

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

FILE:

DATE: JUL 13 1976

MATTER OF: **K-184003****John C. Edwards - Erroneous FICA
deductions - waiver**

DIGEST:

Agency erroneously deducted Social Security (FICA) taxes instead of Civil Service Retirement deductions from employee's pay. Resulting overpayment to employee is waived. Agency may make deposits to the Civil Service Retirement Fund as though no error had occurred, provided employee authorizes agency to obtain FICA refund to extent possible, and provided he has not received refund or credit of FICA.

This decision is in response to a submission from Harold F. Thorne, an authorized certifying officer of the Bureau of Mines, Department of the Interior, dated May 19, 1975. He requests a waiver of an erroneous payment on behalf of Mr. John C. Edwards, an employee of the Bureau of Mines at the Twin Cities Metallurgy Research Center, Twin Cities, Minnesota.

The record submitted to us shows that Mr. Edwards was initially employed by the Bureau of Mines during the periods of June 14 through August 28, 1970, and June 13 through September 30, 1971, as a temporary summer aid under 5 C.F.R. § 213.3102(v) (1974). He was then given a temporary appointment as a janitor for the period from October 1, 1971, through January 31, 1972, under 5 C.F.R. § 316.402(a) (1974). During all of the above periods of temporary employment, Mr. Edwards' salary was subject to a deduction of 5.85 percent for social security taxes under the Federal Insurance Contributions Act (FICA), and such taxes were properly deducted.

On February 1, 1972, Mr. Edwards was converted from a temporary appointment to a permanent excepted appointment as a severely handicapped person who had demonstrated his ability to perform his duties satisfactorily under temporary appointment and under certification by the Special Vocational Rehabilitation Service of the State of Minnesota, 5 C.F.R. § 213.3102(u) (1974).

According to the submission, Mr. Edwards' pay became subject to a deduction of 7.0 percent for the Civil Service Retirement Fund upon his conversion to the excepted appointment and that

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fact was so indicated on his personnel action form (SF-50). Through clerical error, however, the change in deductions from FICA to the Civil Service Retirement Fund (CSRF) was not made. On or about February 15, 1975, the error was discovered and corrected, and since that time appropriate deductions have been made and credited to the Civil Service Retirement Fund. In the meantime, however, during the period February 1, 1972, through February 15, 1975, a total of \$1,448.59 had been improperly deducted for FICA taxes and deposited with the Internal Revenue Service. For that period, a total of \$1,771.53 should have been deducted for the Civil Service Retirement Fund, representing a net difference of \$322.94. Mr. Edwards has requested waiver of the difference, that it be paid from appropriated funds, and that the entire amount be credited to his account in the CSRF. We read the submission to state, in effect, that the employee has requested that deposits be made to the CSR Fund as though no error had occurred. We find that the error is within the scope of the "Waiver Act," 5 U.S.C. § 5584, and that sufficient authority is provided therein to correct fully the error made.

The agency report indicates that there was no evidence of fraud, misrepresentation, fault, or lack of good faith on the part of Mr. Edwards and that it would be against equity and good conscience and not in the best interests of the United States to collect the \$322.94 erroneously paid to Mr. Edwards, representing the 1.15 percent difference between the FICA deductions taken and the 7 percent which should have been deducted for the CSRF. Accordingly the collection of such amount is hereby waived.

The certifying officer's submission poses a number of questions in regard to the above-described situation which are answered in turn.

"1. Assuming we will receive back from F.I.C.A. as an erroneous contribution \$1,448.59, can we pay to John C. Edwards as a cash payment the amount of the F.I.C.A. deduction?"

No. Had there been no error, deductions in the proper amount would have been made and deposited to the Civil Service Retirement Fund. We see no basis to make any other correction.

As a condition to corrective action, the employee must agree in writing to permit the agency to obtain, to the extent possible, a refund of the FICA amount from the Internal Revenue Service. Additionally, the employee must state that he has not claimed and will not claim a refund or credit of the amount of the erroneous FICA deduction, or if he has made a claim, he must identify and return to the agency any amounts refunded or credited or state that his claim has been rejected. See 26 C.F.R. Parts 31 and 301.

The Internal Revenue Service has informed us that any amount paid into the retirement fund for the employee, over and above the amount of FICA taxes recovered, is a monetary benefit which must be reported as taxable income. Accordingly, the Bureau of Mines would be required to report such income to IRS and to include it as income on the Form W-2 supplied to the employee.

"2. Does the Bureau of Mines have any responsibility to assure that that money is deposited to his retirement fund through the use of SF-2803?"

Yes. See answer to question 1. We feel that if the employee does not wish a full deposit made into the CSRF for the period covered by the erroneous deductions, then no agency action should be taken, and the employee would be entitled to seek a refund or credit of the erroneous FICA deductions directly from Internal Revenue Service. See 26 C.F.R. Parts 31 and 301. Internal Revenue Service regulations permit an employee to file a claim for refund of overpayment of FICA taxes if the employee does not receive reimbursement from the employer and does not authorize the employer to file a refund claim. 26 C.F.R. § 31.6402(a)-2(b). Any claim for refund is subject to the 3-year limitation set forth in 26 U.S.C. § 6511. See 26 C.F.R. § 301.6511(a)-1.

"3. Do the provisions of Public Law 90-616 provide for the expenditure of current appropriated funds in the amount of * * * [\$322.94] due to a prior year error, and can that money be deposited to Mr. Edwards' retirement account to complete the \$1,771.53 which should have been deposited with the retirement fund?"

The provisions of 5 U.S.C. § 5534 do not provide for the expenditure of current appropriated funds in the amount of \$322.94 due to a prior year error. Rather the retirement fund payments in question are chargeable to, and payment should be made from, the fiscal year appropriation from which such payments would have been made had no error occurred. In this connection see 31 U.S.C. §§ 701-708 and the General Accounting Office, Policy and Procedures Manual For Guidance of Federal Agencies, Title 7, section 19.

"4. Since interest is due on deposits for nondeduction service, is the Bureau of Mines responsible to pay such interest as computed by the Civil Service Commission, and can that be paid from current year appropriated funds?"

The Civil Service Commission informally advises that since deposits to the fund are being made as though no error occurred, the question of payment of interest will not arise.

"5. Would the interest on the payment, if appropriate, to the retirement fund be computed on the * * * [\$322.94], on the \$1,448.59, or on the full \$1,771.53?"

See answer to question 4.

"6. Under the circumstances presented, what is the responsibility of the Bureau of Mines for making matching contributions from appropriated funds to the retirement fund?"

If no error had occurred, matching contributions would have been made. The Civil Service Commission informally advises that agency contributions to the fund will be required as though no error had occurred.

R.F. KELLER

Deputy Comptroller General
of the United States