

**DOCUMENT RESUME**

03542 - [A2653813]

[Request for Reconsideration of Denial of Request for Waiver of Erroneous Leave Payment]. E-188250. September 19, 1977. 4 pp.

Decision re: Robert M. O'Mahoney; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Personnel Management and Compensation: Compensation (305).

Contact: Office of the General Counsel: Civilian Personnel.

Budget Function: General Government: Central Personnel Management (805).

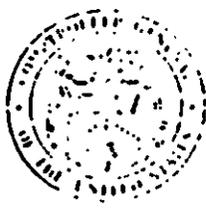
Organization Concerned: Environmental Protection Agency.

Authority: 5 U.S.C. 5584. 4 C.F.R. 91.5. 24 Comp. Gen. 522. E-165663 (1969). E-186262 (1970).

An employee requested reconsideration of a determination denying his request for waiver of an erroneous lump-sum leave payment made after he was terminated and transferred to a new agency. The waiver was not granted because the employee had specific information beforehand that he was not entitled to payment. (HTW)

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*Robert M. O'Mahoney*



**DECISION**

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

**FILE:** B-188250

**DATE:** September 19, 1977

**MATTER OF:** Robert M. O'Mahoney - Request for waiver

**DIGEST:** Employee who transferred without break in service was told by EPA officials that lump-sum leave payment could only be made when employee separated, and not upon transfer to new agency, but was erroneously issued check for lump-sum leave balance. Employee states that he brought payment to attention of payroll office and was advised he was entitled to payment. Waiver may not be granted because employee had specific information beforehand that he was not entitled to lump-sum leave payment.

This action is in response to a request by Mr. Robert M. O'Mahoney for reconsideration of the determination of our Claims Division denying his request for waiver under 5 U.S.C. 5584 (1970) of an erroneous payment of lump-sum leave in the amount of \$4,431.36.

Mr. O'Mahoney was employed as a consultant by the Environmental Protection Agency (EPA) at an annual salary of \$36,000 when he was terminated for lack of work, effective December 1, 1973. He was able to obtain a position, commencing December 2, 1973, with the Federal Power Commission (FPC) as an Attorney-Adviser, grade GS-15/3, at the then existing rate of \$30,147. Incident to the transfer from EPA to FPC, Mr. O'Mahoney asked whether he would receive a lump-sum leave payment for his accumulated annual leave balance. He was informed that he was not entitled to a lump-sum leave payment. He was desirous of receiving payment for his unused leave since he was accepting a lower-paying position. On or about January 13, 1974, Mr. O'Mahoney received a check in the amount of \$3,281.96 representing a \$4,431.36 payment for 236 hours of accrued annual leave, less \$886.27 withheld for Federal tax and \$263.13 withheld for State tax. Mr. O'Mahoney made no inquiry as to the propriety of the payment. The EPA personnel office states that the payment was not questioned until the fact that no break in service occurred was discovered upon receipt from the FPC of Mr. O'Mahoney's leave record. By letter of December 13, 1974, Mr. O'Mahoney was notified

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that the payment should be refunded in the amount of \$3,281.96, due to his reemployment. On February 6, 1975, he was advised that the gross amount of \$4,431.36 was due in accordance with 24 Comp. Gen. 522 (1945).

In a May 20, 1975 memorandum to this Office, Mr. O'Mahoney stated (referring to himself in the third person):

"Applicant believed that because he was taking a reduction in grade and pay, he was equitably entitled to a lump sum payment for his accrued annual leave, and so stated to EPA personnel. EPA personnel said he was not so entitled, and he cleared EPA without payment, and with the impression he was not going to get such payment.\* \* \*"

In a December 30, 1974 memorandum regarding this overpayment, Mr. O'Mahoney stated:

"I was informed by everyone I talked to at EPA that I was not entitled to a lump sum payment and that it could not be paid. I cleared EPA without receiving any such payment and began employment at the FPC.

"When the check arrived from EPA in January, I concluded that officials at EPA had reviewed the situation at my request and concluded I was correct."

The Claims Division denied Mr. O'Mahoney's request for waiver on the basis that, as an attorney with over 22 years of Federal service who had investigated his entitlement to a lump-sum leave payment, he was at fault for not bringing the receipt of the lump-sum leave payment to the attention of the proper officials.

In a letter dated November 10, 1976, appealing the Claims Division settlement, Mr. O'Mahoney stated (again referring to himself in the third person):

"\* \* \*Petitioner had in fact discussed this matter at length with the Office of Planning and management at EPA before his transfer to the FPC. That Office was therefore fully aware of his imminent departure

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and had informed him that they would not issue him a lump sum payment. Consequently EPA's action in issuing the lump sum payment some weeks after his departure was a complete surprise to Petitioner and Petitioner did inquire then of the payroll office of the Environmental Protection Agency as to the propriety of his cashing the check. He was told emphatically that the check was his and that he should cash it."

However, in that letter Mr. O'Mahoney did not provide any specific information regarding his discussion with the EPA payroll office concerning the propriety of his cashing the check.

The authority to waive overpayments of pay and allowances is contained in 5 U.S.C. 5584 (1970) and the regulations implementing that section, which are found at 4 C.F.R. 91.5 (1976). Section 91.5 provides for waiver of an erroneous payment whenever:

"(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. 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.\* \* \*"

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 it is administratively

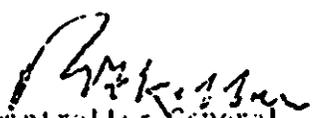
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determined that a reasonable man, under the circumstances involved, would have made inquiry as to the correctness of the payment and the employee involved did not, the employee could not be said to be free from fault in the matter, and the claim against him should not be waived. See B-165663, June 11, 1969.

As stated above, after denial of his request for waiver by the Claims Division, Mr. O'Mahoney stated that he did, in fact, contact the EPA payroll office to question the payment. Thus, he argues that he was not at fault for the purpose of the waiver statute.

If an employee questions the accuracy of his pay and is assured by the proper officials that he is being correctly paid, a request for waiver generally would be looked upon favorably by this Office. For instance, in Matter of James H. Schroeder, B-186242, June 28, 1976, this Office waived the indebtedness of an employee who had questioned an apparent overpayment but had been assured that he was entitled to the amount he was receiving. While stating that the employee had reason to question the payment, this Office found that the employee did not have any special knowledge of personnel law which would give him a basis to question the agency's assurance that the payment was correct. However, unlike Mr. O'Mahoney, the employee had not inquired and been advised that he was not entitled to the pay before receiving it. Unlike the employee in the Schroeder case, Mr. O'Mahoney had specific, explicit information prior to the payment that he was not entitled to a lump-sum leave payment and, thus, did have a basis upon which he could reasonably be expected to realize that the payment he received was not correct, notwithstanding that he states he was advised otherwise by the payroll office.

In view of the above, the determination of our Claims Division denying Mr. O'Mahoney's request for waiver is sustained.

  
Douglas M. Costello, Comptroller General  
of the United States