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DECISION



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

FILE: B-208039

DATE: March 2, 1983

MATTER OF: Dr. Robert J. Davey - Waiver of Erroneous Salary Payments

DIGEST:

Reemployed annuitant was erroneously overpaid compensation due to agency's failure to reduce his pay by the amount of his annuity. Waiver is granted since the employee was not notified of the requirement that his salary be offset by the annuity, and the record does not establish knowledge sufficient to support a finding of fraud, misrepresentation or lack of good faith on his part.

Dr. Robert J. Davey, a reemployed annuitant, appeals our Claims Group's December 10, 1981, denial of his request for waiver of a claim against him by the United States for the recovery of \$4,962.40 in erroneous salary overpayments.

The question presented is whether Dr. Davey knew, or should have known, that his salary as a reemployed annuitant would be less than he had earned previously, and whether his failure to question his receipt of the same salary during the period of reemployment precludes waiver of his debt on grounds of fault. For the following reasons, we believe that it does not, and waiver is hereby granted.

Dr. Davey, a GS-13, step 7, Research Animal Scientist with the Department of Agriculture's Science and Education Administration (SEA) in Beltsville, Maryland, retired from Federal service on August 22, 1980. Dr. Davey was subsequently reemployed by the SEA on August 24, 1980, as an annuitant on a temporary half-time appointment. At the time of Dr. Davey's reemployment, an SEA payroll clerk entered an incorrect code in the "salary share code" box (item 82) of the agency's Notification of Personnel Action, Form AD-350, thereby erroneously identifying Dr. Davey as an employee who was not receiving a Civil Service annuity. At the same time, however, the clerk correctly entered the estimated amount of Dr. Davey's annual annuity in box 84 on the same form.

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As a result of this administrative error, the agency failed to deduct Dr. Davey's annuity payments from his regular base pay, as required by 5 U.S.C. § 8344 (1976). Under that provision, an amount equal to the annuity allocable to the actual period of reemployment must be deducted from a reemployed annuitant's salary. The SEA failed to make the required deductions from Dr. Davey's salary from August 24, 1980, through February 7, 1981, when it finally discovered that an error had been made. On February 10, 1981, SEA notified Dr. Davey of the error, and began to make the proper deductions as required by law. In response to this reduction in salary, Dr. Davey resigned from his position, effective March 7, 1981, having decided that the amount of his pay was "inadequate, considering the nature of [the] assignment and the time and effort it required."

The gross amount of the overpayment was \$4,962.40. In a letter dated March 26, 1981, Dr. Davey requested waiver of the overpayment, claiming that it was the result of an administrative error, and that it had occurred through no fault of his own. Dr. Davey further stated that since he had not been told what his hourly rate of pay would be upon reemployment (though he had asked for at least an estimate of that amount), he had no reason to know that he was being overpaid until he received SEA's February 1981 letter. The SEA recommended that Dr. Davey's request for waiver be denied on the grounds that Dr. Davey knew, or should have known, through discussions with agency personnel officers or by reading pertinent Federal retirement literature, that his annuity was required to be deducted from his salary upon reemployment. The SEA contended that its failure to reduce Dr. Davey's hourly rate of pay was an obvious error which should have caused Dr. Davey to question the correctness of his salary. Our Claims Group concurred and denied waiver in the belief that "an employee of Dr. Davey's experience should have known that a rehired annuitant's salary must be reduced by the amount of his annuity."

Dr. Davey now appeals our Claims Group's denial of his request for waiver. In a letter dated March 30, 1982,

Dr. Davey reasserts that he had no actual knowledge of the annuity deduction requirement. Furthermore, he questions the statement by our Claims Group that an employee of his experience should have been familiar with that requirement.

The Comptroller General is authorized by 5 U.S.C. § 5584 (1976), to waive claims for overpayment of pay and allowances, other than travel and transportation expenses and allowances and relocation expenses, if collection would be "against equity and good conscience and not in the best interests of the United States." Such authority may not be exercised if there is "an 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 a waiver of the claim." Implementing the statute, 4 Code of Federal Regulations, section 91.5(c) (1982), states that:

"Any significant unexplained increase in pay or allowances which would require a reasonable person to make inquiry concerning the correctness of his pay or allowances, ordinarily would preclude a waiver when the employee or member fails to bring the matter to the attention of appropriate officials. Waiver of overpayments of pay and allowances under this standard necessarily must depend upon the facts existing in the particular case."

We have held that this language applies not only to unexplained increases in pay, but also to continued receipt of the same salary when a reduction is expected. Arthur Weiner, B-184480, May 20, 1976; William White, B-186562, March 11, 1977.

The record in this case contains no evidence to support the agency's allegation that Dr. Davey had actual knowledge of the requirement that his annuity be deducted from his salary. Although SEA states that its local personnel specialists are charged with the task of informing retirees of changes in their pay status upon reemployment, the agency

has furnished no concrete evidence to show that Dr. Davey was so informed in this particular case. Furthermore, there is nothing in the record to indicate that Dr. Davey received any pamphlets or other literature from the agency which discussed the annuity deduction requirement.

Although Dr. Davey was a grade GS-13 employee with many years of Government service, he was employed by SEA as a Research Animal Scientist. There is nothing in the record to indicate that Dr. Davey was exposed to personnel law or specific payment regulations or practices in the context of his position. Therefore, there is no reason to assume that, merely because of his long term of Government service, Dr. Davey was familiar with the annuity deduction practices in question here. William White, cited above; Donald C. Leavens, B-194793, August 14, 1979.

Throughout this inquiry, Dr. Davey has maintained that he had no actual knowledge of the annuity deduction requirement until the agency so informed him in February 1981. We have held that if the circumstances in any case are as consistent with honesty and good faith as with dishonesty, the inference of honesty is required to be drawn. 57 Comp. Gen. 664 (1978). Considering the above circumstances, we do not believe that the record establishes knowledge sufficient to indicate fraud, misrepresentation, fault, or lack of good faith on Dr. Davey's part. Donald C. Leavens, above; Leon L. Snell, B-188874, August 17, 1977. Therefore, we conclude that collection of overpayments made to Dr. Davey would be against equity and good conscience and would not be in the best interests of the United States.

Accordingly, the overpayments totaling \$4,962.40 are hereby waived under the authority of 5 U.S.C. § 5584.

for *Milton J. Aorolan*
Comptroller General
of the United States