



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: John C. Layton - SES Member Given Presidential Appointment - Waiver of Salary Overpayments

File: B-253803

Date: March 17, 1995

DIGEST

A Senior Executive Service (SES) employee granted a presidential appointment in 1986 elected to retain SES pay, rather than to accept the higher Executive Level IV pay of his new position. The employee understood, as a result of incorrect or misleading advice by agency advisors, that the SES pay election would entitle him to no less than the Level IV pay. Under applicable rules, the election limited his entitlement to the lower SES pay he had been receiving prior to the appointment. Nonetheless, the agency erroneously paid him at the higher Level IV rate for 6 years. When the agency discovered the error in 1992, it corrected the employee's pay rate, billed him for the overpayments, and transmitted the matter to GAO which concludes that the debt created by the overpayments is a debt arising from an erroneous payment, and as such may be considered for waiver under 5 U.S.C. § 5584. GAO concludes further that this debt meets the statutory and regulatory requirements for waiver, and it is therefore waived.

DECISION

The Department of Energy (DOE) requests that we determine that the salary election a Senior Executive Service (SES) member made upon his appointment as DOE Inspector General in 1986 was invalid because he made the election based on incorrect advice as to the effect of the election or he misunderstood the impact of the election. DOE further requests, therefore, that we authorize voiding of the election and retroactive correction of the salary rate resulting from the 1986 election and that the Inspector General be allowed to exercise a change in the corrected salary rate that he would have been allowed in 1991 under 5 C.F.R. § 317.801(c) in order to be eligible for the special pay adjustment for law enforcement officers that became available in 1992.

We conclude that the record in this case does not support a finding that the election in 1986 resulted from an unjustified or unwarranted personnel action which, pursuant to the Back Pay Act, 5 U.S.C. § 5596 (1988), could be voided to authorize a retroactive change in the salary rate. However, we do find that the record supports waiver of collection of

overpayments of salary the employee received from 1986 through early 1992, and he may take advantage of the special pay adjustment for law enforcement officers effective in 1992.

BACKGROUND

In January 1986, Mr. John C. Layton occupied a SES position in the Department of the Treasury and was being paid at the ES-5 pay rate. Effective January 6, 1986, he received a presidential appointment to the position of Inspector General in the Department of Energy. The pay of that position was the higher Executive Level IV rate, fixed by statute, and was the same as the ES-6 rate.¹ The Inspector General position was not in the SES, but pursuant to 5 U.S.C. § 3392(c), which provides special provisions applicable to career SES employees who receive presidential appointments, Mr. Layton could elect to retain some or all of the benefits of his old SES position, such as basic pay, performance awards, awarding of ranks, severance pay, leave, and retirement. 5 U.S.C. § 3392(c), and Office of Personnel Management (OPM) implementing regulations at 5 C.F.R. § 317.801(b).

On January 10, 1986, Mr. Layton completed and signed a memorandum prepared for him by DOE by which he elected to retain all of the SES benefits, including "basic pay." While the memorandum did not specifically so state, the effect of Mr. Layton's election to retain SES basic pay was to retain the pay rate of the SES position in which he was serving at the time of his presidential appointment, ES-5. However, due to administrative error, DOE did not pay him at that rate but at the higher Executive Level IV rate of the Inspector General position, *i.e.*, the pay rate to which he would have been entitled but for his election to retain SES pay.

In late 1991, Mr. Layton inquired whether his current pay election would entitle him to the 4 percent special pay adjustment for law enforcement officers that was to become effective in early 1992. DOE states that Mr. Layton's inquiry was made with the clear intent to change his election, if necessary, to qualify for the special pay adjustment.

¹5 U.S.C. § 5315 establishes the pay rate for the DOE Inspector General at Executive Schedule Level IV. 5 U.S.C. § 5382 provides authority for the establishment of pay rates for the SES, and provides that the highest rate shall not exceed the rate for Level IV of the Executive Schedule. Pursuant to these authorities, six SES pay rates were established, with ES-6 being the highest. The ES-6 rate has generally been the same rate as the maximum allowed by § 5382, *i.e.*, the Level IV rate. In January 1986, the rate for ES-5 was \$70,500, and the rates for both ES-6 and Level IV were \$72,300. Exec. Order No. 12496, Dec. 28, 1984, 50 Fed. Reg. 211.

DOE's personnel office confirmed that Mr. Layton was entitled to the special pay adjustment, but it also discovered that his original pay election in January 1986 to retain SES pay had not been implemented and he had been paid erroneously at the Level IV rate. As a result, beginning with the first full pay period in January 1992, DOE adjusted his salary to the ES-5 rate, and corrected all personnel actions related to pay to reflect the election he had made in 1986. In June 1992, DOE formally provided Mr. Layton with documents indicating that he had been overpaid for the 6-year period.

Mr. Layton, by letter of June 11, 1992, advised DOE that he considered their determination to be incorrect and requested that it be reconsidered. He acknowledged that prior to becoming DOE Inspector General, he was paid at the ES-5 level in the Department of the Treasury, but when he considered accepting the appointment as DOE Inspector General, he expected to be paid at Executive Level IV. He states that when the DOE personnel office advised him in January 1986 that he had the option of retaining some or all of the SES benefits, since Executive Level IV pay was equivalent to ES-6 pay, he elected to retain the benefits of career SES status. He further states that he did not elect to receive ES-5 pay, and he did not "intend, nor choose, nor expect, to be paid less than the position authorized by legislation." He states that DOE personnel involved in his in-processing concurred in his election, and he was informed that he would be paid at Level IV, equivalent to ES-6, after making his election.

DOE decided nonetheless to seek collection of the overpayments, and formally notified Mr. Layton, under the Debt Collection Act, that he was in debt in the amount of \$11,964.67 for the overpayments of pay. Subsequently, DOE referred the matter here for our consideration.

In transmitting the matter to us, DOE reports that although the individuals in the personnel office to whom Mr. Layton referred as advising him on his SES elections in 1986 are no longer with DOE, there is evidence that in late 1985 and early 1986 the "new" options to retain SES benefits² were not completely understood and that Mr. Layton was incorrectly advised, as he asserts. DOE further states that the fact that no questions were raised at the time about an election that would result in a lower rate than was otherwise available indicates a lack of understanding on the part of the advisors, and the confusion was compounded by the agency's failure to implement the election and, instead, to pay him at the higher Level IV rate for 6 years. DOE also notes that it is reasonable to conclude that Mr. Layton would not have knowingly made an election that would result in his receipt of a lower rate of pay than that to which his new appointment entitled him. Therefore, DOE concludes that Mr. Layton was either incorrectly informed about the effects of an election

²We note that although the statute authorizing the election of benefits was enacted as part of the Civil Service Reform Act of 1973, Pub. L. 95-454, 92 Stat. 1161, final implementing regulations were not issued until 1985. See Anthony J. Calio, 66 Comp. Gen. 674, 677 (1987).

of SES basic pay or that he misunderstood the impact of such an election.

ANALYSIS AND CONCLUSION

The action Mr. Layton and DOE request to remedy this situation is that we determine that Mr. Layton's 1986 basic pay election be considered as having been made in error, and therefore it is invalid and should be voided to allow him to be retroactively entitled to the Level IV pay of the Inspector General position which he in fact received from January 1986 through January 1992. DOE further suggests that his request in late 1991 to receive SES pay with the 4 percent law enforcement officers supplement should be implemented effective in early 1992, as authorized by OPM regulations allowing annual changes in such elections for the purpose of adding or dropping SES benefit coverage. 5 C.F.R. § 317.801(c), *supra*.

The only authority of which we are aware under which we might authorize the voiding of the election and retroactive change in pay entitlement in such a case is the Back Pay Act, 5 U.S.C. § 5596, the purpose of which is to restore employees who have been subjected to an unjustified or unwarranted personnel action to the position they would have been in had it not been for such action and to allow them to receive the amount of pay, allowances or differentials they would have received had such actions not occurred. Morris v. United States, 595 F.2d 591, 594 (Ct. Cl. 1979). Implementing regulations define an unjustified or unwarranted personnel action as an act of commission or omission (i.e., failure to take an action or confer a benefit) that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency. Such actions include personnel actions and pay actions (alone or in combination). 5 C.F.R. § 550.803.

We have recognized in some cases that erroneous information provided by an agency or an agency's failure to provide information may result in an unjustified or unwarranted personnel action within the meaning of the Back Pay Act. However, in those cases there was a clear showing that the agency had an affirmative duty to provide such advice; the action taken or not taken, as the case may be, was clearly based on the advice or lack thereof; and it resulted in a loss of pay, allowances, or differentials to the employee.³

We do not believe that Mr. Layton's case rises to this level. In his case, DOE carried out

³See Anthony J. Calio, 66 Comp. Gen. 674 (1987), where an agency failed to advise an employee of his option under 5 U.S.C. § 3392(c), *supra*, to elect to retain SES benefits, as a result of which he was not afforded the opportunity to elect to accrue annual and sick leave during the first 4 years of his presidential appointment; and Orlan Wilson, 66 Comp. Gen. 185 (1987), where an agency erroneously advised an employee that he was eligible for immediate retirement and thereby induced his voluntary separation.

its duty to provide Mr. Layton the option to elect retention of any or all SES benefits, and he availed himself of this opportunity. While apparently he believed that his election to retain SES basic pay would entitle him to be paid at the ES-6 rate (equivalent to the Level IV rate of the Inspector General position) rather than his existing ES-5 rate, and he apparently received incorrect or incomplete advice concerning the effect of his election, we do not think this is sufficient to establish that the agency committed an unjustified or unwarranted personnel action within the meaning of the Back Pay Act which would permit the voiding of the election and retroactive change in pay entitlement.

However, we agree with the agency that due to administrative error Mr. Layton received erroneous payments when he was paid at the Level IV (ES-6) pay rate rather than the lower ES-5 rate that was applicable pursuant to his election to retain SES basic pay, and as a result, he is in debt to the government. Under the waiver statute, 5 U.S.C. § 5584, and its implementing Standards for Waiver, 4 C.F.R. Parts 91-92 (1994), we have authority to consider for waiver a debt arising out of an erroneous payment of pay to an employee, the collection of which would be against equity and good conscience and not in the best interests of the United States, provided there exists, in connection with the claim, no indication of fraud misrepresentation, fault, or lack of good faith on the part of the employee.⁴

In Mr. Layton's case, we find no indication of fraud, misrepresentation, or lack of good faith on his part. As to fault, we consider an employee who receives overpayments made due to agency error to be at least partially at fault if, in light of all the circumstances, a reasonable person in the employee's position should have been aware that he was receiving overpayments and should have taken action to have the error corrected but did not. See 4 C.F.R. § 91.5(b); and Frederick D. Crawford, 62 Comp. Gen. 608 (1983). The record contains no indication that Mr. Layton was aware he was being overpaid, or had any basis for learning he was being overpaid, and it supports his contention that he believed that his election entitled him to no less than the Level IV statutory pay rate of his Inspector General position.

We note that the SF 50 Notification of Personnel Action form issued January 6, 1986, upon Mr. Layton's appointment as Inspector General, shows his pay rate as Level IV with his salary as \$72,300, the rate at that time applicable to both Level IV and ES-6. Subsequent SF 50's issued to him over the years documenting pay increases show similar

⁴Ordinarily, consideration of a debt for waiver by our Office is initiated by the debtor filing a request for waiver with the agency which made the erroneous payment which then forwards the matter to us with a report and recommendation; however, we may initiate such action on our own motion where we deem it appropriate. 4 C.F.R. § 92.1. In the present case, we find the information in the report and documents furnished by DOE sufficient for us to consider Mr. Layton's debt for waiver.

information as to pay rates.⁵ We also note that the memorandum he signed in 1986 electing to retain SES benefits did not state the SES pay rate, but merely referred to "basic pay" as one of the benefits. Based on this information and the understanding he had that the amount of pay he would receive as a result of his election would be no less than Level IV, and for the reasons the DOE stated, set out above, we do not think that Mr. Layton was at fault for not being aware that he was being overpaid. That is, from his entry into the Inspector General position in January 1986 until the error was discovered in January 1992, Mr. Layton received pay at the rate he expected, and the SF 50's he was issued were not inconsistent with this expectation.⁶

Accordingly, pursuant to 5 U.S.C. § 5584, we hereby waive Mr. Layton's debt in the amount of \$11,964.67 for the overpayments of pay he received during the period of January 1986 to January 1992.

We understand that since January 1992 Mr. Layton has been paid correctly at the ES-5 rate plus the law enforcement officers supplement, which exceeds the Level IV rate.

for
 \sl Seymour Efros
 Robert P. Murphy
 General Counsel

⁵We have obtained information from DOE showing the format and content of the leave and earnings statements that Mr. Layton received. That information is compatible with the information shown of the SF 50's.

⁶We presume that had the agency initially begun payment to Mr. Layton in 1986 at the correct ES-5 rate, he would have thought that to have been incorrect, as not being in accordance with his understanding. To correct the matter, it appears he could have made a new election in January 1987, pursuant to 5 C.F.R. § 317.801(c), to drop his retention of the SES basic pay rate and receive the Level IV rate of the position.