



Comptroller General
of the United States

Washington, D.C. 20548

634311

Decision

Matter of: Hilda M. Rapp - Court of Veterans Appeals
Employee - Salary Overpayments Waiver

File: B-253937

Date: March 2, 1994

DIGEST

1. The U.S. Court of Veterans Appeals, established by Congress pursuant to Article I of the Constitution in the executive branch, is an "Executive agency" as that term is defined in 5 U.S.C. §§ 105 and 104(1), and therefore is an "agency" covered by the waiver statute, 5 U.S.C. § 5584. Accordingly, GAO has authority to consider for waiver a debt arising out of an erroneous payment of pay to an employee of that court.

2. A reemployed annuitant upon entry on duty had her pay properly reduced as a result of her receipt of a civil service annuity. However, although she furnished appropriate notices to agency officials of cost-of-living increases in her annuity each January, due to administrative error additional reductions in her salary were not made for those increases, and this resulted in her receiving salary overpayments. She is found not to be at fault and her debt is waived since based on the documents she received the errors were not readily apparent and she was expecting general salary increases at the same time as the annuity increases each January.

DECISION

This concerns the request by Ms. Hilda M. Rapp, for waiver of her debt in the gross amount of \$4,500 which arose out of overpayments she received due to errors in computing her pay as a reemployed annuitant incident to her employment as a secretary to a judge of the United States Court of Veterans Appeals.¹ The initial matter for us to determine is whether the Court of Veterans Appeals is included as an agency covered by provisions of the waiver statute, 5 U.S.C. § 5584, granting our Office authority to consider for waiver

¹Ms. Rapp's request was referred to the Claims group of this Office by the Executive Officer and Clerk of the Court.

the debt of an employee of the court. As explained below, it is our view that the Court of Veterans Appeals is an agency covered by the waiver statute and, therefore, we do have authority to consider Ms. Rapp's debt for waiver. We also find that the debt qualifies for waiver, and therefore we grant waiver.

The Waiver Statute and the Court of Veterans Appeals

The waiver statute, 5 U.S.C. § 5584, provides authority to waive a claim of the United States arising out of an erroneous payment "to an employee of an agency," and such authority is granted to:

- (1) the Comptroller General;
- (2) the head of the agency when the claim aggregates not more than \$1,500; or
- (3) the Director of the Administrative Office of the United States Courts when the claim aggregates not more than \$10,000 and involves, as pertinent in this case, an officer or employee of "any of the courts set forth in" 28 U.S.C. §610. See 5 U.S.C. § 5584(a).

For the purposes of section 5584, "agency" is defined as:

- "(1) an Executive agency;
- "(2) the Government Printing Office;
- "(3) the Library of Congress;
- "(4) the Office of the Architect of the Capitol;
- "(5) the Botanic Garden; and
- "(6) the Administrative Office of the United States Courts, the Federal Judicial Center, and any of the courts set forth in section 610 of title 28." See 5 U.S.C. § 5584(g).

Under these statutory provisions, the determination of whether a debt arising out of an erroneous payment to an employee of the Court of Veterans Appeals is subject to waiver depends on whether such employee is an employee of an "agency" within the meaning of one of the six definitional categories set out in section 5584(g), supra.

In submitting Ms. Rapp's case to our Office for waiver consideration, the Executive Officer and Clerk of the Court states that the Court of Veterans Appeals was established

under Article I of the Constitution and is a court of law exercising judicial power, but it is not one of the courts enumerated in 28 U.S.C. § 610, referred to in 5 U.S.C. § 5584(g)(6), supra. On that basis, the Executive Officer states that, absent a specific legislative grant of authority, the court's chief judge lacks waiver authority under 5 U.S.C. § 5584.

As the court's Executive Officer states, the Court of Veterans Appeals is not one of the courts listed in 28 U.S.C. § 610, and thus it is not an agency as defined by category (6) of 5 U.S.C. § 5584(g), nor is it one of the agencies listed in categories (2)-(5) thereof. However, based on the following, we believe it falls within the meaning of category (1), "an Executive agency."

The United States Court of Veterans Appeals was "established" by statute enacted in 1988, now codified at 38 U.S.C. §§ 7251-7298 (1988), "under Article I of the Constitution of the United States." 38 U.S.C. § 7251. The court is composed of a chief judge, who is "the head of the Court," and at least two and not more than six associate judges, the terms of office of all of whom are 15 years. 38 U.S.C. § 7253(a), (c), (d). They are appointed by the President, by and with the advice and consent of the Senate, and may be removed from office on grounds of "misconduct, neglect of duty, or engaging in the practice of law," but "not on any other ground." 38 U.S.C. § 7253(b)(f). The court's jurisdiction is limited to exclusive jurisdiction to review decisions of the Board of Veterans' Appeals of the Department of Veterans Affairs, but the court was not made a part of that department or of any other department or agency. 38 U.S.C. § 7252. The clerk of the court is appointed by the court, judges of the court may appoint their secretaries and law clerks, and the clerk of the court may appoint necessary deputies and employees with the court's approval. 38 U.S.C. § 7281.

As noted, the court was created pursuant to Congress's power under Article I of the Constitution, and not as an Article III, judicial branch court. The legislative history of the statute creating the court states that it was intended to be established in the executive branch.²

The term "Executive agency", used in category (1) of 5 U.S.C. § 5584(g), is defined by 5 U.S.C. § 105, for the purposes of title 5, U.S. Code, to mean "an Executive department, a Government corporation, and an independent establishment", which are further defined by 5 U.S.C.

²H.R. Rep. No. 100-963, 100th Cong., 2d Sess. 5, reprinted in 1988 U.S. Code & Ad. News, Vol. 7, 5786.

§§ 101, 103, and 104. The Court of Veterans Affairs clearly does not fall within the definition of an "Executive department" (5 U.S.C. § 101), nor of a "Government corporation" (5 U.S.C. § 103). However, we believe it falls within the following definition of an "independent establishment" provided in 5 U.S.C. § 104(1):

"(1) an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment;"

As noted above, the court was "established" in the executive branch, but it is not an Executive department, government corporation, or any of the other entities excluded by section 104, supra, nor is it a part of any other named entity. Therefore, it is our view that the Court of Veterans Appeals is an independent establishment in the executive branch within the meaning of section 104, and as such it is included within the category, "Executive agency" as defined by section 105, and as used in 5 U.S.C. § 5584(g).

Accordingly, it is our view that the Court of Veterans Appeals is an agency covered by the waiver statute, 5 U.S.C. § 5584. Therefore, our Office has jurisdiction to consider for waiver a debt of an employee of that court.³ It also appears that the court's Chief Judge, as "the head of the Court" (38 U.S.C. § 7253(d)), does have the waiver authority granted "the head" of an Executive agency by 5 U.S.C. § 5584(a)(2) to waive a debt aggregating not to exceed \$1,500, although he does not have the authority granted the

³We also note that Ms. Rapp is an "employee" for the purposes of 5 U.S.C. § 5584. Section 2105, title 5, U.S.C., defines an "employee", as used in section 5584, as "an officer and an individual who is appointed in the civil service" by, as pertinent here, "the President; or an individual who is an employee." Ms. Rapp's position is in the "civil service," as defined by 5 U.S.C. § 2101(1). See also 50 Comp. Gen. 329 (1970). And, she was appointed to it by an "individual who is an employee," since she was appointed by a judge of the court who would be considered an "officer," and thus included in the definition of "an employee" provided by 5 U.S.C. § 2109, supra. See in this regard 71 Comp. Gen. 522 (1992), wherein we held that a judge of the Court of Military Appeals (also an Article I court), a position similar to that of a judge of the Court of Veterans Appeals, is an officer as defined by 5 U.S.C. § 2104(a).

Director of the Administrative Office of the United States Courts to waive a debt aggregating not to exceed \$10,000 for employees of courts named in 28 U.S.C. § 610. Since Ms. Rapp's debt exceeds \$1,500, we will proceed to consider it for waiver.⁴

Waiver Consideration - Ms. Rapp's Debt

The report submitted by the Executive Officer and Clerk of the Court on Ms. Rapp's waiver request indicates that she was receiving a federal civil service annuity when she was appointed in October 1989 to her position as a GS-11 secretary to a judge of the court. At that time she was the court's only reemployed annuitant and it was the first year of the court's existence. The court had contracted with the Department of Agriculture (USDA) to handle the processing of all court staff and for payroll and personnel services through USDA's National Finance Center (NFC). When Ms. Rapp was appointed, she supplied the USDA personnel office with the appropriate information regarding her civil service annuity which at that time was \$14,496 per annum. USDA entered the information into the NFC payroll and personnel database to permit adjustment of her court salary to take into account her receipt of the annuity. As a reemployed annuitant she was entitled to continue to receive her monthly annuity payments from the Office of Personnel Management, but her biweekly salary from the court was required to be reduced in the amount of her annuity allocable to each pay period. Apparently, initially the appropriate entries were made into the payroll system and Ms. Rapp received correctly reduced salary payments into December 1989.

In January of 1990, 1991, and 1992, Ms. Rapp received cost-of-living increases in her annuity and at about the same time received annual comparability increases in her court salary. Each January she furnished a copy of the "Notice of Annuity Adjustment" she received from OPM to the court's personnel specialist who forwarded it to USDA to make the appropriate adjustments to her salary. At the same time, her court salary was being adjusted upward due to the annual raises. Although the upward salary adjustments were made, through administrative error, the downward adjustments for the annuity increases were not made. This resulted in biweekly gross salary overpayments to Ms. Rapp of from \$25.60, when they began, to \$80.00 in December 1992 when the errors were discovered.

⁴Under 5 U.S.C. § 5584(a)(1), our waiver jurisdiction is unlimited as to amount of the debt. See also 4 C.F.R. § 91.4 (1993).

Ms. Rapp states that because the overpayments resulted from a gradual process of a succession of administrative failures, and she had neither the formulas for calculation of her pay split or the regulations to recheck the payroll office's computations, she did not perceive the problem. She indicates that she promptly furnished the annual notices of annuity increases to the court, but because she lacked access to and knowledge of the regulations, she was compelled to rely on the personnel office of the court and the USDA and NFC to make the necessary adjustments.

The Executive Officer and Clerk of the Court indicates that without knowing the calculation process, Ms. Rapp had no means to check the correctness of her pay increases. Upon consideration of all the facts, he states that he finds Ms. Rapp blameless in the matter.

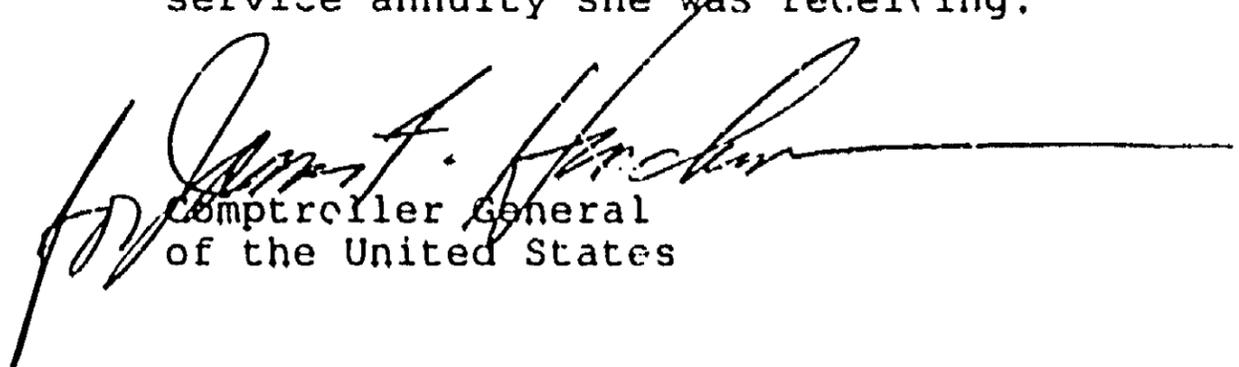
We note that when Ms. Rapp was first employed by the court she received a standard form 50 (Notification of Personnel Action) that stated that as a reemployed annuitant her annual salary was to be reduced by the amount of her retirement annuity and by future cost-of-living increases. She also received from OPM the annual notices of annuity adjustments which she provided the court and which showed the old and new monthly annuity amounts. In addition she received biweekly earnings and leave statements which showed the full annual GS-11 rate of her court salary before reduction for her annuity, the actual reduced biweekly gross and net amounts paid to her in salary, and year-to-date gross and net amounts paid. A person with full knowledge of how a reemployed annuitant's salary is to be reduced could determine the possibility that she was being overpaid by converting the new monthly annuity amount shown on the OPM notice to an annual figure by multiplying it by 12, subtracting that amount from the unreduced gross annual salary rate shown on her earnings and leave statements, dividing that amount by 26 and comparing it with the reduced gross biweekly amount shown on the earnings and leave statement. However, without performing such computations, the documents Ms. Rapp received would not make it readily apparent that her pay had not been further reduced due to the annuity increases.

Pursuant to 5 U.S.C. § 5584, and the implementing Standards for Waiver, 4 C.F.R. Part 91, waiver may be granted in a case such as this if the erroneous payment occurred through administrative error and there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee. In Ms. Rapp's case there is no indication of fraud, misrepresentation or lack of good faith on her part. As to fault, it is imputed when an employee receives a significant unexplained increase in pay, or otherwise knows or reasonably should know that an erroneous payment

has occurred, and fails to bring the matter to the attention of the appropriate officials. See also, Edward W. Allen, B-232219, Oct. 28, 1988. We have repeatedly held that where an employee is furnished documents, such as earnings and leave statements, which if reviewed would indicate to a reasonable person the likelihood of error, and he or she does not alert responsible officials, he or she is considered at least partially at fault in the matter. See e.g., Frederick D. Crawford, 62 Comp. Gen. 608 (1983).

In Ms. Rapp's case, while as noted above with appropriate knowledge she may have been able to use the documents she received to perform computations which would have indicated an error, on their faces the documents did not readily indicate the error. Also, considering that Ms. Rapp had taken appropriate actions to have her pay reduced because of her reemployed annuitant status, and in fact her pay was substantially reduced, and that when the under reductions were made she was also entitled to and expected general pay increases, we do not think she was at fault in not noticing the errors. Compare, Hollis W. Bowers, 65 Comp. Gen. 216 (1986); and Richard W. DeWeil, B-223597, Dec. 24, 1986.⁵

Accordingly, we hereby waive the claim of the United States against Ms. Rapp for the erroneous payments of salary she received as a result of the under reductions for the civil service annuity she was receiving.



Comptroller General
of the United States

⁵See, however, Edward E. Wolfe, B-204973, where the opposite conclusion was reached when such mitigating factors were not present.