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DECISION

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

Request for Reconsideration

FILE: B-198207 DATE: January 14, 1981

MATTER OF: Bernard J. Killeen - Reconsideration--Waiver of optional life insurance premiums

DIGEST: 1. Reconsideration of our previous decision which held that where employee elected optional life insurance coverage but appropriate deductions were not made from his pay from 1968 to 1977, resulting overpayment may not be waived reveals no material error of fact, nor erroneous conclusions of law as to employee's optional life insurance coverage, fault or constructive notice, and is therefore affirmed.

2. Assuming that employee made inquiries to proper officials concerning his optional life insurance coverage, it does not necessarily follow that employee is entitled to waiver of claim against him for overpayment of pay resulting from agency's failure to deduct premiums since it cannot be said that collection of it would be against equity and good conscience. Employee received the benefit of the insurance coverage which remained in force even though premiums were not deducted.

We have been asked by Mr. Bernard J. Killeen to reconsider our decision B-198207, August 22, 1980, which denied his request for waiver of an overpayment that resulted from the Social Security Administration's (SSA) failure to make proper deductions from his pay for optional life insurance coverage under the Federal Employees Group Life Insurance Program (FEGLI). Upon reconsideration, we affirm our previous decision.

The circumstances that gave rise to the overpayment are not in dispute and were treated at length in our previous decision. We briefly summarize them as follows. On February 13, 1968, Mr. Killeen, an SSA employee, signed a Form SF-176-T ("Election, Declination or Waiver of Life Insurance Coverage") by which he elected optional in addition to regular life insurance coverage and authorized payroll deductions to be made for the optional insurance.

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As a result of administrative error, no payroll deductions were made for optional insurance from 1968 through 1977. Because the optional life insurance nevertheless remained in effect, the failure to deduct premiums resulted in an overpayment to Mr. Killeen of $1,573.

In support of his request for reconsideration, Mr. Killeen contends that our previous decision contained a material error of fact and was based on erroneous conclusions of law in regard to his life insurance coverage under FEGLI, fault and constructive notice. He has also submitted an additional statement of one of his former administrative officers, the significance of which will be treated in our discussion of fault and constructive notice. With the exception of this statement, we note that the arguments he raises concerning erroneous conclusions of law are all addressed in our previous opinion.

In our previous decision we stated that "[w]hile he (Mr. Killeen) recognizes that his wife would have benefited had she become his widow between 1968 and 1977, he notes that the opposite is equally true and suggests that because she did not become his widow no benefit was received." Mr. Killeen now contends that this statement constitutes a material error of fact which affected the outcome of our previous decision because "[a]t no time, did I ever so recognize, state or acknowledge that my wife would have benefited." Since there seems to be some misunderstanding concerning the law in these areas, we will amplify our previous decision.

In his request for reconsideration, Mr. Killeen reiterates his argument that we have ignored the long-established principle of life insurance law that without a premium payment there can be no liability on the part of the insurer, and thus he was not covered under FEGLI. Whatever validity his argument may have in regard to ordinary insurance contracts, it overlooks the fact that the FEGLI coverage is not a contractual matter but is governed by applicable regulations promulgated pursuant

to Federal statutes. As was stated in our previous decisions, throughout the period from 1968 to 1977, Mr. Killeen's optional FEGLI coverage was effective by virtue of 5 C.F.R. 871.203 and 871.204 which presently and throughout the period in question provided:

> "§ 871.203 Effective date of insurance
>
> "(a) The effective date of an election of optional insurance is the first day an employee actually enters on duty in a pay status on or after the day the election is received in his employing office.
>
> "(b) An election of optional insurance remains in effect until canceled as provided in § 871.204. For an employee whose optional insurance has stopped for a reason other than declination or waiver, optional insurance is reinstated on the first day he actually enters on duty in a pay status in a position in which he again becomes eligible."
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> "§ 871.204 Declination.
>
> "(a) An insured person may at any time cancel his optional insurance by filing with his employing office a declination of optional insurance or a waiver of regular insurance coverage.
>
> "(b) A cancellation of optional insurance becomes effective and optional insurance stops at the end of the pay period in which the declination or waiver is received in the employing office.
>
> "(c) A declination of optional insurance remains in effect until it is canceled as provided in § 871.205."

Once effective, optional insurance can be canceled only by the employee's becoming ineligible for coverage

or the employee's written cancellation. Since Mr. Killeen had elected the optional insurance, never rescinded the election, and did not become ineligible for the coverage during the period that no deductions were made, he received the full benefits of the optional life insurance coverage despite the fact that no insurance premiums were withheld. In such circumstances, we cannot say that collection of the claim would be against equity and good conscience. See Thomas O. Marshall, Jr., B-190564, April 20, 1978. Indeed, such a result is consistent with FEGLI since its inception. See 34 Comp. Gen. 257 (1954).

The authority for the waiver of claims for overpayment to Federal employees of pay and allowances of more than $500 is contained in 5 U.S.C. § 5584 (1976). That section provides that where collection of such a claim would be against equity and good conscience and not in the best interests of the United States, it may be waived in whole or in part by the Comptroller General of the United States unless:

> "* * *in his opinion, 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* * *."

The standards for "fault," and "constructive notice" in their legal senses are well established, and were set forth in our previous opinion. Indeed, we have long held that a waiver of indebtedness would not be granted where it appears that the employee did not verify the information provided on his payroll change slips or his leave and earnings statements. See Bernard Popick, B-184574, July 1, 1976. From his submission Mr. Killeen apparently believes it is unreasonable to "transfer" the negligence of the employing agency to him, an "innocent party." The point of our previous decision, however, was not that the administrative error was transferred but rather we found that the employee, who

was given the means to verify the correctness of his pay checks and failed to do so, is not without "fault" in its established legal sense. Fred P. McCleskey, B-187240, November 11, 1976.

In this regard, Mr. Killeen's request for reconsideration contains a letter from one of his former administrative aides whose duties included taking care of personnel matters in the SSA District Office where Mr. Killeen was assigned. The substance of the aide's statement is that at one time before 1977 Mr. Killeen asked her if he had optional FEGLI coverage. After checking the records available to her, she told him that he did not have it because no deductions were being made for it. We note that one of Mr. Killeen's original contentions in his memorandum of April 5, 1977, was to this effect, and since this and possibly other inquiries were apparently made orally, our previous decision merely observed that the SSA found no evidence that the Regional Personnel Office or the Payroll Division was contacted by Mr. Killeen or someone acting on his behalf. Even assuming that such inquiries were made, it would still not necessarily follow that Mr. Killeen is entitled to a waiver of the claim against him since, as we have pointed out above, we cannot say that the collection of it would be against equity and good conscience. See Robert L. Fondren, B-186802, November 30, 1976 in which it was indicated that even assuming the employee did not know erroneous payments were being made and that being assured by responsible operating officials that the insurance coverage was in force and the proper deductions were being made, it does not necessarily follow that employee is entitled to waiver since he still received the insurance coverage.

In this regard, we also note that our previous decision found that by receipt of two Form 50's in 1972 and again in 1976, Mr. Killeen had two actual written notices of the administrative error in failing to deduct the optional notices he may have received during the period. It remains our view that he should have been aware that he had elected insurance coverage which would require additional deductions from his salary, and when those

deductions were not made he should have made a determined effort to find out what happened to his election.

For the foregoing reasons, we affirm our previous decision denying Mr. Killeen's request for waiver.

Milton J. Socolar

For the Comptroller General
of the United States