

DECISION



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

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FILE: B-194626

CNG 0058
DLG 00

DATE: August 9, 1979

DLG 02906

MATTER OF: National Treasury Employees Union and U.S. Customs
Service, Region IX - [Negotiated Agreement Concerning
Waiver of Erroneous Payments]

DIGEST: Federal Labor Relations Authority requests decision
whether collective bargaining agreement provision con-
flicts with the Comptroller General's standards for
waiver contained in 4 C.F.R. Part 91. Agreement requires
agency to notify employee of error within 5 days of pay-
ment to employee or overpayment will be waived. Where
agreement does not consider employee's obligation to
inquire as to correctness of payment, it is inconsistent
with standards for waiver and may not be implemented.

This decision is in response to the request from the Federal
Labor Relations Authority, FLRC No. 78A-29, concerning the legality
of a provision in a locally negotiated collective bargaining agreement
on waiver of erroneous payments of pay and allowances. The question
presented for our decision is whether the provision in the negotiated
agreement conflicts with the standards for waiver of claims issued by
our Office and contained in 4 C.F.R. Part 91 et seq.

The Federal Labor Relations Authority is considering the
negotiability of several provisions of a collective bargaining agree-
ment entered into by the U.S. Customs Service, Region IX, and the
National Treasury Employees Union. The provision of the agreement
which is the subject of our decision provides, in Article 35,
Section 3, as follows:

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"The Employer agrees that where, through administrative
error or oversight, an employee receives a monetary
payment above that to which he or she would otherwise
be entitled, said overpayment shall be waived upon a
showing that:

- "1. The amount involved is not more than five
hundred dollars (\$500.00) or the equivalent;
- "2. The employee was not responsible for the
error; and
- "3. Collection action under the claim would be
against equity and good conscience and not in

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the best interests of the U.S. Government, that is, notice of the mistaken overpayment was not brought to the employee's attention by the Employer within five (5) calendar days of the payment."

The Customs Service argues that this provision is inconsistent with the standards for waiver issued by our Office, particularly 4 C.F.R. § 91.5(c), since the negotiated agreement would permit an employee who has not made reasonable inquiries as to the correctness of a payment to retain the overpayment. The union contends that the provision is consistent with the rules, regulations, and decisions of our Office with regard to the standards for waiver.

Under the authority of 5 U.S.C. § 5584 (1976) a claim of the United States 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. Such waiver may be made by the head of the agency when the claim is in an amount aggregating not more than \$500 and by the Comptroller General for claims exceeding \$500 provided "the waiver is made in accordance with standards which the Comptroller General shall prescribe." 5 U.S.C. §5584(a). The law provides further that this authority for waiver 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).

The standards for waiver, promulgated by this Office under 5 U.S.C. § 5584, are contained in 4 C.F.R. Part 91 et seq. These regulations provide, in section 91.5(c), 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 * * *." (Emphasis added.)

Our decisions have held that 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 under the circumstances involved a reasonable man would have made inquiry as to the correctness of the payment and the employee involved did not do so, then, in our opinion, the employee could not be said to be free from fault and the claim against him should not be waived. B-177629, February 22, 1973; and B-165663, June 11, 1969. See also Gilbert G. Quintero, B-183558, April 23, 1975.


In the present case, the collective bargaining agreement provision does not provide for an inquiry into the facts surrounding the overpayment. Instead, the agreement imposes a burden upon the agency to notify the employee within 5 days of the mistaken payment or lose its right to collect the overpayment. Furthermore, as the U.S. Customs Service has pointed out, the collective bargaining agreement does not take into consideration the obligation of the employee to make inquiries as to the correctness of a significant unexplained increase in pay or allowances. See 4 C.F.R. § 91.5(c).

As an example of the duty to make reasonable inquiries, we have held that 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. See Roosevelt W. Royals, B-188822, June 1, 1977, and decisions cited therein. An employee has the responsibility to verify the information provided on his payroll change slips or leave and earning statements, and where a reasonable man would have made inquiry but the employee did not, then he is not free from fault and the claim may not be waived. John J. Doyle, B-191295, July 7, 1978; and Simon B. Guedea, B-189385, August 10, 1977.

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The provision of the collective bargaining agreement in question here makes no mention of the obligation of an employee to review records or documents in his possession for accuracy or to otherwise inquire as to the correctness of a significant unexplained increase in pay. The requirement that an overpayment be waived if the agency has not notified the employee of the error within 5 days does not take into consideration other facts which are relevant in determining if the employee is free from fault.

Accordingly, we conclude that the collective bargaining agreement provision is not consistent with the provisions of 5 U.S.C. § 5584 or the standards for waiver set forth in 4 C.F.R. Part 91, and such provision could not be legally implemented.


Acting Comptroller General
of the United States