



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Robert W. Conville
File: B-252830
Date: June 25, 1993

DIGEST

An employee received erroneous payments of overtime compensation because the symbol used to signify his pay status under the Fair Labor Standards Act was erroneously changed from exempt (symbol "E") to nonexempt (symbol "N") on his personnel and pay records. Since this change caused a significant increase in the hourly rate of pay he received for each overtime hour performed, had he examined his Earnings and Leave Statement he would have been alerted to the possibility of error. Since he failed to do so and failed to bring the matter to the attention of an appropriate official, he is considered partially at fault, thereby precluding waiver under 5 U.S.C. § 5584 (1988).

DECISION

This decision is on an appeal from our Claims Group settlement Z-2917781, Mar. 10, 1993, disallowing waiver of Mr. Robert W. Conville's debt to the United States in the amount of \$3,605.92. On review, we sustain our Claims Group's action.

Mr. Conville was employed by the Department of the Army as a Computer Programmer Analyst, grade GS-12, step 4, stationed at Picatinny Arsenal, New Jersey. His status for overtime pay purposes under the Fair Labor Standards Act (FLSA) was as an exempt employee, which status he held continuously for a number of years prior to the events which gave rise to his debt to the United States.

Each Notification of Personnel Action (SF-50) and Earnings and Leave Statement (ELS) issued to the employee contained a block to show his pay status under the FLSA. The symbol used in that block is either an "E" for exempt or "N" for nonexempt. Since Mr. Conville was exempt from the FLSA, the symbol "E" appeared in that block on all SF-50s and ELSs issued to him prior to December 28, 1988, as did the SF-50 which was issued on December 28, 1988, to reflect the pay adjustment increase that was to become effective

January 1, 1989. However, due to an error in that SF-50, Mr. Conville's position title and identifying number were misdescribed. As a result, the agency immediately issued a corrective SF-50. While that corrective SF-50 showed the proper position title and identifying number for Mr. Conville, a different administrative error occurred, namely that the FLSA pay status symbol was inadvertently changed from "E" to "N". As a result, all ELSs issued to Mr. Conville thereafter carried the symbol "N" in the FLSA block.

However, the erroneous change to nonexempt status was not picked up by the payroll clerk until June 1989. Thereafter, beginning with the pay period ending July 15, 1989, he was paid at the FLSA rate, causing him to be overpaid a total of \$3,605.92 before the error was discovered in February 1991.¹

Waiver of debts under 5 U.S.C. § 5584 (1988) arising from erroneous payments of pay, allowance, travel, transportation and relocation expenses to federal employees, is an equitable remedy. Because of its equitable nature, waiver must necessarily depend on the facts in each case since by statute, "an indication of . . . fault . . . on the part of an employee" precludes waiver.²

Fault, as used in 5 U.S.C. § 5584, is considered to exist if it is determined that an employee exercising reasonable diligence should have known that an error existed, but failed to take corrective action.³ The standard to be employed is whether a reasonable person should have been aware that he was receiving payments in excess of his proper entitlement.⁴

Generally, where an employee receives documents which, if reviewed, would indicate an overpayment, and the employee fails to review such documents for accuracy or otherwise fails to take corrective action, he is not without fault and

¹FLSA rates are generally higher than title 5 overtime rates. Thus, beginning in 1989, Mr. Conville's hourly overtime rate increased by approximately \$10. See 29 U.S.C. § 207(a)(2) (1988) and 5 U.S.C. § 5542(a)(2) (1988).

²5 U.S.C. § 5584(b)(1).

³4 C.F.R. § 91.5 (1992).

⁴George R. Beecher1, B-192485, Nov. 17, 1978.

waiver is denied.⁵ This rule is particularly relevant in the case of ELSSs. Each employee receives an ELS biweekly and has an obligation to examine it to determine its correctness. If he fails to do so and his ELS contains an error which results in an overpayment, he is generally not free from fault and the resulting debt will not be waived.⁶ Moreover, when an employee receives a significant unexplained increase in pay and fails to make inquiries or bring the matter to the attention of appropriate officials, waiver is generally precluded. 4 C.F.R. § 91.5(b) (1992).

We believe that the significant increase in Mr. Conville's overtime compensation should have alerted him to the possibility of an error, at least sufficiently so to cause him to review his ELSSs for accuracy. If he had reviewed the ELS form, he would have noted the number of overtime hours he was being paid for and the gross amount of that pay and also that the FLSA block contained the symbol "N" instead of the symbol "E". Because of that change and the significant increase in his overtime compensation rate, Mr. Conville should have questioned the propriety of the pay he was receiving. Since he failed to do so, he must be deemed partially at fault in the matter. Therefore, waiver of his debt may not be granted and the action by our Claims Group in his case dated March 10, 1993, is sustained.



James F. Hinchman
General Counsel

⁵Hollis W. Bowers, 65 Comp. Gen. 216 (1986); Sheldon H. Avenius, Jr., B-226465, Mar. 23, 1988; and John J. Williams, B-251667, Apr. 2, 1993.

⁶John J. Williams, *supra*. See also, Arthur Weiner, B-184480, May 20, 1976.