

DECISION

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

AUG 2 1976

FILE: B-185254

DATE:

MATTER OF: Kenneth W. Nelson - Waiver of overpayment

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- DIGEST:
1. Civilian employee who received dual compensation for overtime may not be granted waiver of claim by United States for overpayment because earnings statement furnished to him would have indicated overpayment to reasonably prudent employee. Employee was therefore at fault for failure to call matter to attention of proper officials to question correctness of payment.
 2. Civilian employee controverts statement of administrative report, thus creating dispute of fact. Since employee furnished no further evidence for his position, GAO will accept administrative statement of facts in absence of preponderance of evidence to the contrary.

This action concerns an appeal by Mr. Kenneth W. Nelson, of the denial by our Transportation and Claims Division (now Claims Division) of his application for waiver of the claim by the United States against him for an overpayment of salary in the amount of \$1,611.30.

The record indicates that Mr. Nelson, an employee of the Department of the Treasury, Bureau of Customs, entered on duty as a Customs Inspector at Birmingham, Alabama, on December 5, 1971. The overpayment in question arose from the improper recording of overtime hours worked by Mr. Nelson under the conditions prescribed by the Act of February 13, 1911, 35 Stat. 399 (hereinafter 1911 overtime). The proper method of recording 1911 overtime is to enter such time on Form 6082, Customs Work Ticket, for payment to the employee and for reimbursement from the party in interest. This procedure was followed to register the 1911 overtime earned by Mr. Nelson. However, Mr. Nelson also recorded the same hours of overtime on Form 2384, his Time and Attendance Record. Being recorded on Form 2384, the hours so listed were paid by the Internal Revenue Service Data Center as Federal Employees Pay Act (FEPA) overtime hours. Mr. Nelson therefore, received both 1911 overtime payments and FEPA overtime payments for the same hours during the period from January 17,

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1972 through June 21, 1973. The overpayment of FEPA overtime was administratively discovered on August 30, 1973.

Pursuant to 5 U.S.C. 5584, Mr. Nelson requested waiver of the claim by the United States against him for the overpayment. In its letter of January 22, 1975, our Claims Division denied the request. In so deciding, the Division stated that Mr. Nelson should have known that 1911 overtime is not recorded on Time and Attendance Records and further that the dual recording of the same hours should have made him aware of the possibility of double payment. In rejoinder, Mr. Nelson states on appeal that he did not record his overtime because it was not his function to do so. He further states that he was not aware of the proper recording procedures.

In addition, the Claims Division based its denial on the receipt by the employee of two separate statements setting forth the amount and type of overtime compensation paid. The employee first received a copy of Form 3023, Employees Earnings Statement, which itemized the number of FEPA overtime hours worked per pay period and, in addition, indicated the total amount of overtime compensation being paid (FEPA overtime plus 1911 overtime). Secondly, the administrative report indicated that the Customs Data Center issued Form RCS-AAA6446, 1911 Overtime Earnings Statement, which itemized the amount of 1911 overtime compensation earned for each pay period in which such overtime was worked. Based upon these earnings statements, the Division concluded that Mr. Nelson had ample opportunity to have noticed the double compensation and was therefore at fault for failing to call it to the attention of the proper officials. In response, Mr. Nelson states that he did not receive Form RCS-AAA6446 for the period in question and, even if received, the statement would not clarify matters since the reimbursement classification is not set forth therein.

By law, waiver of a claim against an employee may not be made where there is fault or lack of good faith on behalf of the employee. 5 U.S.C. 5584(b)(1). Whether an employee who receives an erroneous payment is free from fault can only be determined by an analysis of all pertinent facts, not only those giving rise to the overpayment, but also those indicating whether the employee reasonably could have been expected to have been aware that an error had been made. If a reasonable person, under the circumstances, would have made inquiry as to the correctness of payment and the employee in the matter before us did not, then that employee cannot be said to be free from fault and therefore cannot be granted a waiver of the claim against him. B-173565, October 27, 1971.

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Because our Claims Division correctly based its denial on the information delivered to the employee in the earnings statements, we need not reach the issue regarding the recording of the overtime. It is our view that the reasonably prudent employee would know whether he had worked 1911 overtime or FEPA overtime. In the case of Mr. Nelson, the heavy preponderance of his overtime was of the 1911 type. Thus, in most instances here, where no FEPA overtime was performed, the overtime compensation amounts on both earnings statements should have been identical. In any event, knowing the type and number of hours of overtime worked, a comparison of the separate earnings statements should have indicated the incorrect FEPA payments. As noted above, Mr. Nelson denied seeing the 1911 Overtime Earnings Statement, but presents no further evidence on this point. Since the appeal controverts the administrative report, there is a dispute of fact regarding this point. We have, however, consistently accepted the administrative statement of the facts in the absence of a preponderance of the evidence to the contrary. 41 Comp. Gen. 47, 54 (1961); B-178654, April 8, 1974. On the basis of the record before us, the presumption in favor of the administrative report has not been overcome. Since Mr. Nelson was thus on notice of the dual compensation, he was at fault for failure to call the matter to the attention of the proper officials to question the correctness of the payment. In these circumstances, waiver of the claim against him is not permitted by 5 U.S.C. 5584(b)(1).

Accordingly, the denial by the Claims Division of Mr. Nelson's request for waiver of the claim against him is hereby sustained.

R.F.KELLER

| Deputy Comptroller General
 of the United States