

**DECISION**

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

FILE: B-195322

DATE: November 27, 1979

MATTER OF: Guy F. Windley - [Request For Waiver Of  
Erroneous Overpayment Of Post Differential]

- DIGEST:**
1. Denial of request for waiver of erroneous overpayment of post differential pursuant to 5 U.S.C. § 5584 is sustained. Although overpayment resulted from administrative error without any indication of fraud or misrepresentation on part of employee, employee knew, or should have known, he received overpayment and he did not report matter to agency officials. Further, in circumstances presented waiver request was properly considered by our Claims Division under 3-year limitation period in 5 U.S.C. § 5584(b)(2) since date of discovery--as distinguished from date of erroneous payment--is controlling date in determining timeliness of application for waiver.
  2. Employee's request for waiver of erroneous overpayment of post differential has been duly considered and denied by employee's agency and General Accounting Office under 5 U.S.C. § 5584. Although 5 U.S.C. § 5922(b) contains standards for waiver of overseas differentials similar to those in 5 U.S.C. § 5584, employee may request agency to waive overpayment under 5 U.S.C. § 5922(b) since agency's views concerning waiver under latter statute have not been expressed.
  3. Generally, 31 U.S.C. § 952 does not provide authority to compromise claim or to terminate or suspend collection action on claim of United States for overpayment of pay to Government employee where he is still employed and has present or prospective ability to pay. Also, monies held in employee's retirement account are available for setoff when employee is separated and withdraws his contribution or when he qualifies for a retirement annuity. See 58 Comp. Gen. 501 (1979) and cases cited.

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Mr. Guy F. Windley, a former employee of the Agency for International Development, requests reconsideration of his request for waiver of his indebtedness to the United States in the amount of \$3,179.70. Our Claims Division considered Mr. Windley's request under the provisions of 5 U.S.C. § 5584 and denied waiver of the indebtedness on November 29, 1976. AGC00097

The record shows that Mr. Windley was paid \$4,646 post differential on a bi-weekly basis from January 14, 1970, through April 17, 1971. He was eligible for post differential pay only during the periods while he was on temporary duty in Nigeria from January 14, 1970, to March 30, 1970, and on temporary duty assignments in India from January 1, 1971, to March 30, 1971, and again from June 3, 1971, to September 21, 1971. This latter period of temporary duty was exclusive of the time for which the post differentials were paid. For these periods of temporary duty, Mr. Windley was entitled to receive post differential in the amount of \$1,466.30. However, he received \$4,646 resulting in an overpayment of \$3,179.70.

In its adjudication in Z-1390300, November 29, 1976, our Claims Division determined that, although the overpayment resulted from administrative error without any indication of fraud or misrepresentation on the part of Mr. Windley, there was a lack of good faith on his part within the meaning of 5 U.S.C. § 5584. The adjudication concludes as follows:

"In this case, it appears that Mr. Windley was cognizant of the amount of pay to which he was entitled, and he should have noticed and brought to the attention of the appropriate officials the erroneous payments of post differential that continued after his return from service in foreign areas. The employee was sufficiently aware of the rules and regulations governing post differentials to know when he was entitled to such compensation when he had not received any for the temporary duty in India from June 3, 1971, to September 21, 1971. This Office has long held that where an employee knows, or reasonably could be expected to know, that he is receiving an erroneous payment, he has a duty to retain such funds for subsequent refund to the United States.

"The Code of Federal Regulations, Title 4, Chapter 1, Section 91.5, states certain conditions that must be met

before a waiver of claim can be granted. One criterion provides that any significantly unexplained increase in an employee's pay which would require a reasonable man to make inquiry about the correctness of his pay ordinarily would preclude a waiver when the employee fails to bring the matter to the attention of proper officials. Accordingly, it would not be against equity and good conscience, nor would it be contrary to the best interests of the United States, to require refund. We therefore deny waiver of the claim of the United States against Mr. Windley in the gross amount of \$3,179.70. \* \* \*"

Mr. Windley's request for reconsideration is principally directed toward the purpose and operative effect of the following 3 year limitation period contained in 5 U.S.C. § 5584(b)(2):

"§ 5584. Claims for overpayment of pay and allowances, other than travel and transportation expenses and allowances and relocation expenses

\* \* \* \* \*

"(b) The Comptroller General or the head of the agency, as the case may be, may not exercise his authority under this section to waive any claim--

\* \* \* \* \*

"(2) \* \* \* if application for waiver is received in his office after the expiration of three years immediately following the date on which the erroneous payment of pay was discovered or three years immediately following October 21, 1966, whichever is later; \* \* \*"

Mr. Windley contends that the construction of this statutory provision extends to the recovery of the debt as well as the application for waiver, and if the Comptroller General cannot exercise his waiver authority after 3 years then recovery of the overpayment is also barred after 3 years. This Office is unaware of any law, or any regulation made pursuant to law, which would support Mr. Windley's contention. Specifically, section 5584(b)(2) provides an explicit statement concerning the time limitations for applications for waiver of certain erroneous overpayments. However, the statute contains no

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corresponding time limitation provision concerning the recovery by the United States of such erroneous overpayments. For a general discussion of statute of limitations applicable to suits for debts or money demands see 58 Comp. Gen. 501 (1979). Therefore, the General Accounting Office has no authority to require the termination of collection action.

In any event, Mr. Windley's contention in regard to the limitation provision does not control the disposition of his request for waiver of the overpayment to him. The administrative record indicates that the overpayment was discovered in June 1974 when Mr. Windley filed a claim for post differential due him. Where requests for waiver must be filed within the 3 year period established by 5 U.S.C. § 5584(b)(2) and 4 C.F.R. § 91.5, we have held that the date of discovery, as distinguished from the date of payment, is the controlling date in determining whether a request for waiver is timely filed. B-152040, B-158422, December 26, 1968; see also, 54 Comp. Gen. 133 (1974). Accordingly, Mr. Windley's request for waiver was timely filed and our Claims Division had authority to consider it.

The Claims Division denied Mr. Windley's request for waiver because he knew, or could reasonably have been expected to know, that he had received an overpayment and had a duty to retain such funds for subsequent refund to the United States. This is in accordance with decision B-165908 March 14, 1969. The Claims Division also stated that the conditions for granting waiver would preclude waiver if a significant unexplained increase in an employee's pay would require a reasonable man to inquire about the correctness of his pay and he failed to bring the matter to the attention of proper officials. See B-165663, June 11, 1969, and B-175584, June 1, 1972. Our review of the entire record indicates that Mr. Windley knew, or should have known, that he had received an overpayment of pay. Accordingly, we have no basis to disagree with the denial of his request for waiver of the overpayment.

Finally Mr. Windley asks whether the denial of waiver in his case has foreclosed rights he may have to petition for relief under 31 U.S.C. § 952, or 5 U.S.C. § 5922(b).

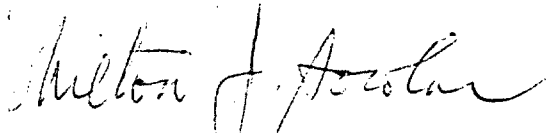
Although agencies are required to take aggressive action to collect the claims of the United States, section 952(b) of title 5, United States Code, authorizes the head of an agency to compromise such a claim or to terminate or suspend collection action when the amount does not exceed \$20,000 and (1) no person liable on the debt

has the present or prospective financial ability to pay any significant sum thereon or (2) the cost of collecting the claim is likely to exceed the amount of recovery. The provisions of 5 U.S.C. § 5922(b) authorize the head of the agency concerned, under regulations prescribed by the President, to waive in whole or in part a right of recovery of allowances and differentials paid in advance which subsequently have not been covered by the accrual of allowances to the employee, if it is shown that the recovery would be against equity and good conscience or against the public interest.

In each of these authorizing statutes the request for waiver, compromise or termination, must be directed in the first instance to the head of the agency concerned. While it is unclear whether Mr. Windley addressed his request for relief to the agency under the provisions of 5 U.S.C. § 5922(b), we note that the statute contains language very similar to 5 U.S.C. § 5584; namely, that waiver may be considered where recovery of the debt would be "against equity and good conscience or against the public interest." The Agency for International Development has recommended denial of waiver of the overpayment under 5 U.S.C. § 5584 but has not expressed any views concerning its position on waiver under 5 U.S.C. § 5922(b). Therefore, should the employee so desire, he may direct a request for waiver of the overpayment under that provision to the Agency.

Generally, 31 U.S.C. § 952 does not provide authority to compromise a claim or to terminate or suspend collection action where there is a present or prospective ability to pay on the debt. See B-189701, September 23, 1977. This is especially true where the individual is currently employed by the Government and the overpayments may be collected by setoff pursuant to 5 U.S.C. § 5514. See 4 C.F.R. § 102.3 Also, monies held in an employee's retirement account are available for setoff when he is separated and withdraws his contribution or when he qualifies for a retirement annuity. 58 Comp. Gen. 501, supra, and cases cited therein.

Accordingly, the denial of Mr. Windley's request for waiver of the claim of the United States against him in the gross amount of \$3,179.70 is sustained, and the unreimbursed amount of that total should be recovered.



For The Comptroller General  
of the United States