See 4 C.F.R. § 91.2(c) and (d).

Nevertheless, Mr. Rivera may request that OPM waive his net indebtedness for the refunded contributions. The provisions of 5 U.S.C. § 8346(b), as implemented by 5 C.F.R. Part 831, authorize OPM to waive erroneous payments from the Civil Service Retirement and Disability Fund.

Severance Pay and Lump-Sum Leave Payment

Mr. Rivera's indebtedness for payments of severance pay in the amount of \$20,235.60 and the lump-sum leave payment in the amount of \$7,612.44 is appropriate for waiver consideration under 5 U.S.C. § 5584, since those payments constitute "erroneous payments" within the meaning of the waiver statute. See Vincent T. Oliver, 59 Comp. Gen. at 397; see also FPM letter 550-76, July 15, 1982. Under the authority of 5 U.S.C. § 5584, this Office may waive debts arising out of erroneous payments to Government employees if collection "would be against equity and good conscience and not in the best interests of the United States." However, that authority may not be exercised if there is an indication of fault

on the part of the employee in the matter. "Fault" is considered to exist if it is determined that the employee knew or should have known that an error existed but failed to take corrective action. See 4 C.F.R. § 91.5(c).

The HHS maintains that the conditions for waiver outlined in 4 C.F.R. § 91.5(c) are not appropriate for application where deductions from backpay result in a net indebtedness because, in the context of backpay awards, employees will "always meet the 'knew or should have known' test" and "this result could be very costly for the Government." However, the concerns expressed by HHS have no bearing on an individual waiver determination since 4 C.F.R. § 91.5(c) requires that such a determination be based on the particular facts and circumstances surrounding the erroneous payment. See generally Ronnie C. Sutton and John W. McKenzie, B-206385, December 6, 1982.

Applying the standards set forth in 5 U.S.C. § 5584 and 4 C.F.R. § 91.5(c) to this case, we find no indication that Mr. Rivera was at fault in accepting payments of severance pay or the lump-sum payment for annual leave. Although Mr. Rivera received the lump-sum leave payment after the National Council of CSA Locals filed suit alleging that CSA's functions had been transferred to HHS, he could not have known that the union would prevail on the merits of the case. Furthermore, the district court's determination in National Council of CSA Locals v. Schweiker, cited previously, did not order the reinstatement of former CSA employees, but merely directed HHS to determine whether CSA's functions had been transferred to HHS. Even after HHS determined that a transfer of functions had occurred, it notified former CSA employees that selection for reemployment in the transferred positions would depend upon their retention standing and qualifications. Ultimately, HHS reinstated only 150 of the 750 employees who had been separated from CSA.

Under these circumstances, Mr. Rivera reasonably could not have known that his separation from CSA was improper until he was notified that he would be retroactively reinstated to one of the positions which had been transferred to HHS. Accordingly, we hold that repayment of the lump-sum leave payment and payments of severance pay which Mr. Rivera received prior to the date of that notification may be waived under the provisions of 5 U.S.C. § 5584.

The HHS maintains, however, that it would not be against "equity" and "good conscience" to collect the lump-sum leave payment from Mr. Rivera because, at the time of his reinstatement, he was reccredited with annual leave covered by the lump-sum payment. We disagree. As indicated previously, the determination to waive an erroneous payment for annual leave turns on circumstances surrounding the erroneous payment at the time it was made, and not on facts existing at a later time when the payment has been found to be erroneous and the leave reccredited. Furthermore, we note that the purpose of 5 U.S.C. § 5584 is to validate a payment or benefit to which an employee is not legally entitled. If an employee is not reccredited with annual leave covered by the lump-sum payment, but repayment of the lump sum is "waived," the employee is in the same position as he was prior to the "waiver." Likewise, an employee receives no benefit if he is reccredited with leave and required to repay the lump-sum payment. Only when waiver of the repayment is granted and leave reccredited has the employee received the additional, equitable benefit intended by the waiver statute.

Accordingly, we find no basis for concluding that collection of the lump-sum leave payment from Mr. Rivera would be consistent with equity, good conscience, or the best interests of the United States. Therefore, collection of the erroneous lump-sum payment for annual leave and the payments of severance pay is waived.

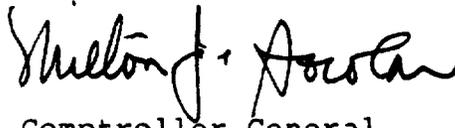
Unpaid Retirement Contributions

Under the Back Pay Act, an employee who is restored to duty following an erroneous separation is deemed for all purposes to have performed Government service during the period of the separation, and such service is creditable for retirement purposes. See 5 U.S.C. § 5596(b)(1)(B); and FPM Supplement 831-1, paragraph S3-4j (September 21, 1981). Therefore, all Federal pay that would have been earned during the period of the separation is subject to deductions for retirement fund contributions. Even if no amount of backpay is due the employee because of excessive deductions, the employee must remit the appropriate amount of retirement contributions to the agency in order to receive full credit for the period of the separation. See 5 U.S.C. § 8334(c) (1982).

Accordingly, Mr. Rivera must pay retirement contributions in the amount of \$1,497.96 in order to receive credit for service during the period of his separation. Collection of that amount may not be waived under 5 U.S.C. § 5584, since no erroneous payment of pay has been made. 55 Comp. Gen. 48 (1975).

CONCLUSION

For the foregoing reasons, we hold that the \$34,092 in retirement contributions previously refunded to Mr. Rivera must be deducted from his \$21,400 backpay award, and that his net indebtedness of \$12,692 for those contributions may be considered for waiver by OPM. Mr. Rivera's indebtedness for payments of severance pay amounting to \$20,235.60 and the \$7,612.44 lump-sum leave payment is waived under the provisions of 5 U.S.C. § 5584. Mr. Rivera must pay \$1,497.96 for retirement contributions covering the period of his separation, and that amount is not subject to waiver.

for 
Comptroller General
of the United States