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DECISION



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

FILE: B-190564

DATE: April 20, 1978

MATTER OF: Thomas O. Marshall, Jr. - Waiver of
Overpayments of Pay

DIGEST: Employee elected optional life insurance coverage but after proper deductions for two pay periods, agency, through administrative error, stopped deducting optional insurance premiums. Employee's request for waiver of erroneous overpayment of pay under 5 U.S.C. § 5584 is denied since employee continued to be covered by optional insurance throughout the period that premiums were not properly deducted and since employee is not free from fault by virtue of his failure to examine Leave and Earnings Statements provided by agency.

This action concerns the appeal by Mr. Thomas O. Marshall, Jr. of the denial by our Claims Division of his application for waiver of the claim of the United States against him for an overpayment of compensation in the amount of \$711.60. The overpayment resulted from insufficient payroll deductions for optional Federal Employees Group Life Insurance (FEGLI).

The record shows that on February 16, 1968, Mr. Marshall executed Standard Form No. 176-T electing optional FEGLI and declining to waive regular FEGLI coverage. For the pay periods ending March 2 and 16, 1968, deductions of \$6 were made from Mr. Marshall's salary for the optional insurance premium. As a result of administrative error no deductions for the optional coverage were made for the pay periods ending March 30, 1968, to May 3, 1975.

Mr. Marshall applied to the Department of the Army for waiver of his indebtedness and, under the provisions of 5 U.S.C. § 5584, the request was forwarded to our Office with the recommendation that the request for waiver be denied. Our Claims Division denied waiver of the erroneous overpayment on December 22, 1976. Inasmuch as the employee had been provided Leave and Earnings Statements, an examination of which would have apprised the employee of the agency's failure to deduct the optional FEGLI premium, the Claims Division found Mr. Marshall to be at least partially at fault for the undetected overpayment.

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In initially applying for waiver, Mr. Marshall disclaimed any notice of the fact that optional FEGLI premiums were not deducted from his pay. While he stated that he received Leave and Earnings Statements by mail for pay periods beginning February 18, 1968, and ending May 3, 1975, he explained that because he was in a travel status for much of the time he and his wife "just do not bother with Leave and Earnings Statements." In appealing the Claims Division's denial of his request for waiver, Mr. Marshall is represented by Lewis D. Shaak, President, National Federation of Federal Employees, Local 1442. On the employee's behalf, Mr. Shaak questions the Claims Division's reliance on Mr. Marshall's receipt of Leave and Earnings Statements as providing a basis for denial of the waiver request. In this regard he states:

"Who among us can truthfully say, 'I examine my leave and earnings statements each and every pay period to ascertain all figures are true and correct.' The majority of us check A.L. and S.L. balances, we know what they should be. * * *"

In addition, he questions the Finance Office's responsibility in view of the fact that the error persisted for 7 years and asks whether Mr. Marshall's heirs would have received the \$10,000 supplemental insurance if he had died during the period that premiums were not withheld from the employee's pay.

The standards for waiver of claims arising out of an erroneous payment of pay are found in Parts 91-93, Title 4, Code of Federal Regulations (1977), which implement Public Law 90-616, as amended, 5 U.S.C. § 5584 (Supp. IV, 1974). Section 91.5(c) provides for waiver where:

"(c) Collection action under the claim would be against equity and good conscience and not in the best interests of the United States. Generally these criteria will be met by a finding that the erroneous payment of pay or allowances occurred through administrative error and that there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee or member or any other person having

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an interest in obtaining a waiver of the claim.
* * * Waiver of overpayments of pay and allowances under this standard necessarily must depend upon the facts existing in the particular case. * * *

We have consistently held that where an employee knows that he is being overpaid, he is precluded from waiver under these standards because it cannot be said that the employee is without fault in continuing to accept the erroneous payments. The same conclusion is required when an employee is found to have constructive knowledge of an overpayment. See Matter of Earl G. Smith, B-188948, June 15, 1977, and cases cited therein.

In Matter of Owen M. Cornell, Jr., B-183249, June 23, 1975, we denied waiver in circumstances similar to the present case, stating:

"We believe that where, as here, an employee (1) elected an employee benefit that was funded out of pay deductions, (2) such employee intended to and, by law, did receive the benefits of his election, (3) the cost of such payment was readily ascertainable when the election was made, and (4) the employee was fully apprised by his earnings statements of the actual amount deducted for payments for the elected benefit within a relatively short period of electing such benefit, then such employee had a duty to find out whether such deductions were properly made and report any discrepancies to the proper authority for rectification."

In the present case, upon electing optional FEGLI coverage, Mr. Marshall received Leave and Earnings Statements reflecting deductions of \$9.03 for regular and optional FEGLI. For the pay period ending March 30, 1968, and thereafter until the error was discovered, only \$3.03 or a slightly greater amount reflecting the regular FEGLI premium was deducted from his pay. Since Mr. Marshall was aware that he had elected optional coverage and since the agency's failure to deduct the optional insurance premium should have been apparent from his examination of Leave

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and Earnings Statements provided, we must hold that Mr. Marshall was on notice of the overpayment. See Matter of Fred P. McCleskey, B-187240, November 11, 1976.

We are unable to agree with the suggestion by Mr. Marshall's representative that the fact that the employee may not have examined his Leave and Earnings Statement relieves him of any responsibility in the matter. Generally, if an employee has records which, if reviewed, would indicate an overpayment, and the employee fails to review such documents for accuracy or otherwise fails to take corrective action, he is not without fault and waiver will be denied. Matter of Arthur Weiner, B-184480, May 20, 1976. This rule is particularly relevant in the case of Leave and Earnings Statements. As we stated in Weiner, we cannot stress too highly the importance of a careful review by each employee of the pay data provided by the employing agency. Such review, and reporting of discrepancies for remedial action, is an essential function in the Government's attempt to reduce payroll errors. Thus, our Office has long held that a waiver of indebtedness will not be granted where it appears that the employee did not verify the information provided on his payroll change slips or Leave and Earnings statement. See Matter of Roosevelt W. Royals, B-188822, June 1, 1977. We agree with the suggestions by Mr. Marshall's representative that the employee's agency has a responsibility to prepare proper payrolls and the duty to take steps to ensure that this responsibility is properly discharged. The employee, however, has the responsibility of verifying the correctness of the payments he receives, and where a reasonable person would have made inquiry but the employee did not, then he is not free from fault, and the claim may not be waived. Matter of Simon B. Guedea, B-189385, August 10, 1977.

We cannot say that collection of claim in this case would be against equity and good conscience. Throughout the period from March 17, 1968, until May 3, 1975, Mr. Marshall's optional FEGLI coverage continued by virtue of 5 C.F.R. §§ 871.203 and 871.204, which presently and throughout the period in question provides:

"§ 871.203 Effective date of insurance.

"(a) The effective date of an election of optional insurance is the first day an

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employee actually enters on duty in a pay status on or after the day the election is received in his employing office.

"(b) An election of optional insurance remains in effect until canceled as provided in § 871.204. For an employee whose optional insurance has stopped for a reason other than declination or waiver, optional insurance is reinstated on the first day he actually enters on duty in a pay status in a position in which he again becomes eligible.

"§ 871.204 Declination.

"(a) An insured person may at any time cancel his optional insurance by filing with his employing office a declination of optional insurance or a waiver of regular insurance coverage.

"(b) A cancellation of optional insurance becomes effective and optional insurance stops at the end of the pay period in which the declination or waiver is received in the employing office.

"(c) A declination of optional insurance remains in effect until it is canceled as provided in § 871.205."

Once effective, optional insurance can be canceled only by the employee's becoming ineligible for coverage or the employee's written cancellation. Since Mr. Marshall had elected the optional insurance, never rescinded the election, and did not become ineligible for the coverage during the period that no deductions were made, then he received the full benefits of the optional life insurance coverage despite the fact that no insurance premiums were withheld. Matter of Robert L. Fondren, B-186802, November 30, 1976.

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In view of the above, we must sustain the determination of our Claims Division to deny the requested waiver.


Deputy Comptroller General
of the United States