



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Alan D. Zempel—Salary Overpayments—Waiver

File: B-260843

Date: October 24, 1996

DIGEST

GS-13 employee was temporarily promoted to GM-14 for the period April 1989 through April 1991, when he was returned to his previous GS-13 position. In February 1992, he was again temporarily promoted to the GM-14 position, until February 1993, when he was returned to GS-13. In March 1993 the agency advised him that due to several errors in setting his pay during these periods, he had been overpaid for which he would be in debt. At about the same time, he was permanently promoted to GM-14, and his pay was again erroneously set at a higher rate which caused him to receive overpayments through November 1993 when the agency corrected the error. Waiver was granted for overpayments he received during the period through February 1993, but denied for the subsequent period on the basis that the advice he received in March should have put him on notice that his pay was incorrect. On appeal, waiver is granted for the additional period since record supports employee's contention that the March advice related only to prior problems with his pay, and he was not aware that upon his subsequent promotion it again was set erroneously.

DECISION

This is in response to Mr. Alan D. Zempel's appeal of our Claims Group's partial denial of his request for waiver of a debt which arose from overpayments of pay he received in various positions over several years as an employee of the Internal Revenue Service.¹ Upon review of the matter, as explained below, we overrule the portion of the Claims Group's settlement denying waiver and waive the additional amount.

BACKGROUND

Mr. Zempel's debt resulted from several personnel and pay setting actions that took place between April 1991 and November 1993, which were determined by the

¹Claims Group Settlement Z-2927659-050, Nov. 29, 1994.

agency to have resulted from administrative errors. Specifically, the agency reports that Mr. Zempel was temporarily promoted from a GS-13 Statistician position to a GM-14 Supervisory Statistician position effective April 23, 1989, at the salary rate of \$55,072, for a period that was not to exceed April, 22, 1990. In April 1990, that appointment was extended for an additional year at a salary rate of \$57,894. In April 1991 he was returned to the GS-13 position at a salary of \$54,694, which the agency subsequently determined should have been set at the rate of \$57,650. This error was corrected and he was paid the correct amount.

In February 1992, an agency staffing specialist incorrectly determined that Mr. Zempel was entitled to pay retention upon his return to the GS-13 position in April 1991, based on his previous temporary promotion. Consequently, the agency erroneously "corrected" his pay rate to increase his then current pay rate to \$61,143 and to pay him retroactively to April 1991 for the extra amount erroneously determined due him. This pay setting error was compounded when Mr. Zempel was given another 1-year temporary promotion to the GM-14 position, effective February 9, 1992. Because of the error in setting his GS-13 pay at a higher rate, his GM-14 pay was set erroneously at \$65,433, when it should have been set at \$63,707.

On February 8, 1993, Mr. Zempel's temporary appointment expired and he was to be returned to his GS-13 position. However, later that month he was selected for permanent promotion to the GM-14 position and his return to the GS-13 position was cancelled. The agency states that in processing the permanent promotion, a personnel specialist discovered the series of mistakes in Mr. Zempel's pay that had occurred over the April 1991 to February 1993 period, and Mr. Zempel was notified of that problem verbally in a meeting on March 3, 1993. It was not until over 4 months later that he was officially notified, by memorandum dated July 23, 1993, that after careful review of his personnel file, it was discovered that "you were not entitled to pay retention. This administrative error resulted in your being overpaid for the periods of April 21, 1991, through February 6, 1993." The memorandum also stated that a personnel action had been processed correcting his change to a lower grade from the temporary promotion, effective February 7, 1993, which set the correct pay and step for his GS-13 position, and "this corrective action prevents the continuation of the overpayment." Finally, the memorandum advised him of the approximate amount of the overpayment, that the National Finance Center would be taking collection action in the form of a notice of intent to offset his salary, and advised him of how to request waiver of the debt. The July 23 memorandum made no mention of any problem with the GM-14 rate at which he was then being paid as a result of his permanent promotion.

Shortly after receiving the July 23 memorandum, Mr. Zempel replied by memorandum stating that he was not informed on March 3 that he had been overpaid as a GS-13; that he was informed only that he was not entitled to retained pay at the GM-14 rate; that the first he learned he had been overpaid was when he

received the July 23 memorandum in early August; and that all the pay setting changes that had been made in his pay were made by the agency's personnel specialists, and he had no reason to believe they were incorrect.

It appears that the next written communication Mr. Zempel received regarding this matter was a notice from the National Finance Center dated October 1, 1993, that as a result of an "internal adjustment" processed during pay period 18 [September], records showed that he had been overpaid \$2,992.00, and that his salary would be offset to collect the debt. He subsequently received another similar Finance Center notice, dated December 24, 1993, advising him that as a result of a "corrected or late" personnel action processed during pay period 24 [November – December], he had been overpaid \$872.59, and that his salary would be offset to collect that amount. No specific information was provided in either notice as to the underlying errors that had been discovered that led to these collection actions. However, the October notice apparently related to the net indebtedness arising out of the erroneous payments addressed in the agency's July 23 memorandum to Mr. Zempel, and the December notice apparently related to the net indebtedness incurred after his pay was erroneously set when he received the permanent promotion in late February or early March 1993, the latter error having been discovered in November.

In September 1994, the agency referred a request for waiver to our Claims Group recommending that Mr. Zempel's debt for the overpayments he received for the period from April 21, 1991, through March 2, 1993, be waived since they resulted from administrative errors regarding which there is no evidence that Mr. Zempel had any knowledge nor any reason to question the accuracy of the pay setting procedures which led to the errors.

As to the indebtedness that resulted from overpayments Mr. Zempel received for the period March 3 through November 13, 1993, however, the agency recommended denial of waiver, stating that Mr. Zempel was verbally notified at the March 3, 1993, meeting that "an error had been made in pay setting," and that he was officially informed by the July 23, 1993 memorandum that "action was taken to correct his salary from April 21, 1991 – February 6, 1993." Although no corrective action was taken for the March–November overpayments until November 1993, the agency stated that the advice he received at the March 3 meeting made him aware that he was receiving these overpayments, which he should then have set aside for refunding when the error was corrected. The agency stated that he made no further attempts to have the error corrected, and thus the agency concluded he accepted

these payments with knowledge of their erroneous nature, which constitutes a lack of good faith on his part, precluding waiver.²

Our Claims Group agreed with the agency and waived the gross amount of the overpayments received during the first period, \$4,512.80, and denied waiver for the gross amount of the overpayments received for the second period, \$1,271.20.

Mr. Zempel has appealed the denial of waiver of the \$1,271.20, asserting that the March 3, 1993, meeting was held at his request because he had been informed that upon his return to the GS-13 position effective February 8, he would not be entitled to retained pay as he had been upon return to the GS-13 position from the previous 2-year temporary promotion. He states that he wished to clarify why he would not be granted retained pay upon return from the second temporary promotion. He also states that he left that meeting believing that he had no right to pay retention either for the current reduction to GS-13 or for the previous reduction to that grade, but he was not informed that he was then receiving erroneous payments. He indicates that the first he heard that agency personnel thought he had been informed of an overpayment was in the July 23 memorandum, to which he responded promptly to set the record straight. He states that he was surprised to hear that his pay had been incorrectly set during the earlier period, but that he was not aware that his GM-14 pay had been incorrectly set when he received the permanent promotion, and he was not informed of that until his pay was reduced in pay period 23 (November 1993). He argues that he did everything a reasonable and prudent person could have done to act in good faith, and that the remainder of his debt should be waived also.

ANALYSIS

Upon review of the record, we agree with Mr. Zempel. The errors that occurred in his pay during the April 1991 through February 1993 period, relating to granting him retained pay when he first returned to his GS-13 position, appear to have been the primary subject of the March 1993 meeting. The language of the July 23, 1993, agency memorandum supports Mr. Zempel's assertion in that regard. As noted above, the memorandum indicates that, although he would be placed in debt for the resulting overpayments that occurred during the period of April 1991 – February 1992, action had been taken that corrected the matter and that "prevents continuation of the overpayment." The record contains no other indication that he was advised his salary had been set at an incorrect rate incident to his permanent

²The waiver statute, 5 U.S.C. § 5584, provides that the waiver authority may not be exercised if there exists "an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee" seeking waiver.

promotion and that he was receiving additional overpayments, until November 1993 when action was taken to reduce his GM-14 pay rate.

In these circumstances, we find that it was not unreasonable for Mr. Zempel to have been unaware that he was receiving erroneous payments during the March – November 1993 period. Accordingly, the remaining portion of his debt in the amount of \$1,271.20 qualifies for waiver under 5 U.S.C. § 5584, and it is hereby waived.

/s/Seymour Efros
Robert P. Murphy
General Counsel