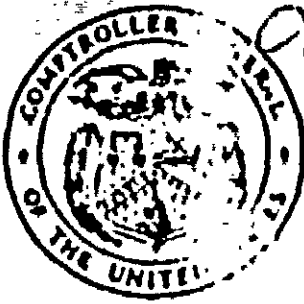


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DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548****FILE: B-202983****DATE: March 10, 1982****MATTER OF: Sidelle Wertheimer - Erroneous FICA
Deductions - Waiver**

DIGEST: Agency erroneously deducted FICA instead of Civil Service Retirement from employee's salary during a 10-month period. Erroneous FICA deductions should be recovered and paid into the Civil Service Retirement Fund. Since the amount is not more than \$500, the erroneous overpayment representing the difference between FICA and Civil Service Retirement deductions is remanded to the agency for its determination as to the granting of waiver.

The issue in this decision is what action should be taken when the agency erroneously deducted social security taxes under the Federal Insurance Contributions Act (FICA) from an employee's salary instead of Civil Service Retirement (CSR). We hold that the erroneous FICA deductions should be recovered and paid into the Civil Service Retirement Fund. The erroneous overpayment representing the difference between FICA and CSR deductions is remanded to the agency for its determination as to the granting of waiver.

This decision is in response to a request from Deborah S. DuSault, Director, Personnel Systems and Payroll Division, Department of Housing and Urban Development (HUD), concerning the erroneous withholding of FICA deductions from the salary of Ms. Sidelle Wertheimer.

Ms. Wertheimer was employed by HUD in January 1980, on a term appointment following her employment by another Federal agency. However, since she was selected from a certificate of eligibles, she was processed as a new appointee with FICA coverage. Based upon her prior employment, Ms. Wertheimer should have continued to be covered under Civil Service Retirement. See 5 C.F.R. § 831.201(b)(1) (1981).

The error was discovered in November 1980, and the agency now questions what corrective action may be taken. First, HUD questions whether the deductions may be transferred from FICA to Civil Service Retirement on a retroactive basis. Second, HUD seeks waiver of the difference in deductions between FICA and Civil Service Retirement.

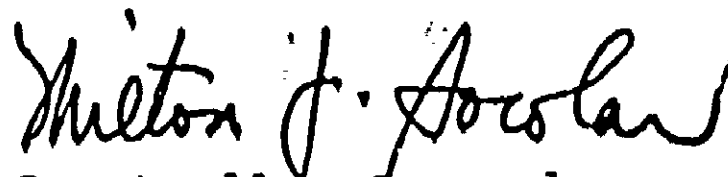
As we held in John C. Edwards, B-184003, July 13, 1976, the employee must agree in writing to permit the agency to obtain, to the extent possible, a refund of the FICA amount from the Internal Revenue Service (IRS). The employee must state that she has not claimed and will not claim a refund or credit of the amount of the erroneous FICA deduction, or if she has made a claim, she must identify and return to the agency any amounts refunded or credited or state that her claim has been rejected. See 26 C.F.R. Parts 31 and 301 (1980). See also Patricia J. Engevik, B-202201, December 23, 1981.

The difference between FICA and Civil Service Retirement deductions constitutes an erroneous overpayment of pay to Ms. Wertheimer which may be subject to waiver under the provisions of 5 U.S.C. § 5584 (1976) and 4 C.F.R. Part 91 (1981). See Engevik, supra, and Edwards, supra. However, since we have no report as to the facts concerning the overpayment and since we are advised that the amount in question does not exceed \$500, we are remanding the question of waiver to the Department of Housing and Urban Development for an investigation of the facts and its determination whether to grant waiver in this case. See 4 C.F.R. §§ 92.2 and 91.4(b).

The agency questions whether these payments may be made to the retirement fund in view of a provision in Federal Personnel Manual Supplement 831-1, S2-5, which states that where an agency discovers it has erroneously failed to withhold required retirement deductions, the period of service will be considered creditable but retroactive deductions should not be made. It is our view that this provision does not preclude the action described above but rather addresses the question whether retroactive deductions should be collected from the employee. See Engevik, supra.

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Accordingly, action may be taken consistent with the above decision.

for 
Comptroller General
of the United States