

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

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FILE: B-212402**DATE:** December 14, 1983**MATTER OF:** John J. Short - Waiver of Erroneous
Payments of Pay**DIGEST:**

Employee in grade GS-4, step 8, who received Upward Mobility appointment to position in grade GS-3, step 10, was afforded pay retention under 5 U.S.C. § 5363 (1982). Agency erroneously computed employee's pay comparability adjustment in October 1980, and, in October 1981, increased employee's salary when it should have terminated his retained pay status. The errors were not discovered until March 1982. Resulting overpayments for period October 1980 to October 1981 may be waived since employee questioned propriety of pay increase and was advised by agency officials that it was correct. However, a portion of the overpayments made between October 1981 and March 1982 may not be waived since employee accepted those overpayments knowing that an error had been made.

This decision responds to correspondence received from Mr. John J. Short, an employee of the U.S. Department of Agriculture, Science and Education Administration, Agricultural Research, North Central Region, Northern Regional Research Center. Mr. Short requests reconsideration of our Claims Group settlement, dated March 29, 1983, which denied his request for waiver of overpayments in the amount of \$1,588.96. For the reasons stated below, our Claims Group settlement is reversed in part and sustained in part.

Mr. Short was employed by the agency's Northern Regional Research Center (NRRRC) in grade GS-4, step 8, at \$12,394 per annum. Effective July 13, 1980, he received an Upward Mobility appointment to the position of Biological Aid, grade GS-3, step 10. Because of his reduction in grade, Mr. Short was afforded pay retention under the provisions of 5 U.S.C. § 5363 (1982). Under section 5363(a)(3),

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an employee receiving pay retention is entitled to basic pay at a rate equal to: (a) the employee's allowable former rate of basic pay, plus (b) one-half of the annual comparability adjustment allowable for the maximum rate of basic pay payable for the grade of the employee's new position. See generally 5 C.F.R. § 536.205 (1983). Implementing regulations set forth in 5 C.F.R. § 536.205(d), provide that an employee's entitlement to pay retention ceases when the maximum rate for the grade of his new position equals or exceeds his allowable former rate of basic pay.

Accordingly, effective July 13, 1980, Mr. Short's salary entitlement was limited to his former rate of basic pay (grade GS-4, step 8, \$12,394 per annum) plus one-half of each comparability increase for grade GS-3, step 10, until his entitlement to pay retention terminated. Therefore, on October 5, 1980, the date of the first applicable comparability adjustment, Mr. Short's salary should have been fixed at \$12,927 per annum (\$12,394, his former rate of basic pay, plus \$533, one-half of the comparability increase for grade GS-3, step 10). The agency, however, erroneously granted Mr. Short the full comparability increase for grade GS-4, step 8, fixing his annual salary rate at \$13,518. Mr. Short states, and the agency acknowledges, that he immediately questioned officials in the North Central Region (NCR) personnel office, which services NRRC, regarding the correctness of his adjusted salary. As will be discussed below, Mr. Short now alleges that NCR officials responded to his inquiries with oral assurances that his salary rate was correct.

The error in Mr. Short's pay was compounded on October 4, 1981, when the agency increased his salary from \$13,518 to \$14,989. According to the General Schedule rates effective October 4, 1981, Mr. Short's adjusted salary was between the rates of basic pay for grade GS-4, step 10 (\$14,937) and grade GS-5, step 6 (\$14,994). See Executive Order No. 12,330, 46 Fed. Reg. 50921 (1981). Had Mr. Short's rate of retained pay been computed properly, the agency would have realized that he was entitled to a salary of \$13,304, the maximum rate for grade GS-3, step 10, as of October 4, 1981. On that date, the employee's entitlement to pay retention under 5 U.S.C. § 5363 terminated because the maximum rate for the grade of his new

position (\$13,304) exceeded his correct retained rate of \$13,229 (\$12,394, his former rate of basic pay, plus allowable comparability increases of \$533 in October 1980 and \$302 in October 1981). See 5 C.F.R. § 536.205(d), discussed above.

Mr. Short states that the October 4, 1981, pay increase was considerably larger than he had anticipated, and, therefore, he realized that an error had been made. He promptly contacted officials in NCR's personnel office regarding the possibility of an error, and continued to pursue the matter with officials at NRRC. By memoranda dated November 30, 1981, and January 14, 1982, officials at NRRC requested NCR's personnel office to check its computation of Mr. Short's rate of basic pay. Both memoranda explained that Mr. Short believed he was being overpaid, and was concerned that he might be required to repay substantial amounts in the future. In its memorandum dated January 14, 1982, NRRC stated that Mr. Short's adjusted salary was \$14,989, and suggested that it should have been \$14,171, the rate of basic pay for grade GS-4, step 8, effective October 4, 1981.

The Department of Agriculture discovered its errors in March 1982, and later determined that those errors had caused Mr. Short to be overpaid in the total amount of \$1,588.96 between October 1980 and March 1982. The agency forwarded Mr. Short's request for waiver of the overpayment to our Claims Group with the recommendation that it be waived. Our Claims Group denied waiver, determining that Mr. Short was at fault since he was aware that he was being overpaid as early as October 1980, and, therefore, should have retained the amount of the overpayment for an eventual refund. While our Claims Group acknowledged that Mr. Short had made several inquiries regarding the correctness of his pay, it found that he had not been assured at any time that his pay was correct.

Mr. Short disputes our Claims Group's determination, stating that officials in NCR's personnel office orally assured him that his pay was correct in response to his inquiries immediately following the October 1980 and October 1981 comparability increases. He maintains that he reasonably relied on those assurances, and, therefore, waiver is proper.

Under the authority of 5 U.S.C. § 5584 (1982), this Office may waive overpayments of pay and allowances received by an employee if collection action "would be against equity and good conscience and not in the best interests of the United States." However, that authority may not be exercised if there is an indication of fault on the part of the employee in the matter. "Fault" is considered to exist if it is determined that the employee knew or should have known that an error existed but failed to take corrective action. See 4 C.F.R. § 91.5 (1983).

We find no indication that Mr. Short was at fault in accepting overpayments made during the period October 1980 to October 1981. The record shows that Mr. Short questioned the correctness of his pay immediately following the October 1980 comparability increase, and he alleges that appropriate officials advised him that his pay was correct. He was not formally advised that his salary rate was incorrect until March 1982, approximately 18 months after the date of the initial overpayment. Further, the record does not indicate that Mr. Short had any special knowledge of personnel laws or that he worked in a position in which such knowledge was required. Under these circumstances, we believe that it was reasonable for Mr. Short to rely on assurances given him by officials in NCR's personnel office. See James H. Schroeder, B-136262, June 28, 1976; and Thomas J. Strenger, B-132311, November 7, 1974.

With respect to overpayments made during the period October 1981 to March 1982, however, the record shows that Mr. Short realized at the time of the October 1981 comparability increase that an error had been made. The amount of pay he received at that time exceeded not only his former salary in grade GS-4, step 8, but also exceeded the highest step in that grade. Thus, he continued to question the correctness of his pay even after he allegedly had received assurances that his pay was correct.

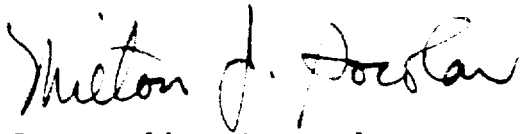
This Office has consistently held that when an employee is aware of an overpayment of pay when it occurs, he is not entitled to relief under 5 U.S.C. § 5584. If he accepts such an overpayment, knowing it to be erroneous, he cannot reasonably expect to retain it and should make provision for its repayment. In these circumstances, collection of the overpayment is not considered to be against equity,

good conscience, or the best interests of the United States, even though the employee may have promptly apprised proper authorities of the situation and sought an explanation or correction of the error. Beatrice M. Lansdown, B-201815, March 25, 1981; Thomas K. Nahulu, B-189657, August 18, 1977.

Since Mr. Short was aware at the time of the October 1981 comparability increase that he was being overpaid, we hold that he was not free from fault in accepting overpayments during the period October 1981 to March 1982.

With respect to the amount of Mr. Short's liability, we note that NRRC believed, and Mr. Short reasonably could have expected, that his salary should have been set at \$14,171, the rate of basic pay for grade GS-4, step 8, effective October 4, 1981. Such an adjustment, although erroneous, would have been consistent with the agency's pay-setting determination in October 1980. For this reason, Mr. Short should be required to repay only the difference between the salary he received at the annual rate of \$14,989 and salary at the rate prescribed for grade GS-4, step 8 (\$14,171) for the 6-month period in question.

Accordingly, that portion of our Claims Group settlement denying waiver of erroneous payments accepted by Mr. Short during the period October 1980 to October 1981 is reversed. We sustain that portion of the settlement denying waiver of overpayments made between the date of the October 1981 comparability adjustment and March 1982, subject to the limitation mentioned above.

for 
Comptroller General
of the United States