

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

8355

FILE: B-192283

DATE: November 15, 1978

MATTER OF: L. Mitchell Dick--Waiver of Overpayment
of Pay

DIGEST: Employee was erroneously overpaid salary incident to granting of within-grade increase to step 5 prior to completion of 104 weeks of service in step 4. Request for waiver of overpayment under 5 U.S.C. § 5584 (1976) is denied since employee is not without fault in failing to question significant unexplained increase in pay or to verify correctness of compensation through payroll documents and earnings statements furnished to him by employing agency.

This action is in response to the appeal by Mr. L. Mitchell Dick of the denial by our Claims Division of his application for waiver of an erroneous overpayment of compensation in the amount of \$700.80. The overpayment resulted from the granting of a within-grade increase prior to completion of the prescribed waiting period between step increases.

Mr. Dick, an employee of the General Accounting Office, received a within-grade increase to grade GS-16, step 3, effective April 27, 1975, and another within-grade increase to grade GS-16, step 4, effective April 25, 1976. Due to a statutory pay adjustment effective February 27, 1977, Mr. Dick's annual salary rate as a grade GS-16, step 4, was increased from \$39,600 to \$43,592. Finally, effective April 24, 1977, Mr. Dick received a within-grade increase to grade GS-16, step 5. This last action was erroneous since the minimum waiting period for increases from step 4 to step 5 is 104 weeks rather than 52 weeks. See 5 U.S.C. § 5335(a)(2) (1976).

The erroneous step increase resulted in an increase in Mr. Dick's net pay of over \$25 per pay period. As a result of this error, Mr. Dick was overpaid from April 24 through November 19, 1977, in the total amount of \$700.80. The error was discovered by the employee in November 1977, while he was doing preliminary preparation of his 1977 income tax returns and was promptly reported to the appropriate officials.

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By letter dated June 19, 1978, the Claims Division denied Mr. Dick's request for waiver on the ground that he was not without fault since he possessed records which, if reviewed, would have indicated the overpayment. On the basis of the information contained in the Payroll Change Slip, SF 1126a, issued April 18, 1977, and the leave and earnings statements issued to the employee, the Claims Division concluded that Mr. Dick should have been on notice of the strong possibility of an error in his pay, especially since these documents actually did provide such notice to Mr. Dick in November 1977, when he discovered the error.

On appeal, Mr. Dick argues that the use of the term "review" and the plural form for "records" and "documents" indicate that the test of an employee's fault is whether he or she made a study of several different pieces of information over a period of time which would normally alert an employee of the error. Yet, Mr. Dick states that a different test has been imposed in his case, namely that of being considered to be on notice upon receipt of the first official document. He believes that test is contrary to several decisions of our Office. Mr. Dick argues further that while he believes it is proper to use leave and earnings statements as evidence of negligence on the employee's part when the agency discovers the error and the employee has failed to bring the matter to the attention of appropriate officials, he finds it incongruous that these same leave and earnings statements can be used against an employee after he discovers an error and brings it to the attention of agency officials. Mr. Dick states that the rationale that receipt of leave and earnings statements precludes waiver of erroneous overpayments, regardless of whether the agency or employee discovered the error, is contrary to the spirit and intent of the waiver statute and the waiver standards appearing in 4 C.F.R. Part 91 (1977).

Mr. Dick also points out that his net pay fluctuated greatly during this period of time. Finally, Mr. Dick argues that he should at least be granted a waiver of the amount of overpayment which occurred in the first pay period in question before he received a leave and earnings statement which would have put him on "notice" of the error.

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Under the authority of 5 U.S.C. § 5584 (1976) a claim arising out of an erroneous payment of pay or allowances may be waived if collection would be against equity and good conscience and not in the best interests of the United States. This authority may not be exercised if there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim. 5 U.S.C. § 5584(b)(1). The standards for waiver, which are contained in 4 C.F.R. Part 91, provide, in pertinent part, that a claim may be waived 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. Waiver of overpayments of pay and allowances under this standard necessarily must depend upon the facts existing in the particular case.* * *" 4 C.F.R. § 91.5(c).

In the present case, we note that Mr. Dick's pay did fluctuate during this period for the following reasons. Mr. Dick received a statutory pay adjustment effective February 27, 1977, which raised his annual salary rate from \$39,600 to \$43,592 and raised his net pay approximately \$77. In addition, effective March 27, 1977, Mr. Dick changed the number of tax exemptions he claimed which caused his net pay to decrease by approximately \$23. Then, however, effective

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April 24, 1977, Mr. Dick's net pay increased again by approximately \$25 due to the erroneous within-grade increase. Under these circumstances we believe that the within-grade increase constituted a significant unexplained increase in pay which would have caused a reasonable person to make inquiry as to the correctness of this payment. In this connection our Office has held that if under the circumstances a reasonable person would have made inquiry as to the correctness of a payment, but the employee did not, then the employee is not free from fault and the claim against him may not be waived. Simon B. Guedea, B-189385, August 10, 1977; Roosevelt B. Royals, B-188822, June 1, 1977; and B-165663, June 11, 1969.

In addition, where an employee has records which, if reviewed, would indicate an overpayment, and the employee fails to review such documents for accuracy or otherwise fails to take corrective action, he is not without fault, and waiver will be denied. Thomas O. Marshall, Jr., B-190564, April 20, 1978; Guedea, supra; Royals, supra; and Arthur Weiner, B-184480, May 20, 1976. This rule is particularly relevant in the case of leave and earnings statements. As we stated in Weiner, we cannot stress too highly the importance of a careful review by each employee of the pay data provided by the employing agency. Such review, and reporting of discrepancies for remedial action, is an essential function in the Government's attempt to reduce payroll errors. Thus, our Office has long held that a waiver of indebtedness will not be granted where it appears that the employee did not verify the information provided on his payroll change slips or leave and earnings statements. See Guedea, supra; Royals, supra; and decisions cited therein.

We have held that the employee's agency has a responsibility to prepare proper payrolls and the duty to take steps to insure that this responsibility is properly carried out. The employee, on the other hand, has the responsibility of verifying the correctness of the payments he receives through the leave and earnings statements and other documents he receives, and where a reasonable person would have made inquiry but the employee did not, then he is not free from fault and the claim may not be waived.

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In the present case, Mr. Dick received a Payroll Change Slip, SF 1126a, dated April 18, 1977, which indicated the nature of the action, a within-grade increase, and showed Mr. Dick's new step within grade GS-16 as step 5. This document also contained two erroneous items of information: (1) the date of his last equivalent increase which was listed as April 27, 1975, instead of April 25, 1976; and (2) the old and new annual salary rates which were both listed as \$43,592, the salary rate for Mr. Dick's current grade and step, grade GS-16, step 4. In addition, the leave and earnings statement issued for the pay period ending May 7, 1977, clearly indicated that a within-grade increase had occurred by listing in the "Remarks" category the step, annual salary rate, and effective date of the increase, as well as indicating the proper new rate of GS-16, step 5, in the appropriate space at the top of the form. As the Claims Division letter noted, the information contained in these two documents should have put the employee on notice of the strong possibility of an error in his pay. His failure to inquire as to the correctness of the pay action at that time constitutes fault on the employee's part. See B-178695, June 21, 1973; and B-174301, October 22, 1971.

The decisions Mr. Dick cites, Royals, supra; Weiner, supra; Fred P. McClesky, B-187240, November 11, 1976; B-176546, September 8, 1972; and B-165663, January 30, 1969, all stand for the proposition, discussed above, that an employee is not without fault where he fails to review leave and earnings statements which would indicate the overpayment. Our decisions do not draw a distinction between errors which are discovered by the agency and those which are discovered by the employee, except where the employee has reported a discrepancy to appropriate officials and has been assured that the payment is correct. See, for example, Thomas J. Strenger, B-182311, November 7, 1974. See also Vernon E. Dorsey, B-188247, July 6, 1977. Furthermore, we do not agree that these decisions are contrary to the spirit or intent of the statute and waiver standards. By receiving earnings statements, employees are in a position to mitigate an agency's error by making an inquiry with the appropriate officials. Thus, we cannot say that collection of the claim under these circumstances would be against equity and good conscience.

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Mr. Dick further cites other decisions of our Office in support of his claim for waiver. In Robert L. Zerr, B-184182, July 22, 1976, we waived an overpayment which resulted when an employee who transferred to a different agency had his rate of pay in the new agency established at step 7 instead of step 3 in grade GS-12 based upon a temporary promotion to grade GS-13 in the former agency. This, we held, did not result in an unexplained increase in pay, and, under the circumstances, we concluded that the employee neither knew nor should have known of the erroneous pay-setting action. In Julius C. Steel, B-182188, January 22, 1975, and in B-177180, December 22, 1972, we waived overpayments on the grounds that the erroneous increases were not so significant as to put the employees on notice of the error and there was no evidence that the leave and earnings statements indicated the employee's grade and step which would put the employees on constructive notice of the error. The facts in these cases are clearly distinguishable from those in the present case and, therefore, the holdings in such cases are not in conflict with our holding in the present case.

Finally, Mr. Dick asks, if waiver is not granted for the entire period, that waiver be granted for the first pay period of overpayment of pay ending May 7, 1977, on the ground that he was not on "notice" of the overpayment until he had received his leave and earnings statement for that pay period. We note that the Payroll Change Slip, SF 1126a, described above, contained some erroneous information, such as the current annual salary rate for grade GS-16, step 5, which might not have put the employee immediately on notice of the error. On the other hand, that document definitely shows a within-grade step increase. We believe that information would raise a question or reasonable doubt in the employee's mind as to the correctness of this action. Moreover, as noted above, the leave and earnings statement for the pay period ending May 7, 1977, clearly indicated that Mr. Dick had received a within-grade increase effective that pay period. Under these circumstances, we do not believe that Mr. Dick could have reasonably expected that he could retain the overpayment for this

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pay period without being liable for a refund. Therefore, we find no basis to allow waiver of the overpayment which occurred in the first pay period.

In view of the above, we must sustain the determination of our Claims Division denying the requested waiver.

R. F. K. 11m.
Deputy Comptroller General
of the United States