

Mr. Guritz

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DECISION

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

[Request for Waiver of Indebtedness]

FILE: B-198770

DATE: November 13, 1980

MATTER OF: Philip W. McNany

- DIGEST:
1. It is a fundamental and long-established rule of law that a person receiving money erroneously paid by a Government agency or official acquires no right to that money and is liable to make restitution; however, by special statutory authorization the claim against a Federal employee arising out of an erroneous payment of pay or allowances may be waived, if collection of the erroneous payment "would be against equity and good conscience and not in the best interests of the United States." 5 U.S.C. 5584.
 2. The claim against a Federal employee for a refund of excessive Temporary Lodging Allowance payments he received through administrative error may not properly be waived even though he was without fault in the matter where the employee should have known and in fact did know that the payments were erroneous; in such circumstances the employee had a duty to set aside the overpayments for their eventual return, and collection action was therefore neither against equity and good conscience nor contrary to the interests of the United States.

This decision is issued in response to correspondence received from Mr. Philip W. McNany, a civilian employee of the Department of the Army. Mr. McNany requests reconsideration of the action taken by the Claims Division of our Office on March 5, 1980, to deny a complete waiver of the Government's claim against him for the recovery of erroneous Temporary Lodging Allowance payments he received incident to a transfer from the United States to

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Europe in 1978. In view of the facts presented and the applicable provisions of law, we are sustaining the action of our Claims Division.

On July 31, 1978, Mr. McNany traveled to Europe incident to a permanent change-of-station transfer from Fort Huachuca, Arizona, to Stuttgart, Germany. He initially moved into a hotel near Stuttgart and became entitled to a Temporary Lodging Allowance. That allowance is authorized by the statutory provisions of 5 U.S.C. 5923(1)(A) to defray the reasonable costs of temporary commercial quarters secured by a Federal employee at a new post of duty in a foreign area when rent-free Government quarters are not provided. On August 22, 1978, Mr. McNany moved from the hotel into an Army Bachelor Officers Quarters, and his entitlement to the Temporary Lodging Allowance terminated. However, due to administrative error he continued to receive allowance payments through the pay period ending on September 30, 1978. The schedule of overpayments was as follows:

Pay Period Ending Date	<u>Temporary Lodging Allowance:</u>		
	<u>Authorized</u>	<u>Paid</u>	<u>Amount of Overpayment</u>
August 5, 1978	\$174.00	\$ 0.00	(\$ 174.00)
August 19, 1978	406.00	591.00	185.95
Sept. 2, 1978	58.00	407.63	349.63
Sept. 16, 1978	0.00	406.37	406.37
Sept. 30, 1978	<u>0.00</u>	<u>406.37</u>	<u>406.37</u>
Totals	\$638.00	\$1,812.32	\$1,174.32

On June 28, 1979, Mr. McNany was advised that he was obligated to refund the total net overpayments he had received, and he arranged to make that refund through

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deductions from his salary at the rate of \$50 per pay period.

Mr. McNany later also requested that the refund requirement be waived. He indicated that he had noticed the overpayments when he received his paycheck and Leave and Earnings Statement for the pay period ending on September 2, 1978. He then notified the concerned finance and housing management officials about the overpayments he was receiving and made reasonable efforts to have the error corrected. In those circumstances, he said, he did not feel it was his fault that he was overpaid, and he suggested that he should therefore be entitled to a complete waiver of the claim against him.

Our Claims Division, in its March 5, 1980 action in the matter, denied waiver in the amount of \$1,162.37, i.e., the amount of erroneous Temporary Lodging Allowance payments received by Mr. McNany for the pay periods ending on September 2 through September 30, 1978. With respect to those erroneous payments it was essentially concluded that Mr. McNany was at fault in the matter and that waiver was therefore unwarranted, since he knew he was being overpaid and should therefore have retained the excess amounts for their eventual refund. It was further concluded, however, that Mr. McNany could not reasonably have known that he had received excessive Temporary Lodging Allowance payments in August 1978, and waiver was therefore granted for those overpayments, which in net amount had been \$11.95.

Mr. McNany has since questioned the correctness of the conclusion reached by our Claims Division that he was at "fault." In substance, he again points out that he personally informed the concerned officials as soon as he noticed he was being overpaid in September 1978, and he made reasonable efforts to have the error corrected. He further states that he did set the overpayments aside in a savings account and could have refunded those amounts in one lump-sum payment, but he elected

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to make the refund through \$50 per pay period deductions from his salary as a matter of personal preference when his repayment options were explained to him. He expresses the belief that since the overpayments were caused solely by administrative errors which he tried to correct, he should therefore have been entitled to keep the overpayments he received.

It is a fundamental and long-established rule of law that a person receiving money erroneously paid by a Government agency or official acquires no right to that money and is liable to make restitution. Restitution results in no loss to the recipient, since he merely received something which he was never entitled to have in the first place. See, e.g., Barnes, et al. v. District of Columbia, 22 Ct. Cl. 366, 394 (1887); and United States v. Sutton Chemical Co., 11 F.2d 24 (4th Cir. 1926).

However, subsection 5584(a) of title 5, United States Code, authorizes waiver in whole or in part of a claim against a Federal employee arising out of an erroneous payment of pay or allowances, "the collection of which would be against equity and good conscience and not in the best interests of the United States." Subsection 5584(b) specifically prohibits waiver if there is any indication that the employee was at "fault" in the matter.

In the present case, it appears that Mr. McNany knew that the Temporary Lodging Allowance payments he received after he moved into Government quarters on August 22, 1978, were excessive and erroneous. It further appears that the excess payments were caused solely by administrative error; that Mr. McNany informed the appropriate officials about the error; and also that he set aside the overpayments he received. In these circumstances, we find no indication of "fault" on Mr. McNany's part which would operate to preclude a grant of waiver in this case under 5 U.S.C. 5584(b)(1).

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(Nevertheless, it is to be noted that an employee is not entitled to a grant of waiver as a matter of legal right every time he receives an excessive payment of pay or allowances through an administrative error and through no fault of his own. Rather, the waiver statute was enacted to provide authority to relieve debtors from their obligations under certain circumstances when, as stated above, requiring repayment would be against equity and good conscience and not in the best interests of the United States. We have consistently ruled that it is not against equity and good conscience to require a Federal employee or service member to refund excess payments of pay and allowances known to be erroneous at the time of receipt, even though the overpayment is solely the result of administrative error and the individual concerned may have been completely without fault in the matter.) See, e.g., 56 Comp. Gen. 943, 951-953 (1977); Matter of Commander Franklin D. Julian, USN, B-193367, January 10, 1979; Matter of Ann J. Pelick, B-189083, September 13, 1978; Matter of Thomas K. Nahulu, B-189657, August 18, 1977; Matter of Kenneth J. Moore, B-185458 October 5, 1976.

(In this case Mr. McNany knew at the time that erroneously excessive Temporary Lodging Allowance payments were included in his pay each payday in September 1978. While the actions he took to set aside the excess payments and notify the appropriate officials are commendable, they are also the actions expected of a reasonably prudent person in the circumstances. Thus, it is our view that requiring him to refund those overpayments was neither against equity and good conscience nor contrary to the best interests of the United States.)

(Accordingly, the action taken by our Claims Division to deny a complete waiver in this case is sustained.)

Harvey R. Van Cleave

For The Comptroller General
of the United States

Memorandum

November 13, 1980

TO : Associate Director, FGMSD - Claims Group (Room 5858)

Harry R. Van Cleave
FROM : Comptroller General
For The

SUBJECT: Philip W. McNany--Request for waiver
B-198770-O.M.

Returned herewith is Claims File No. Z-2819369 concerning the request of Mr. Philip W. McNany for waiver of certain allowance overpayments he received from the Department of the Army. Also attached is a copy of decision B-198770, of today's date, sustaining the previous denial of waiver made in the case.

Attachments - 2