

UNITED STATES

D.C. 20548

Regals + For DATE: November 19, 1980

Dominick A. Galante - Waiver of Overpayment

of Pay

DIGEST:

MATTER OF:

Employee was erroneously granted step increase computed from the date of his last previous increase to GS-12, step 7, without consideration by agency of effect of repromotion on effective date after downgrading due to a reduction-in-force (RIF). Request for waiver of claim by Government under provisions of $\sqrt{5}$ U.S.C. § 5584 (1976) is granted where overpayment resulted from administrative error through no fault of employee, and record does not clearly establish that employee knew or should have known effect of RIF on waiting periods between step increases.

This decision is in response to an appeal by Claims Division's action of July 9, 1979, Settlemed Certificate No. Z-2736812, which denied his request for waiver of the claim against him by the United States for \$1,169.60 in erroneous overpayments. Mr. Dominick A. Galante, a civilian employee of the United States Army at Fort Meade, Maryland, from our Claims Division's action of July 9, 1979, Settlement Certificate No. Z-2736812, which denied his request States for \$1,169.60 in erroneous overpayments of pay,

Due to a reduction-in-force (RIF), Mr. Galante, was reduced-in-grade on September 2, 1973, from GS-12, step 7, to GS-9, with retained pay for 2 years from the date of assignment. \5 U.S.C. \\$ 5337 (1970). He was repromoted to his original grade and step on January 6, 1974, which is the actual date of his "last equivalent increase." Thus, his next equivalent increase was not due until 3 years later in January 1977. 5 U.S.C. § 5335(a) (1976); 43 Comp. Gen. 507 (1964); Richard C. Dunn, $\sqrt{B-193394}$, March 23, 1979; Duane E. Tucker, $\sqrt{B-193336}$, March 23, 1979.

As a result of the Army's misinterpretation of Civil Service regulations pertaining to "last equivalent increase," however, he was given increase on August 4, 1974, since the waiting period

was mistakenly measured from his previous equivalent increase to GS-12, step 7, which took place on August 8, 1971, without taking into consideration the RIF. The Army now contends that Mr. Galante should have questioned the within-grade increase of August 4, 1974, which occurred only 7 months after his repromotion, but which took place 3 years after his last actual step increase. After this mistake was discovered in June 1976, the within-grade increase granted August 4, 1974, was cancelled, and the quality step increase granted Mr. Galante on September 14, 1975, was changed to a GS-12, step 8, from a GS-12, step 9.

The relevant statutory and regulatory provisions concerning waiver of a claim of the United States arising out of an erroneous payment of pay are set forth in 5 U.S.C. § 5584 (1976) and 4 C.F.R. Part 91 et. seq. In relevant part, 4 C.F.R. § 91.5(c) provides that a claim may be waived wherever:

"(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 an interest in obtaining a waiver of the claim."

From our examination of the record in the instant case, there is no indication of fraud, misrepresentation, or lack of good faith. The resolution thus turns on the question of whether Mr. Galante's lack of knowledge, whether actual or constructive, of the law in this area is to be considered an imputable indication of fault on his part.) We have consistently held that:

"* * * whether an employee who receives
an erroneous payment is free from fault

in the matter, can only be determined by a careful analysis of all pertinent facts, not only those giving rise to the overpayment but those indicating whether the employee reasonably could have been expected to have been aware that an error had been made. If under the circumstances involved a reasonable man would have made inquiry as to the correctness of the payment and the employee involved did not do so, then, in our opinion, the employee could not be said to be free from fault and the claim against him should not be waived." 58 Comp. Gen. 721, 723 (1979).

As a general rule, our decisions have held that an employee should be aware of the waiting periods between step increases and should make an inquiry about an increase not in accord with those waiting periods. Herbert H. Frye, B-195472, February 1, 1980; John R. Hanson, B-189935, November 16, 1978; L. Mitchell Dick, B-192283, November 15, 1978. On the other hand, where the erroneous increase was not so significant as to put an employee on notice of error, Julius C. Steel, B-182188, January 22, 1975, or where the record does not clearly establish that the employee knew, or should have known, that the rate of pay actually received at his new position was more than the rate of pay to which he was entitled, we have granted waiver. Robert L. Zerr, B-184182, July 22, 1976,

While the law to be applied regarding the effect of a RIF on waiting periods for step increases may have been clear in the abstract, 43 Comp. Gen. 507 (1964), and see also the later cases of Dunn, and Tucker, supra, this in itself would not determine the outcome of the instant case in light of our governing criteria of a careful analysis of all pertinent facts as enunciated in 58 Comp. Gen. 721 (1979). (Indeed, we note that the administrative error herein was due to a misinterpretation of Civil Service Commission regulations on the part of Army personnel who presumably had expertise in accommission.

the area of personnel law.) Furthermore, in accord with Steel, and Zerr, supra, we believe that the erroneous increase involved here was not so significant as to put Mr. Galante on notice of error, especially since it had been 3 years since his last step increase, and he would have normally been expecting one at that time. There are also no indications on Mr. Galante's payroll change slips which could put him on actual or constructive notice of the error.)

We note that the decisions cited regarding knowledge of the Federal pay structure and waiting periods are distinguishable on their facts from the instant Thus, in Frye, supra, the employee had 38 years of Government service and had received an erroneous step increase before the usual maximum and commonly known waiting period. Likewise in Hanson, and Dick, supra, the employees due to their positions were chargeable with at least constructive knowledge of the Federal pay structure, and the erroneous step increases occurred before the usual minimum and commonly known waiting periods. See also George R. Beecherl, B-192485, November 17, 1978, where the Standard Form 50 issued to that employee in connection with the RIF specifically stated that his eligibility for retained pay began on a certain date, and the employee knew that the period was for only 2 years.

In conclusion, we do not believe that Mr. Galante reasonably could have been expected to have been aware of the effect of a RIF on the waiting period for step increases) (Indeed) not only in the instant case, but in others, (officials of various personnel offices have had difficulty in ascertaining the law in this area.) See Robert L. Morton, 57 Comp. Gen. 646 (1978).

(Accordingly, since there was an administrative error and there is no indication of fault on the part of Mr. Galante, the collection of the overpayment in the amount of \$1,169.60 is hereby waived) under the provisions of 5 U.S.C. § 5584 (1976).

Harry R. Van Clane

For The Comptroller General of the United States

UNITED STATES GOVERNMENT

Memorandum

GENERAL ACCOUNTING OFFICE

November 19, 1980

TO

Associate Director, FGMSD - Claims Group (Room 5858)

FROM :

Garry D. Man Cleve. Comptroller General

For The

SUBJECT:

Dominick A. Galante - Waiver of Overpayment of Pay - B-198570-0.M.

Returned herewith is file Z-2736812 forwarded for our consideration. By decision B-198570, dated today, copy attached, we have granted waiver under the provisions of 5 U.S.C. § 5584 (1976).

Attachments