

DECISION



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

FILE: B-200657

DATE: December 1, 1980

MATTER OF: Fred W. Adams - Waiver of Overpayment

DIGEST: Employee received excess salary payments for 10 months because of administrative error in failing to timely terminate retained pay. Because Standard Form 50, issued 3 months subsequent to retained pay termination date, indicated that employee's pay would continue at the same rate as before expiration of retained pay period, he contends it was reasonable for him to believe his pay was correct. Waiver is denied since the prior Standard Form 50 issued in connection with reduction-in-grade specifically stated that retained pay would not exceed December 4, 1978. Further, employee admits that he knew entitlement period was for only 2 years. He had a duty to question continued receipt of retained pay rate beyond that period.

Mr. Fred W. Adams, a former employee of the Department of Housing and Urban Development (HUD), now retired, seeks further consideration of his request for waiver of his indebtedness to the United States resulting from an overpayment of compensation which was denied by our Claims Division.

Mr. Adams was reduced-in-grade from GS-14, step 9, to GS-13, step 10, effective December 5, 1976. The record shows that the employee was entitled to retained pay for a period of 2 years not to exceed December 4, 1978. This entitlement was noted on the Standard Form 50, Notice of Personnel Action, issued to Mr. Adams at the time of his change to lower grade. However, due to an administrative error, the employee's retained pay was not timely terminated. It continued to be paid until October 7, 1979, when the error was discovered. In the meantime, Mr. Adams had received salary overpayments totaling \$4,648.88.

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The Department of Housing and Urban Development determined that Mr. Adams was at least partially at fault because of his failure to inquire about the correctness of his salary following the scheduled expiration date of his saved pay when he had on at least two separate occasions received Standard Form 50's notifying him of the expiration date. Therefore, in its administrative report, HUD recommended that Mr. Adams' request for waiver of the overpayments be denied. Our Claims Division concurred and denied waiver of the overpayments of salary on July 22, 1980 (Claim No. Z-2823124).

The basis for waiver denial by our Claims Division was that the effective date of the action, which reduced his grade and upon which his retained pay rate period was predicated, was December 5, 1976, and that in December 1978 he should have been sufficiently aware of retained pay termination to put him on notice to question the continued receipt of pay at the higher-level.

The employee contends that, although he was aware of the 2 year limitation on retained pay and should have made inquiry concerning its continuation in December 1978, the circumstances drastically changed with the receipt of a Standard Form 50 dated March 10, 1979, notifying him that he had been reassigned effective February 25, 1979, from CARF Program Specialist, Housing Consumer Services Division to a new position, Consumer Liaison Specialist, Consumer Liaison Division at the same grade of GS-13, and the same salary of \$41,090. Mr. Adams concludes:

"This HUD-50 effective as of 02-25-79 was clearly a notification to me that personnel action had reinstated me in new responsibilities with the \$41,090 salary. In fact, I was in a new office with a new supervisor. What else could I assume?

"And all of this took place two months after the expiration of the salary retention termination."

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The provision of law authorizing the waiver of claims of the United States against employees arising out of erroneous payments of pay, 5 U.S.C. § 5584, permits such waivers only when the collection of the erroneous payments would be against equity and good conscience and not in the best interests of the United States and only when there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee, or any other persons having an interest in obtaining waiver.

The word "fault" as used in 5 U.S.C. § 5584 has been interpreted as including something more than a proven overt act or omission by an employee. Fault is considered to exist if in the light of all the facts it is determined that an employee exercising reasonable diligence should have known that an error existed and taken action to have it corrected. The standard employed by this Office is to determine whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlements. 4 C.F.R. § 91.5(c) (1980).

Employees are under a duty to bring pay questions to the attention of appropriate agency officials. This duty applies to cases of continued receipt of the same salary when a reduction is expected. See Vivian J. Lucas, B-190643, July 6, 1978; George R. Beecherl, B-192485, November 17, 1978.

In the present case, Mr. Adams knew he was being paid more than his authorized GS-13, step 10, salary between December 1978, and October 1979. He explains, however, that beginning with the receipt of the Standard Form 50 dated March 10, 1979, referred to above, he believed that he was entitled to a higher salary as a result of his new position. In consideration of this subsequent Standard Form 50, which contains the erroneous salary information, Mr. Adams believes that our Office should waive the overpayments of salary beginning with the date it was issued, March 10, 1979. Mr. Adams concedes that our Office should not waive the overpayments prior to that date.

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Although Mr. Adams claims to have relied upon the salary amount of \$41,090 as stated on the SF-50 issued 3 months subsequent to the expiration of his retained pay, that same SF-50 reaffirmed his grade to be GS-13. At the time the SF-50 was issued the maximum salary that could be paid for a GS-13 was \$35,688. Therefore, the SF-50 contained an internal inconsistency that should have put Mr. Adams on notice that an error had been made. An employee so situated has a duty to notify and report such an error. Since he had not received a promotion to GS-14, he had no reasonable basis to rely upon the salary amount as stated. Consequently, the objective evidence rebuts Mr. Adams' contention that the subsequent SF-50 was a notification that he had been "reinstated * * * in new responsibilities with the \$41,090 salary." Mr. Adams was at fault for his failure to inform the appropriate HUD officials that his expired retained pay had not been terminated on December 14, 1978, and he was again at fault on March 10, 1979, for not questioning the erroneous information on his SF-50.

It has been consistently held that when an employee is aware of an overpayment of pay when it occurs, he is not entitled to waiver. If he accepts such an overpayment, knowing it to be erroneous, he cannot reasonably expect to retain it and he should make provision for its repayment. Collection of this overpayment from him is not against equity, good conscience, or the best interests of the United States. Therefore, the claim against Mr. Adams may not be waived under 5 U.S.C. § 5584, particularly in light of the fact that Mr. Adams did not bring the situation to the attention of the proper authorities and did not seek an explanation or correction of the error. Ann J. Pelick, B-189083, September 13, 1978; Thomas K. Nahulu, B-189657, August 18, 1977.

Accordingly, the action by our Claims Division denying Mr. Adams' request for waiver of overpayments of salary must be sustained.



For the Comptroller General
of the United States