



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: James J. Burns - Waiver - Erroneous Payments of Sick Leave
File: B-202274
Date: June 24, 1987

DIGEST

An employee on extended sick leave when his position was abolished on December 7, 1979, was carried in sick leave status until April 30, 1980, when he applied for a discontinued service retirement. Initially denied by OPM, the application for retirement was approved as of December 7, 1979, after GAO authorized a retroactive separation. The employee may be granted a partial waiver, representing the difference between the salary he received in the form of sick leave from December 7, 1979, to April 30, 1980, and the retroactive annuity payments he received for the same period. There is no indication that at the time he received it, he knew the payment of salary was or could become erroneous nor is there any indication of any fault, misrepresentation or lack of good faith on the employee's part. He remains liable for the amount of sick leave salary that was duplicated by the retroactive annuity payments.

DECISION

Mr. James J. Burns has requested waiver of his obligation to repay the Internal Revenue Service (IRS) for sick leave he used between December 7, 1979, and April 30, 1980. Under the circumstances and for the reasons explained below, we hereby grant waiver of the portion of Mr. Burns' obligation which represents the difference between the salary he received in the form of sick leave and the retroactive annuity payments he received for the same period.

BACKGROUND

Mr. Burns' position as chief of IRS's Field Branch No. 3 in Camden, New Jersey, was abolished on December 7, 1979. He was on extended sick leave at that time and the IRS did not notify him of the abolishment of his position or his eligibility for discontinued service retirement. Instead, Mr. Burns was assigned to a non-existent position and was retained in sick leave status. When he was finally notified of the situation, he responded that he wished to exercise his right to elect a discontinued service retirement.

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The IRS processed his application for a discontinued service retirement on April 30, 1980, but the Office of Personnel Management (OPM) refused to approve the application on the grounds that Mr. Burns could not be retired from a fictitious position in which he never had served. The OPM suggested that the IRS request the Comptroller General to authorize a retroactive separation date so that Mr. Burns would qualify for a discontinued service retirement.

The IRS requested the Comptroller General to approve a retroactive separation for Mr. Burns and on July 15, 1981, in James J. Burns, B-202274, we found that Mr. Burns was entitled to be retroactively separated as of December 7, 1979, because of IRS's failure to properly notify him of his impending separation and his option to elect a discontinued service retirement.

By a letter dated November 9, 1981, the IRS notified Mr. Burns that if he was separated effective December 7, 1979, as authorized by our decision, OPM would approve his application for a discontinued service retirement. In addition, the IRS stated that:

"By law and OPM regulation your unused sick leave as of December 7, 1979 must be used in calculating your annuity. You will, therefore, be obligated to repay IRS for all sick leave granted after that date. Your alternatives for repayment are (1) to repay the obligation in full immediately after the Data Center advises you of the amount due, (2) to request a monthly allotment of a part of your annuity to IRS to repay the obligation, or (3) to request a waiver of the obligation by the Comptroller General. If you request a waiver, the Data Center will delay processing the case until the Comptroller General has acted on the request for waiver."

At the time OPM had initially denied Mr. Burns' application for discontinued service retirement it authorized him to begin receiving special payments from the civil service retirement fund. Those payments continued from June 1980 to March 1982. He then received a lump-sum retroactive annuity payment consisting of the annuity amounts due him from January 1980 through May 1980 and the difference between the special payments and his proper annuity payments. As of April 1982, Mr. Burns began to receive his proper annuity payment. For the period Mr. Burns had been on sick leave, he had received salary payments in the amount of \$13,796.64. The annuity payments he later received for the same period amounted to \$6,729.70.

After receiving the letter dated November 9, 1981, from the IRS, Mr. Burns requested waiver by letter dated November 20, 1981. The IRS failed to send the request on to the Comptroller General. Mr. Burns states that he made inquiries from time-to-time as to the status of his request and finally, on November 14, 1985, was informed that his request would be sent within the next week or two. On November 15, 1985, Mr. Burns wrote to the Comptroller General himself, requesting waiver. A submission from the IRS was never received by this Office, but the IRS did respond to our inquiry by memorandum against waiver.

Mr. Burns contends that he is entitled to waiver because his indebtedness arose through a series of agency errors. He points out the IRS's failure to notify him of his impending involuntary separation and his option to elect a discontinued service retirement and its failure to submit his request for waiver to the Comptroller General. In further support of his entitlement to waiver Mr. Burns points to his good faith attempts to cooperate fully during this period and the financial strain repayment would cause at this time in his life.

The IRS, on the other hand, states that Mr. Burns' indebtedness should not be waived because he received a double payment for the period in question - a salary payment from the IRS and an annuity payment from OPM.

OPINION

Under the authority of 5 U.S.C. § 5584 (1982), our Office may waive in whole or in part debts arising out of erroneous payments of pay and allowances if collection "would be against equity and good conscience and not in the best interests of the United States." The implementing regulations issued by our Office in connection with those standards provide in 4 C.F.R. § 91.5(c) that:

* * * * 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 * * *.

The purpose of 5 U.S.C. § 5584 is to validate in whole or in part a payment or benefit to which an employee is not legally entitled but to which, after an examination of the particular circumstances surrounding the overpayment, it is determined the employee is equitably entitled.

On occasion erroneous payments are made by the government and accepted by individuals unknowingly. When corrective action is taken quite often it results in an additional payment to the individual. Thus, we have an erroneous payment and a subsequent valid payment. While exceptions have been made, it is our view that it is not against equity and good conscience to require collection of that part of the erroneous payment equal to the valid payment. See Vincent T. Oliver, 59 Comp. Gen. 395 (1980), 57 Comp. Gen. 554 (1978), and 56 Comp. Gen. 587 (1977). While the cited decisions refer to specific statutes mandating corrective action, we do not view the application of such rationale as inappropriate in cases involving erroneous payments and retroactive payments made to rectify the errors. See Maureen S. Fearn, B-221466, July 3, 1986, 65 Comp. Gen. _____.

In our opinion application of the foregoing is appropriate in Mr. Burns' situation. Due to his retroactive retirement Mr. Burns was not entitled to the salary he had received while on sick leave. It is our view that the retroactive retirement payment he received is tantamount to a waiver of the corresponding amount of sick leave pay, leaving the balance of the erroneous payments for waiver consideration.

Neither Mr. Burns nor the IRS knew that his receipt of salary in the form of sick leave was erroneous or would become erroneous at the time he was receiving it. It did not become evident to them until OPM refused to grant his retirement application of April 30, 1980. Prior to electing the December 1979 retirement date, Mr. Burns was informed of the possibility that he would have to repay the salary he received while on sick leave. There is no indication that the situation in which Mr. Burns now finds himself resulted from any misrepresentation, fault, or lack of good faith on his part. As we pointed out in our decision of July 15, 1981, the necessity for Mr. Burns' retroactive separation resulted from IRS's administrative error. The correction of this error resulted in a retroactive annuity payment being made to him which included credit for the sick leave for which he had been paid his full salary erroneously.

Given these circumstances, we find that waiver of Mr. Burns' indebtedness is appropriate in the sum of \$7,066.94, which represents the amount by which his sick leave payments exceed the retroactive annuity payments he received. See Vincent T. Oliver, 59 Comp. Gen. 395 (1980). Waiver is denied as to the

balance of the indebtedness, for which he received the retroactive annuity payment.

Milton F. Fowler
for Comptroller General
of the United States