

DECISION

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

FILE: B-204974

DATE: June 24, 1982

MATTER OF: Seymour Zirin

DIGEST: Where an individual receives a lump-sum payment part of which is erroneous and he is promptly notified of the mistake and asked to refund the money, the fact that he was without fault does not provide a basis for granting waiver since it would not be against equity and good conscience and would be in the best interests of the United States to recover the money.

This action is the result of an appeal by Mr. Seymour Zirin of a settlement of our Claims Group denying his request for waiver of his debt to the United States in the amount of \$869.74. The debt arose as a result of an erroneous payment for compensatory leave included in a lump-sum payment of \$11,912.20. His request for waiver is denied for the following reasons.

The payment occurred at the time of Mr. Zirin's retirement from the United States civil service at grade GS-14 with over 37 years of service. Following his retirement he received a lump-sum payment for 1 regular workday and accrued annual and compensatory leave. The erroneous payment resulted from the agency's failure to consider the fact that by operation of the law the amount he could be paid for the compensatory leave was limited. The lump-sum check he received was dated January 16, 1981. It appears that he was notified of the error in his lump-sum payment by the certifying officer on February 9, 1981, through a telephone conversation. A letter from the certifying officer explaining the error and requesting refund of the erroneous payment was also sent on that date. Mr. Zirin says he did not receive the letter until February 18, 1981.

Upon receiving the request for refund, Mr. Zirin asserted that he was without fault in the matter and thus should be granted a waiver of the debt. He said that the money, apparently the lump-sum payment, was unavailable since he had invested it. Subsequently his request for waiver was referred to the Claims Group of this Office for consideration. His request was denied on the basis that an individual with as much Federal service as he had and who had apparently worked for compensatory time throughout his career must

be considered at least partially at fault for not recognizing that an overpayment occurred. Whether or not Mr. Zirin may be considered partially at fault in this matter, we do agree that Mr. Zirin's request for waiver should be denied.

This Office and the courts have held that an individual who receives an erroneous payment from the United States acquires no right to retain the money. See B-194029, October 22, 1979, and the cases cited therein. With the enactment of 5 U.S.C. 5584 the Congress provided authority to waive claims of the United States against employees arising from erroneous payments of pay and allowances. That section provides in part as follows:

"(a) A claim of the United States against a person arising out of an erroneous payment of pay or allowances * * * the collection of which would be against equity and good conscience and not in the best interests of the United States, may be waived in whole or in part * * *."

The statute goes on to state that the head of an agency or the Comptroller General may not exercise his authority under this section to waive a claim if 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 interested in obtaining a waiver of the claim.

Mr. Zirin contends that none of these conditions are applicable to him. He claims that no fault can be attributed to him in connection with the erroneous payment and thus we are precluded from denying his request for waiver.

While Mr. Zirin may not have recognized the overpayment when he received it, we do not find this to be the issue in the case. The primary issue is whether the collection of this erroneous payment would be against equity and good conscience and not in the best interests of the United States.

Mr. Zirin received a lump-sum payment of nearly \$12,000, of which \$869.74 was erroneous. He was promptly notified of the mistake and was asked to refund the money. It seems

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clear that Congress in enacting the waiver statutes did not intend that waiver would be an entitlement if the employee was not at fault in accepting the erroneous payment. If that had been the case there would have been no reason to include the provisions quoted above concerning "equity," "good conscience," and "not in the best interests of the United States." Obviously Congress did not intend that a waiver would be granted every time a Government agent made a mistake in the payment of pay and allowances and the recipient was without fault.

In this case the employee received a substantial lump-sum payment, only a small part of which was erroneously paid. The mistake was discovered soon after payment was made and the employee was promptly notified. He asserted that he did not realize that an error had been made in the original payment and claims a right to waiver of collection by the Government primarily on the basis that the payment has been invested.

Although we do not require proof of financial hardship in connection with waiver cases and although we cannot establish a specific time frame applicable to all cases within which notice of overpayment may be given so as to justify denial of waiver, in a case such as this we must predicate our determination of whether a denial of waiver would be against equity and good conscience on all the facts and circumstances. In making a determination we must evaluate the interests of the United States as well as the debtor's situation.

Thus, in the circumstances of this case we do not find it to be against equity or good conscience to require Mr. Zirin to return the \$869.74 which was erroneously included in his \$11,912.20 lump-sum payment. We note that if it is acceptable to his agency, Mr. Zirin may arrange with them to repay the debt in installments rather than liquidate his investment.

Accordingly, we deny Mr. Zirin's request for waiver since it is not against equity and good conscience to require repayment and since it is in the best interest of the United States to collect the erroneous payments.

William J. Rowland
for Comptroller General