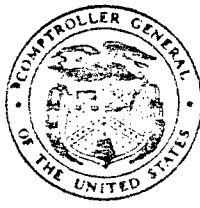


DECISION

18605
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

P/M-1
Putnam

FILE: B-197886

DATE: June 24, 1981

MATTER OF: Ruth Levitt - Waiver of Overpayment

DIGEST: Former employee of HEW was erroneously paid for 80 instead of 8 hours on final salary check and advised by agency officials to retain check. When she later received her lump-sum leave payment in a much smaller amount than she anticipated, she assumed overpayment had been deducted. Agency failed to respond to her telephone inquiries and did not give her a leave and earnings statement for the leave check until 14 months later. We find she was justified in her assumption and in paying her income taxes on that basis. Accordingly, employee was not at fault and collection would be against equity and good conscience. Waiver of the overpayment is granted.

Ms. Ruth Levitt, a former employee of the Department of Health, Education, and Welfare (HEW), now the Department of Health and Human Services, has appealed Settlement Certificate Z-2787094, September 27, 1979, issued by our Claims Division. The Certificate denied Ms. Levitt's request for waiver of a claim of the United States against her arising out of an erroneous payment in the amount of \$702.72, for 80 hours rather than 8 hours of salary for the pay period ending September 13, 1975. The Claims Division concluded that inasmuch as Ms. Levitt was aware of the erroneous payment at the time it was made to her, she had a duty to ascertain that repayment had been made from her lump-sum leave payment or to retain the funds for repayment upon request from her agency. Ms. Levitt should have been able to estimate the correct amount of her lump-sum leave payment and, if she were unable to do so, she should have requested a statement in writing that repayment had been made. The Certificate concluded that her failure to do so placed her at least partially at fault

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and such a finding of fault statutorily precludes waiver of the claim. Ms. Levitt feels that the determination of fault is unreasonable and requests a reconsideration by the Comptroller General.

According to the record, Ms. Levitt was inadvertently paid for 80 hours rather than 8 hours of salary for the pay period ending September 13, 1975, the last pay period prior to her voluntary retirement from HEW. Ms. Levitt received the erroneous paycheck from the Regional Representative, Bureau of Disability Insurance, Social Security Administration, HEW, with a letter dated October 2, 1975. The letter stated:

"Enclosed is your salary check for the pay period ending 9/13/75. As you are aware, due to a teletype error the check incorrectly pays you for 80 hours instead of 8 hours. We have notified Central Payroll of the error. You may receive at some time in the future a request to repay the incorrect amount or the amount might be deducted from accrued benefits due you. In any event, you should be aware that Central Payroll will institute some type of recovery action. If you have any questions, please do not hesitate to contact us."

Ms. Levitt states that when her last paycheck was found to be for 80 hours instead of 8 hours, she thought it should be returned. She reports that she was advised by an official in the personnel office that she should accept the erroneous check and that the overpayment would probably be deducted from the next check representing her accrued annual leave.

In the latter part of October 1975, Ms. Levitt received a check for her lump-sum leave in the net sum of \$2,078.50 representing 372 hours of accrued annual leave. According to Ms. Levitt, when she received the second check, "it was for so much less

than I had anticipated I not only assumed that the overpayment had been deducted but that there was possibly an underpayment as well."

Ms. Levitt further reports that she made several telephone calls to the agency in an unsuccessful attempt to obtain an itemized accounting of her final lump-sum leave check. She contends that in view of the statement in the letter of October 2, 1975, from the Regional Representative, she felt that no further follow up was needed and that the overpayment had been deducted since she had not received a request to repay. Ms. Levitt states that in January 1976 when she received her W-2 Form for 1975, with no request to repay, she assumed that all corrections had been made. Then, by reporting the \$702.72 overpayment as income on her Federal, State, and City income tax returns, she says she paid additional taxes of \$324.04. In a subsequent letter to the agency, Ms. Levitt states that "[b]y the following April [1976] since I had heard nothing further I assumed the overpayment had been adjusted and paid my taxes on the gross shown on my W-2."

She did not receive a leave and earnings statement with the lump-sum leave check. In fact, Ms. Levitt did not receive a leave and earnings statement until December 1976, approximately 14 months later. At that time, she discovered for the first time that the gross amount of her lump-sum annual leave payment was \$3,708.80. The statement showed that deductions totaled \$1,630.30 representing \$1,161.59 for Federal income taxes and \$468.71 for State income taxes, and that no deduction had been made for the 72 hours of pay erroneously paid to Ms. Levitt. She did not receive notice that the overpayment had not been deducted until November 1976.

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In a subsequent letter to HEW dated April 15, 1977, Ms. Levitt states "* * * it was not possible to tell from the amount in the final lump-sum check whether or not the deduction had been made, and I was not, even after several phone calls, able to obtain an accounting." In her present appeal, Ms. Levitt states she is willing to pay any amount to which she was not entitled, but objects to losing money on her Federal, State, and City taxes because of the Government's unreasonable delay in notifying her of the overpayment. In summary, Ms. Levitt contends that the Government erred in advising her to accept the check containing the overpayment; in not advising her until 14 months later that the overpayment still existed; and in delaying a decision on waiver until September 1979, after the statute of limitations had run for filing an amended Federal income tax return for 1975.

The provision of law authorizing the waiver of claims of the United States against employees arising out of erroneous payments of pay, 5 U.S.C. § 5584 (1976), permits such waivers 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 only when 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 the waiver.

This Office has held that when an employee is aware of an overpayment of pay when it occurs, he is not entitled to relief under 5 U.S.C. § 5584. If he accepts such an overpayment, knowing it to be erroneous, he cannot reasonably expect to retain it and should make provision for its repayment. See James T. Harrod, B-195889, February 14, 1980; Ann J. Pellick, B-189083, September 13, 1978; Robert M. O'Mahoney, B-188250, September 19, 1977; and Thomas K. Nahulu, B-189657, August 18, 1977.

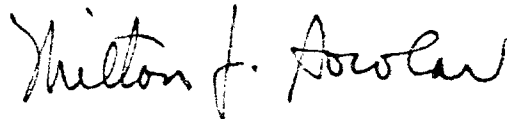
In the instant case, however, even though Ms. Levitt was aware of the error in her final salary check, she was advised by HEW officials to retain the check. Therefore, the facts and circumstances involved

in her claim do not fall squarely within the confines of the "awareness rule." In addition, there are other factors which lend credibility to the contentions of Ms. Levitt that she properly assumed that the erroneous payment had been deducted from her lump-sum annual leave check. She did not receive a leave and earnings statement along with her lump-sum leave check. The statement was not received until 14 months later. At the time she received her lump-sum check, it was for so much less than she had anticipated, she not only assumed that the overpayment had been deducted but that there had been an underpayment of her annual leave. Moreover, Ms. Levitt made several telephone calls to the agency but was unable to obtain an itemized accounting of her annual leave payment. Therefore, she was unable to ascertain whether the overpayment had been deducted from her lump-sum leave check, and upon receipt of her W-2 income tax form in January 1976, with no request to repay, she assumed that all corrections had been made. Accordingly, she reported the full amount shown on her W-2 form (which included the \$702.72 overpayment) as income on her 1976 Federal, State, and City income tax returns. She states that the additional taxes on the erroneous payment amounted to \$324.04.

Under these circumstances, we do not believe that Ms. Levitt was at fault or lacked good faith. The agency made a series of errors, not the least of which was failing to take action to correct the initial overpayment for almost 14 months. In addition, after advising Ms. Levitt to cash the faulty check, the agency failed to furnish her a leave and earnings statement for the lump-sum leave check and failed to respond to her requests for an itemized accounting. Hence, in the absence of any demand for repayment, Ms. Levitt was justified in her assumption that the overpayment had been corrected and was justified in paying her taxes on the same assumption.

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Under the circumstances, and in consonance with the provisions of 5 U.S.C. § 5584, we conclude that it would be against equity and good conscience to require Ms. Levitt to pay the indebtedness owed the Government for the erroneous payment of \$702.72 in salary. The settlement certificate of September 27, 1979, issued by our Claims Division, is overruled and waiver of collection of the erroneous payment is granted.

A handwritten signature in cursive script, reading "Milton F. Rowland".

Acting Comptroller General
of the United States