



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: David L. Williams - Waiver of Overpayment -
Reemployed Annuitant - Reconsideration

File: B-243315.3

Date: November 5, 1992

DIGEST

Upon reconsideration, waiver of collection of an overpayment resulting from the agency's failure to deduct an annuity from the pay of a reemployed annuitant is granted. The record shows that the employee had questioned the correctness of his pay but a cognizant agency employee assured him that his pay was correct. Almost 3 years later the agency discovered that there was a computer programming error that had caused the overpayment. In these circumstances, the employee was not at fault and collection of the overpayment would be contrary to equity and good conscience. David L. Williams, B-243315, Sept. 6, 1991 (70 Comp. Gen. 699), reversed.

DECISION

Mr. David L. Williams, a reemployed annuitant of the Department of Labor, requests reconsideration of our denial of his request for waiver of repayment of salary overpayment made to him from July 5, 1987, to June 16, 1990. Upon reconsideration, we reverse our decision in David L. Williams, B-243315, Sept. 6, 1991 (70 Comp. Gen. 699), and grant waiver to Mr. Williams.

Mr. Williams was hired as a reemployed annuitant in Region IV (Atlanta), Occupational Safety and Health Administration (OSHA), U.S. Department of Labor (DOL), on July 5, 1987. His pay was subject to reduction by his Civil Service Retirement annuity (5 U.S.C. § 8344 (1988)), but due to a computer error in the Department's automated payroll system, Mr. Williams' salary was not reduced for almost three years. During this period, Mr. Williams was overpaid \$75,693.28.

The authority to waive the government's claim for an overpayment of pay and allowances is contained in 5 U.S.C. § 5584 (1988). Waiver may only be granted when collection would be against equity and good conscience and not in the best interests of the United States. The implementing

regulation provides that the standard for granting waiver is met by a finding that the erroneous payment occurred through administrative error with no indication of fraud, misrepresentation, fault, or lack of good faith by the employee. 4 C.F.R. § 91.5(b) (1992). Waiver ordinarily will not be granted when an employee knew or should have known of the error and failed to make inquiry or bring the matter to the attention of the appropriate officials. Id.

We have held that the employee who knows or suspects that he has received an overpayment should be prepared to return any overpayment he has received, since it is not against equity or good conscience to collect an overpayment from such an employee. Hawley E. Thomas, B-227322, Sept. 19, 1988; Richard W. DeWeil, B-223508, Dec. 24, 1986. However, where responsible agency officials assure the employee that his pay is correct, but the agency later discovers that it made an overpayment, waiver may be granted if the employee relied on the erroneous assurances and it was reasonable for him to do so. Joanne B. Fuesel, B-229394, Feb. 2, 1988; Lula F. Fones, B-203196, Dec. 29, 1981.

For example, in Lula F. Fones, the employee, also a reemployed annuitant at DOL, reported a suspected overpayment to her Personnel Office and to the Liaison officer for the Payroll Department. Both advised her that her pay was correct. This advice was erroneous as it was based on her Notification of Personnel Action form, which incorrectly listed her monthly annuity as a yearly annuity. We granted waiver on the basis that the employee's acceptance of the erroneous advice was reasonable.

In his request for reconsideration, Mr. Williams compares himself to the employee described in Lula F. Fones and asks to be treated alike. He states that he first notified his timekeeper and then his supervisor who advised him to alert the Management Office for OSHA, which he did immediately. Mr. Williams further states that he also contacted the individual in DOL's Office of the Assistant Secretary for Administration and Management (OASAM) "who dealt with my reemployment because of the unique requirements of the reemployed annuitant."

According to Mr. Williams, he attempted to contact this individual repeatedly, but it was difficult to reach her. He states that he "would leave messages and she would return my call, each time I would tell her my pay was excessive and she would say she would check it but I would never get a call back. In a few days I would call her and she would say everything was correct that the pay had been adjusted. This went on for months." Finally, Mr. Williams says, he accepted her advice that his pay was correct.

Almost 3 years later, OASAM informed him that "a system problem has resulted in an overpayment in [his] salary." Because of a programming error in the agency's computerized payroll system, Mr. Williams' pay records in Personnel showed that his annuity was being deducted from his salary when, in fact, the payroll computer system was not recording any such deduction.

Mr. Williams has submitted statements from his timekeeper, his supervisor, and several other individuals. The timekeeper states that Mr. Williams brought his pay problem to her attention, and that she directed him to his supervisor. The supervisor recalls Mr. Williams talking to him about this problem a few times and that he referred him to OASAM. He also recalls that Mr. Williams "later told me that he was discussing the matter with the regional OSHA management office and with OASAM. I remember Dave specifically referring to discussions with [the individual] of OASAM. I recall Dave saying that [she] had no problem with Dave's pay and that the payroll records were accurate." A fellow employee states that Mr. Williams discussed with him his frustration in trying to resolve his pay problem, in that the people to whom he took the problem told him that they would get back to him and one person told him that the amount he was getting was correct. There are also statements from individuals who admit to having little or no personal knowledge of Mr. Williams' pay problem, but who vouch for his honesty and good character.

Mr. Williams states that he also attempted to obtain a statement from the individual in OASAM who had advised him that his pay was correct--she was no longer with the agency by that time--but she told him that she was unable to recall the events. He has submitted a copy of a memo that he addressed to her several months after he became a reemployed annuitant, as a "follow-up to the number of phone calls I have made to you over the past few months" regarding his concern as to the "excessive" amount of his pay. Mr. Williams states that he does not remember if she ever replied to his memo.

Finally, in support of his claim, Mr. Williams states that repayment of the debt now "would place an undue hardship on me and my family." He explains that since he is no longer employed with the government his income is limited to his retirement annuity and a small salary from a part time job. He further states that his only assets are the family residence, an automobile, miscellaneous personal property, and other assets of modest value.

Based on the evidence presented, DOL concluded that Mr. Williams should have been more diligent in his efforts to correct the error and that, had he done so, the error

would have been corrected earlier. Before coming to this conclusion, DOL attempted to contact the former OASAM employee cited by Mr. Williams to obtain written corroboration of his contacts with her. Although the record is silent whether DOL contacted her, we may assume that DOL either was unable to do so, or did contact her and received the same response that Mr. Williams' had received. In any event, it does not appear that she contradicted what Mr. Williams had reported.

We view Mr. Williams' efforts to correct the error in a more positive light than does the agency. The submitted statements show that Mr. Williams was concerned about the amount of his pay. The supervisor's statement also contains a report of Mr. Williams contemporaneous comments to the effect that he had tried to find out if his pay was excessive and was told that there was no problem with his pay. We think the supervisor's statement lends support to Mr. Williams' assertion that he had made an effort to correct the error and had been assured that his pay was correct. Since the error was hidden in the DOL payroll computer system, we think it is plausible that the OASAM employee would not have detected the error based on Mr. Williams' inquiry.

Finally, we think that considerable weight should be accorded to Mr. Williams' own unrefuted statement of the facts. Where the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty is to be drawn. Donald C. Leavens, B-194793, Aug. 14, 1979. There is every reason to apply an inference of honesty in this case. We note in this connection the statement from Mr. R. Davis Layne, the OSHA Regional Administrator, that Mr. Williams "has demonstrated the highest degree of professionalism and ethical behavior." In sum, we find it creditable that Mr. Williams did report to OASAM that his paycheck appeared excessive but received assurances that his pay was correct.

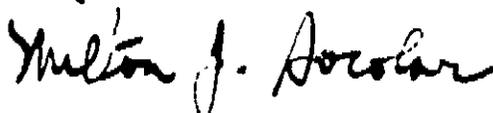
A further point needs to be addressed. In our prior decision, we denied Mr. Williams' waiver request based on a finding that, while he had questioned his pay on numerous occasions, he had continued to be aware that he was being overpaid. We stated that Mr. Williams should have set aside the overpayment for refund whenever the error was corrected. Id.

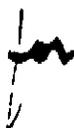
As stated in our waiver regulation, whether waiver will be granted ultimately depends upon the facts existing in the particular case. 4 C.F.R. § 91.5(b). On reconsideration, we think that waiver should be granted upon the facts existing in this case. Mr. Williams obviously was not aware of the computer system problem. He only was aware that his

biweekly paycheck appeared excessive in amount. It is true that he continued to be concerned about the amount of his pay even after he was assured that his pay was correct. Nevertheless, we think it is understandable that Mr. Williams eventually did come to accept and rely on the agency's assurances. Had he set aside an estimated amount each pay period, awaiting the day when an error in his pay might be discovered, he would have been doing so for almost three years. An employee in Mr. Williams' situation should not be expected to set aside an estimated amount each pay period for an indefinite period of time based on a suspicion that he is being overpaid. Given the assurances he received and the length of time during which the error continued undetected, we think that Mr. Williams reasonably accepted and relied on the agency's assurances that his pay was correct.

We therefore find that Mr. Williams acted in good faith in this matter. We do not find fault with him because he eventually relied on the agency's assurances that his pay was correct. Moreover, as he points out, repayment of this debt would impose a severe hardship on him and his family.

Accordingly, we conclude that collection of the debt would be contrary to equity and good conscience. We reverse our prior decision and grant waiver of Mr. Williams' indebtedness of \$75,693.28 under 5 U.S.C. § 5584.



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