



United States
General Accounting Office
Washington, D.C. 20548

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Office of the General Counsel

B-272467.2

August 28, 1998

Kenneth W. Hansen, Esq.
General Counsel
Export-Import Bank
of the United States

Dear Mr. Hansen:

This responds to your letter dated February 5, 1998, advising us that certain information provided us in connection with our consideration of the Export-Import Bank's request for waiver of erroneous payments to three Export-Import Bank employees may have been false. The waivers in question were included in waivers granted by our decision B-272467, December 13, 1996, to over 200 Bank employees.

You are concerned that in waiving the claims against these three employees we may have relied on material misrepresentations and omissions by these employees that, if known at the time, would have led us to deny the waivers. You also state that, in your opinion, had the Bank known of the misrepresentation and omissions at the time the waiver applications were submitted, it is unlikely that the Bank would have sought waivers on behalf of these employees.

You are aware that the authority under which we issued these waivers has since been transferred to the Bank. You state, however, that you are providing this information to us, as the agency that originally had the waiver authority, to correct the record and to seek our concurrence that the transfer of this authority included the transfer of authority to rescind waivers previously granted by our office if factual grounds to do so are determined to exist.

The waiver statute, 5 U.S.C. § 5584 (1994), provided authority for our office to waive a claim, in whole or in part, against a person arising out of an erroneous payment of pay or allowances to an employee of an agency, the collection of which "would be against equity and good conscience and not in the best interests of the United States." 5 U.S.C. § 5584(a). The statute specifically precluded our exercise of this authority if, in our 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 having an interest in obtaining waiver of the claim." 5 U.S.C. § 5584(h).

We exercised our waiver authority under 5 U.S.C. § 5584 (and our similar authority under 10 U.S.C. § 2774 and 32 U.S.C. § 716 applicable to members of the uniformed services and National Guard) based on the written record before us. 4 C.F.R. § 92.7(a)(1996). This record usually included a statement by the employee, member or other person having an interest in obtaining a waiver, and a report from the agency involved. 4 C.F.R. § 92.3. The agency's report included its statement of the circumstances under which the erroneous payment was made, the applicant for waiver's knowledge of the erroneous payment and the steps the applicant took, if any, to bring the matter to the attention of the appropriate official and the agency's response. This report also was to contain the agency's determination as to whether there is any indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee and the factual basis for this determination. 4 C.F.R. § 92.3(a)(6). We relied heavily on this information in making determinations on waiver requests.

It was our practice to grant reconsideration of our initial determination, either denying or granting a waiver, upon written request of the person from whom collection was sought or the agency involved based on full explanation of the errors alleged and the basis of the appeal. 4 C.F.R. § 92.5(b). In cases where we found that new relevant information or material facts warranted a determination different from the one made, we would reverse or modify the prior action. While most reversals or modifications resulted from appeals by the person requesting the waiver, some reversals resulted from requests by the agency involved and resulted in our reversing a previously granted waiver that had been based on an erroneous or incomplete statement or understanding of the facts involved. See Gerald A. Cavis, et al., B-259602, Nov. 27, 1995; and Maureen S. Fern, 65 Comp. Gen. 696 (1986).¹

As you know, effective December 18, 1996, sections 103(d), 105(b), and 116, of Title I of the General Accounting Office Act of 1996, Pub. L. No. 104-316, 110 Stat. 3826 (1996), amended 5 U.S.C. § 5584, 10 U.S.C. § 2774, and 32 U.S.C. § 716, to transfer waiver authority, as it applied to executive branch agencies, to the Director of the Office of Management and Budget (OMB). Section 101(a)(1) of this act provided that in any case where Title I of the act substituted another federal officer, employee, or agency to perform a function previously performed by the Comptroller General or the General Accounting Office, the authority under that provision to

¹See also, Isaac L. Tillman, B-266193, Feb. 23, 1996, where we rescinded a waiver action at the request of an interested agency based on a showing that we had misinterpreted the law.

perform that function is transferred to the other federal officer, employee, or agency.

Section 101(a)(3) of the 1996 act authorized the Director of OMB to delegate waiver functions to any other agency or agencies. Pursuant to this authority, effective December 18, 1996, the Director of OMB delegated the waiver function described in section 103(d) (waiver authority under 5 U.S.C. § 5584) to the Executive branch agency that made the erroneous payment. See Director of OMB's "Determination With Respect to Transfer of Functions Pursuant to Public Law 104-316," Dec. 17, 1996.² Therefore, pursuant to 5 U.S.C. § 5584, as amended, and the Director of OMB's delegation of authority, the Export-Import Bank now has the same authority with respect to the waiver function that our office had prior to the transfer of authority, as it relates to erroneous payments made by the Bank.

Clearly, the Bank has authority to reconsider, reverse or modify, as appropriate, the prior waiver action, where there is a showing that the Bank acted on the basis of some material mistake of fact, error of law, fraud or misrepresentation. In our view, the Bank also has the authority to take such action with respect to prior waivers granted or denied Bank employees by our office. This view is consistent with the well-established principle that a government officer may reopen a settlement or reverse a decision made by his predecessor in office "upon production of new and material evidence, or to correct manifest mistakes of fact such as errors in calculation, or for fraud or collusion." See e.g., Lt. Col. Cecil E. Pickens, B-111513, Aug. 17, 1967; Eugene R. Thomas, B-155572, Aug. 22, 1966; 16 Comp. Gen. 51 (1936), and decisions cited therein.

Sincerely yours,

Robert P. Murphy
General Counsel

²By this same determination, the Director of OMB delegated the waiver authority described in Pub. L. No. 104-316, §§ 105(b) and 116, applicable to members of the uniformed services and the National Guard (10 U.S.C. § 2774 and 32 U.S.C. § 716), to the Department of Defense.