



The Comptroller General
of the United States

Washington, D.C. 20548

APR 1989

Decision

Matter of: Aria Nalley - Waiver of Overpayment

File: B-232480

Date: June 2, 1989

DIGEST

By failing to properly reduce a lump-sum overtime award, the Air Force erroneously overpaid one of its employees. Waiver is granted because the erroneous overpayment was compounded by subsequent confusion resulting in a 6-month delay in seeking its collection. Furthermore, the record does not establish knowledge sufficient to support a finding of fraud, misrepresentation or lack of good faith on the part of the employee.

DECISION

This decision responds to a request from Senator Dennis DeConcini on behalf of Ms. Aria Nalley, a GS-5 practical nurse employed by the Air Force, for a waiver of \$894.88 overpaid by the Air Force to her. For the following reasons, we grant the waiver.

BACKGROUND

For 13 pay periods between July 1985 and July 1986, the Air Force scheduled Ms. Nalley to work in 2-week blocks of 48 hours one week and 32 hours the following week. For the pay periods in question, Ms. Nalley's pay was calculated every 2 weeks as if she had worked 40 hours each week. However, it was later discovered that Ms. Nalley was entitled to overtime pay under the Fair Labor Standards Act (FLSA) for those weeks in which she worked in excess of 40 hours. Both the Office of Personnel Management (OPM) and the Air Force ultimately concurred with this finding.

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For compensation purposes, the FSLA treats any time worked in excess of 40 hours per week as time-and-a-half. 29 U.S.C. § 207(h) (1982). Therefore, for each week that Ms. Nalley worked 48 hours, she was entitled to compensation as if she had worked 52 hours. In order to calculate what was owed to Ms. Nalley for the 13 biweekly periods in question, the Air Force should have added the 32 hours Ms. Nalley worked in alternating weeks (short weeks) to the 52-hour weeks (long weeks) resulting in biweekly totals of 84 hours. Then, the Air Force should have subtracted out the hours Ms. Nalley actually worked (80 hours) and then made a corrective payment for the value of the difference (4 hours) multiplied by the number of pay periods in question (13), or \$473.80. Our decisions have long utilized this type of offset calculation at the time the government makes its lump-sum corrective payment to aggrieved employees. See 61 Comp. Gen. 174 (1981); 59 Comp. Gen. 246 (1980); B-168323, Dec. 22, 1969.

On April 10, 1987, the Air Force erroneously paid Ms. Nalley \$1,368.68 as a lump-sum settlement of her overtime entitlement. The payment reflected the overtime Ms. Nalley worked but did not take into account the short 32-hour weeks she also worked during this period. As a result, no offset was made for the overpayments she had received in the form of 40 hours of pay for these 32-hour workweeks.^{1/} Not until 6 months later did the Air Force seek to recover the \$894.88 it had overpaid Ms. Nalley on April 10, 1987, by its failure to make the offset.

DISCUSSION AND ANALYSIS

Section 5584 of title 5, United States Code, allows the waiver of claims against employees arising out of overpayments of pay 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 where 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 waiver. The standards for waiver set forth in 4 C.F.R. part 91 state that waiver under these criteria necessarily depends upon the facts of each particular case. See 4 C.F.R. § 91.5(c).

1/ Upon the advice of the OPM, the Air Force tried to "offset" the overtime award through a reduction in Ms. Nalley's annual leave balance. OPM subsequently concluded that its initial advice was erroneous and instructed the Air Force to keep Ms. Nalley's leave balance intact.

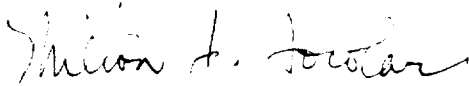
Ms. Nalley contends that the overpayment was made solely due to an administrative error; that she was without knowledge of the overpayment; and that because of the delay by the Air Force in seeking recovery of the overpayment collection of the debt at this time would work a severe financial hardship upon her.

The Air Force acknowledges that there is no indication of fraud or misrepresentation on the part of Ms. Nalley at any time. However, the Air Force recommends against waiver on the basis that Ms. Nalley reasonably should not have expected to receive overtime for the hours over 40 she worked during her long weeks while at the same time retaining 40 hours of pay for the short 32-hour weeks she worked.

Recognizing that this is a close case, we are inclined to give Ms. Nalley the benefit of the doubt. As indicated previously, determining how to deal with the alternating overtime/undertime weeks under the corrective payment mechanism was sufficiently complex to frustrate both OPM and the Air Force in this instance. It is unrealistic to expect that a GS-5 practical nurse, such as Ms. Nalley, without a background in civil service compensation matters should have a better understanding of this admittedly difficult area. See Sutton and McKenzie, B-206385, Dec. 6, 1982 (agency confusion regarding overtime entitlement supports claimant's good faith contention); see also, Dr. Robert J. Davey, B-208039, Mar. 2, 1983 (a GS-13 employee with many years of government service could not be held to have had constructive knowledge of overpayment stemming from erroneous offset calculation).

When an employee receives a lump-sum payment part of which is erroneous we have held that the employee's good faith in the matter does not bar agency collection of that overpayment where the agency acts promptly to notify the employee of the mistake and shortly thereafter seeks recovery of the overpayment. See Seymour Zirin, B-204974, June 24, 1982. In Zirin, the employee was overpaid \$869.74 out of a total payment of almost \$12,000 and recovery was sought within a month of that overpayment. Here, however, the Air Force waited 6 months before recognizing and attempting to collect the overpayment from Ms. Nalley. Therefore, equitable considerations weigh more heavily in favor of Ms. Nalley in this matter than they did for the claimant in Zirin.

Considering the above circumstances, we believe that collection of the overpayment made to Ms. Nalley would be against equity and good conscience and would not be in the best interests of the United States. Accordingly, the overpayment totalling \$894.88 is hereby waived under the authority of 5 U.S.C. § 5584.



Acting Comptroller General
of the United States