

DOCUMENT RESUME

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[Request for Waiver of Erroneous Payments into Private Retirement Funds]. B-179188. November 21, 1978. 3 pp.

Decision re: Calvin J. Dellefield; Gerald J. Kluepke; by Robert P. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel: Personnel Law Matters I.
Organization Concerned: Department of Health, Education, and
Welfare: Litigation and Claims Branch; National Advisory
Council on Vocational Education.

Authority: 5 U.S.C. 5584. 5 U.S.C. 51. 5 U.S.C. 53. =4 C.F.R.
91. =26 C.F.R. 31. =5 C.F.R. 831. F-184003 (1976).

The Litigation and Claims Branch of the Department of Health, Education and Welfare protested the action of the GAO Claims Division pertaining to a request for waiver of erroneous payments by the National Advisory Council on Vocational Education into private retirement funds on behalf of its employees. The payments, which occurred through administrative error, were waived since the agency was not aware that its employees were civilian employees for purposes of classification and pay rates, and there was no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employees. (Author/HTW)

DECISION



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

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FILE: B-179188

DATE: November 21, 1978

MATTER OF: Dr. Calvin J. Dellefield, et al.
Request for waiver of erroneous pay
and allowances

DIGEST:

Erroneous payments by National Advisory Council on Vocational Education into private retirement funds on behalf of its employees which occurred through administrative error are waived since agency was not aware its employees were civilian employees for purposes of classification and pay rates and there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employees.

This decision is in response to the letters of October 19, 1977, and September 28, 1977, from the Litigation and Claims Branch, Department of Health, Education and Welfare (HEW), protesting the action of our Claims Division pertaining to a request for waiver of erroneous payments of pay or allowances under the provisions of 5 U.S.C. 5584 (Supp. V, 1975).

The request for waiver by HEW was made in view of the Comptroller General's decisions in 53 Comp. Gen. 531 (1974), and B-179188, April 15, 1975. We held therein, *inter alia*, that personnel employed by the National Advisory Council on Vocational Education (NACVE) are civilian employees for purposes of chapter 51 (Classification) and subchapter III (General Schedule Pay Rates) of chapter 53 of title 5, United States Code, and that the NACVE did not have the authority to pay its Executive Director in excess of \$36,000, the maximum then payable under the provisions of title 5, United States Code.

All of the requests for waiver are for consideration under the waiver procedures as outlined in 4 C.F.R. 91-93 (1978) and the Chairman, NACVE, has recommended that the waiver be approved.

The Claims Division in its reply to HEW stated that those employees who had Social Security (FICA) taxes deducted from their pay, instead of Civil Service Retirement, should, as a condition to corrective action, agree in writing to permit the agency to obtain, to the extent possible, a refund on the FICA amount from the Internal Revenue Service. See 26 C.F.R. 31.6402(a)-2(b)(1) (1977). Additionally, the employee must state in writing 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. The employees may then elect to buy back into the Civil Service Retirement fund, and this should be handled by the NACVE through the Civil Service Commission.

HEW has protested this requirement because it states that the employees were non-permanent prior to the date of the excepted-indefinite appointments in August 1974. Therefore, HEW contends that as non-permanent employees, they were excluded from the Civil Service Retirement System (CSR). Consequently, action should not be required to have FICA credited to CSR on their behalf.

The reason for Claims Division's action was not only to protect the interests of the United States but also to give the employees an opportunity to participate in the CSR program. Thus, it was not contemplated that the employees be required to participate, but rather that they be given the opportunity to participate. See B-184003, July 13, 1976.

However, we agree with HEW that if the employees were serving under non-permanent appointments prior to August 1974, they would be excluded from CSR coverage. 5 C.F.R. 831.201(a) (14) (1978). Thus, HEW would be correct in its deduction of FICA from the employees salaries for the period in contention. Therefore, we no longer need consider the amount paid by the NACVE for FICA.

HEW has also requested reconsideration of the portion of Claims Division's letters pertaining to the payments made into a private retirement fund by the NACVE on behalf of Dr. Calvin J. Dellefield, Gerald J. Kluempke, and other employees. HEW contends that contributions were made to a private retirement fund on behalf of the employees and not to a state retirement fund as stated in CD's letters of July 8, 1977, and October 13, 1977. HEW further states that certain inequities arise in the different treatment of the employees subject to FICA and the employees subject to the private retirement fund.


Since we agree with HEW's action in its deduction of FICA from the employees salaries, we need not consider inequities, if any, between the proposed handling of the employees subject to FICA and those subject to a private retirement fund. Thus, we need only consider whether the amounts paid into a private retirement fund may be waived.

The authority to waive overpayments of pay and certain allowances is contained in 5 U.S.C. 5584 (1976) which provides, in pertinent part, that the Comptroller General may waive a claim, the collection of which 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. 4 C.F.R. 91.5(c) (1978).

The erroneous payment by NACVE into private retirement funds on behalf of its employees occurred through administrative error since the agency was not aware that its employees were civilian employees for purposes of chapter 51 (Classification) and subchapter III (General Schedule Pay Rates) of chapter 53 of title 5, United States Code. Further, there is no indication in the record of fraud, misrepresentation, fault or lack of good faith on the part of the employees involved.

Accordingly, collection of the overpayments into the employee's private retirement funds is hereby waived under the provisions of 5 U.S.C. 5584 (1976).


Deputy Comptroller General
of the United States