

In Re:

[Redacted]

Claimant

DATE: June 13, 1997

Claims Case No. 97012135

CLAIMS APPEALS BOARD DECISION

DIGEST

Waiver of collection of an overpayment resulting from an agency's failure to reduce the salary of a rehired annuitant to reflect a cost of living increase is denied where the employee generally alleges that he had problems with his pay at various times since his appointment because of his status as a rehired annuitant and that he generally relied on the expertise of pay officials. The employee offered no rebuttal to the finding that he was advised in Notifications of Personnel Actions and through prior experience over a 3-year period that his salary was reduced each time that there was a cost-of-living increase, and he failed here to document the suspected error, obtain assurances from agency pay officials that it was not an error, and show reliance on their advice with regard to this error.

DECISION

, a civilian employee/rehired annuitant of the Department of the Air Force, appeals the decision of the U.S. General Accounting Office (GAO) which disallowed his application for the waiver of the erroneous overpayment of \$1,230.80 of salary.⁽¹⁾ Under Section 103(d) of Public Law No. 104-316, 110 Stat. 3826, 3828-3829, Oct. 19, 1996, Congress transferred to the Director of the Office of Management & Budget (OMB) the Comptroller General's authority under title 5, United States Code, Section 5584 (5 U.S.C. 5584) to consider applications by Federal employees requesting that the government waive debts resulting from the erroneous overpayment of salary and allowances. The OMB Director delegated this authority to the Secretary of Defense effective December 18, 1996.⁽²⁾ The Defense Office of Hearings and Appeals (DOHA) now exercises the authority transferred or delegated to the Secretary of Defense through this Board, which is part of DOHA.

Background

The record shows that the Air Force appointed the employee on November 30, 1990. As a reemployed annuitant, the employee's salary was subject to reduction by the amount of the annuity he was receiving as required by 5 U.S.C. 8344. The employee's salary was calculated correctly from November 30, 1990 until February 19, 1994. In January 1994, the employee's annuity increased, and therefore, he should have expected a corresponding decrease in salary. Due to an administrative error, the employee's salary was not reduced from February 20, 1994 through July 8, 1995. On appeal, the employee contends that from the time of his appointment he had experienced erratic fluctuations in pay from pay period to pay period and that pay officials had always assured him that his pay was correct and that the fluctuations were due to his status as an annuitant. The employee points out that he was actually underpaid in 1993 and 1994. The employee relies on title 4 of the Code of Federal Regulations (C.F.R.), Section 91.5 (4 C.F.R. 91.5), a part of GAO's implementing regulations for 5 U.S.C. 5584, to support his argument that his debt should be waived because he was not guilty of fraud, misrepresentation, fault or lack of good faith.

Our review of the record indicates that the employee received Notifications of Personnel Actions, starting from the one dated November 30, 1990, pertaining to his appointment, which indicated that his annual salary was to be reduced by the amount of his retirement annuity and by future cost of living increases. Also, the DFAS and Air Force administrative reports and the GAO found that as a result of several cost-of-living increases between his appointment and the administrative error in 1994, and the corresponding decreases to his salary, he should have reasonably expected a salary decrease as a result of the January 1994 cost of living increase. When this did not occur, he should have questioned why

this had not occurred.

Discussion

Title 5 of the United States Code, Section 5584 provides for waiver of a claim of the United States against a person which arises out of the erroneous payment to an employee of pay and allowances, including travel, transportation and relocation expenses and allowances. Waiver is permitted only when the collection of the claim would be against equity and good conscience, and not be in the best interests of the United States. Under 5 U.S.C. 5584(b), waiver is not permitted if 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 one having an interest in the claim.

While there is no indication of fraud, misrepresentation or lack of good faith, the employee is not without fault in this matter. He neither rebutted the finding of GAO, DFAS and Air Force officials that there was no reduction in his salary as a result of the January 1994 cost of living increase, nor the finding that he should have reasonably expected a salary decrease at the beginning of 1994 notwithstanding all of personnel notifications and prior salary reductions in connection with prior cost-of-living increases. And, he failed to document any efforts to bring the administrative error in issue here to the attention of the proper officials, obtain assurances that this error did not exist, and show reliance on their advice. Compare David L. Williams,

B-243315, B-243315.3, Nov. 5, 1992. A general statement that he was underpaid for some periods of time or that he generally relied on pay officials is insufficient.

The employee draws our attention to the sentence in 4 C.F.R. 91.5 referring to the lack of fraud, misrepresentation, fault or good faith, but he may have missed the next sentence: "Generally, waiver is precluded when an employee, member, or other person having an interest in obtaining waiver receives a significant unexplained increase in pay or allowances, or otherwise knows, or reasonably should know, that an erroneous payment has occurred, and fails to make inquiries or bring the matter to the attention of the appropriate officials." In a claim involving a similar reduction mandated by the Foreign Service Act of 1980, the Comptroller General found that when an employee knows or reasonably could be expected to know that he is being overpaid, he has the duty to question the accuracy of his pay. See William J. McGovern, B-232546, Oct. 17, 1989. The Comptroller General also noted the affirmative duty of each employee to review his pay records for accuracy.

Conclusion

We affirm GAO's Settlement.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Joyce N. Maguire

Joyce N. Maguire

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. Settlement Certificate Z-2943567-025, August 20, 1996.

2. See also B-275605, March 17, 1997.