

11,138 PLM-1

DECISION



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

FILE: B-194793

DATE: August 14, 1979

MATTER OF: Donald C. Leavens

DIGEST: Reemployed annuitant was overpaid compensation for services as an intermittent consultant due to administrative error since agency failed to reduce pay by amount of annuity. Waiver is granted since he did not conceal fact that he was annuitant and record fails to establish actual or constructive knowledge sufficient to indicate fraud, misrepresentation, fault, or lack of good faith on his part.

Mr. Donald C. Leavens, a reemployed annuitant, appeals the denial by our Claims Division of his request for waiver of a claim against him by the United States for recovery of \$25,666 *For* in erroneous salary payments.

Mr. Leavens retired from the Department of Transportation (DOT) on July 31, 1975, at the GS-15 grade level. Mr. Leavens was reemployed by DOT, October 29, 1975, under an excepted appointment as an intermittent consultant at a rate of \$138 per day, not to exceed 130 days or October 28, 1976. Mr. Leavens received an additional intermittent appointment on November 1, 1976, for a period not to exceed October 31, 1977, or 130 days at the same rate of \$138 per day.

The overpayments were due to an administrative error in that DOT failed to deduct Mr. Leavens' annuity payments from his salary as required by 5 U.S.C. § 8344 (1976). Under this section an amount equal to the annuity allocable to the actual period of reemployment must be deducted from a reemployed annuitant's salary. In addition, DOT erroneously deducted and withheld FICA from Mr. Leavens' pay. See Federal Personnel Manual (FPM) Supplement 831-1, subchapter S15-7b(3) (December 16, 1974). The error was discovered by DOT in 1977 and Mr. Leavens was notified of his indebtedness on November 8, 1977.

Mr. Leavens, in a sworn statement, dated March 29, 1978, says that until the time the overpayment was discovered he had no knowledge of how a reemployed retired annuitant's pay was determined, nor was he familiar with the regulations concerning reemployed annuitants as intermittent consultants. On this basis,

006161

he asks reconsideration of his requested waiver of indebtedness. The DOT has recommended that the waiver not be granted because facts disclosed by a Report of Investigation indicate that Mr. Leavens should have known that he was being paid at the maximum rate rather than the reduced rate agreed upon at the time of his initial appointment.

The authority to waive overpayments of pay and certain allowances is contained in 5 U.S.C. § 5584 (1976) which provides 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).

There is no dispute in this case that an administrative error did in fact occur. Thus, the only issue that we need consider is whether or not Mr. Leavens knew or should have known that the amount of his annuity should have been deducted from his salary. We believe that the record supports Mr. Leavens' contention that he lacked actual or constructive knowledge of that fact.

The Investigation Report prepared by DOT states in its "Findings" that the Personnel Operations Division records disclose that Mr. Leavens never attempted to disguise the fact that he was a retired Federal annuitant. Mr. Leavens completed a Standard Form (SF) 171, dated September 1, 1975, applying for the position as a consultant and indicated in question 32 that he was not receiving or had not applied for retirement pay. Mr. Leavens admits that this was an error on his part and says it was apparently caused by a failure to completely update his SF 171. However, he points out that the same SF 171, in the employment section, states his reason for wanting to leave his last Federal position as retirement, and contains the statement, "I retired from the Federal Service on July 31, 1975." Mr. Leavens also stated on an SF 61-B, Declaration of Appointee, dated October 29, 1975, that he was receiving a Civil Service annuity.

A memorandum of September 17, 1975, to the Deputy Secretary, DOT, requested Mr. Leavens' appointment as an intermittent consultant and stated that his salary of \$138 per day would be reduced by the per-day amount of his annuity to a net salary of \$46 per day. Although Mr. Leavens drafted this memorandum, it appears that the draft was changed to show the annuity deduction after he submitted it to DOT. None of the officials interviewed could say for sure that the changes were made by Mr. Leavens or who would have made such changes. Mr. Leavens has produced a copy of the draft he prepared which states that he is a civil service annuitant, but which does not mention the annuity deduction, and he has denied making any changes in the memorandum. He says that he did not receive a copy of the final memorandum and did not know that it said his salary would be reduced. Mr. Leavens was not employed at DOT when the final memorandum was prepared nor was a carbon copy marked for his information. Since this was official correspondence between DOT branches, it would not have been necessary to furnish Mr. Leavens a copy. Thus, from the facts in the record we cannot conclude that Mr. Leavens was aware of the contents of the final draft and its reference to an annuity deduction.

Mr. Leavens also drafted a reappointment memorandum, dated September 17, 1976. A DOT official was unable to determine if Mr. Leavens had patterned the second memorandum from the first appointment memorandum or from Mr. Leavens' original rough draft. Further, the official states that Mr. Leavens did not initial the reappointment memorandum grid copy because it came directly to the official. The reappointment memorandum does not have any reference to the annuity deduction.

There is also mention in the record of the possibility that Mr. Leavens notified personnel of the amount of his annuity. Mr. Leavens has denied doing so. The record does show that DOT failed to formally request the amount of Mr. Leavens' annuity from the Civil Service Commission as required by FPM Supplement 831-1, subchapter S15-7c(3) (January 22, 1973). However, the reply letter from the Civil Service Commission, in response to a query from Mr. Leavens, states that such a request could have been made informally. Further, the DOT personnel office prepares an estimate of the employee's annuity

B-194793

on an Employee Retirement Data Statement. Mr. Leavens' personnel folder contains such a statement and could have been the source of the annuity amount used in the original request for appointment.

The DOT has advised that it provides its employees with a copy of Pamphlet 18, entitled "Your Retirement System." This pamphlet states that when an annuitant is reemployed by the Federal Government, the pay during reemployment will be reduced by the amount of annuity received. The pamphlet, however, does not specifically refer to reemployment as an intermittent consultant. Moreover, there is nothing in the record to indicate that Mr. Leavens received this pamphlet, and he denies that he did. We note that the pamphlet is dated July 1975, which is around the time of Mr. Leavens' retirement. Thus a question does arise as to whether the subject pamphlet was available then. There is a similar predecessor pamphlet but again there is nothing in the record to indicate that Mr. Leavens received such a pamphlet.

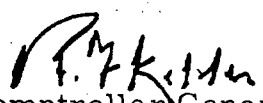
Although Mr. Leavens was a grade GS-15 employee and had many years of Government service, his specialty was transportation, not personnel. Therefore, there is no reason to assume that, because of his long term of Government service, he was familiar with payment regulations or practices. William White, B-186562, March 11, 1977.

There is also an existing presumption of honesty and fair dealing and if, in any case, the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty is required to be drawn. 57 Comp. Gen. 664 (1978). Considering the above circumstances, we do not believe that the record establishes actual or constructive knowledge sufficient to indicate fraud, misrepresentation, fault, or lack of good faith on Mr. Leavens' part. Leon L. Snell, B-188874, August 17, 1977; Max R. Walton, B-189691, November 1, 1977. In view of this and since the overpayments of pay resulted from administrative error, the indebtedness of \$25,666 ~~is~~ hereby waived under the authority of 5 U.S.C. § 5584 (1976).

We have also been informally advised that Mr. Leavens has been paying interest on the principal amount of the claim. A person who has repaid to the United States all or part of the

B-194793

amount of a claim, with respect to which a waiver is granted, is entitled, under 5 U.S.C. § 5584(c) (1976), to the extent of the waiver, to a refund. Leon L. Snell, supra. Therefore, Mr. Leavens may file a claim for refund of any interest that may have been collected from him in satisfaction of the debt.


Deputy Comptroller General
of the United States