

117134
DECISION



20363
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-202201

DATE: December 23, 1981

MATTER OF: Mrs. [REDACTED] --
Correction of Payroll Deduction Errors

- DIGEST:**
1. Federal employee who, through administrative error, has social security taxes instead of Civil Service retirement contributions deducted from salary, seeks to have error corrected. The employing agency should: (a) claim refund of erroneously paid taxes from Internal Revenue Service; (b) deposit correct amount with the Civil Service Retirement Fund; (c) advise Social Security Administration of the correction of records; and (d) collect from the employee the overpayments of salary received as the result of the underdeduction of retirement contributions. The employee will then be restored to a position as though no error had occurred.
 2. The Internal Revenue Service has determined that it is bound by the 3-year statute of limitations prescribed by 26 U.S.C. 6511 when acting on claims submitted by Federal agencies for refunds of erroneously paid social security taxes, and our Office has no basis to question the propriety of that determination.
 3. In adjusting the accounts of a Federal employee who through error had social security taxes instead of Civil Service retirement contributions deducted from salary, the employing agency should apply the social security tax refund recovered from the Internal Revenue Service towards the deposit made to the Civil Service Retirement Fund to correct the error, and should pay the balance of that required deposit from the agency's appropriated funds.

4. If a Federal employee is overpaid as the result of insufficient retirement contributions and other required payroll deductions being withheld from salary, the overpayments are subject to collection from the employee if not waived under the authority of 5 U.S.C. 5584. That statute precludes waiver if the employee was at fault in the matter. An experienced and able employee so overpaid who was furnished Leave and Earnings Statements which if reviewed would have led to an early discovery of the payroll errors, and who failed to review those statements for accuracy, must be considered at fault and may not be granted a waiver.
5. The General Accounting Office has jurisdiction to decide questions related to the correction of errors in Federal employees' payroll records and the waiver under 5 U.S.C. 5584 of overpayments resulting from the errors. However, our Office has no jurisdiction to issue revenue rulings, and the income tax consequences of actions taken to correct payroll errors are primarily matters for consideration and determination by the Internal Revenue Service.

This action is in response to correspondence dated January 5, 1981 (file reference MRODC-C), with enclosures, from the Chief of the Civilian Payroll Office, Army District Corps of Engineers, Omaha, Nebraska. He has requested an advance decision concerning the procedures to be followed in correcting payroll deduction errors that occurred between 1973 and 1979 in the case of [redacted] nee [redacted], SSAN [redacted], a civilian employee of the Department of the Army. The request was forwarded here by the Office of the Comptroller of the Army by letter dated February 12, 1981 (DACA-FAF-C).

Background

[redacted] began working with the Army Corps of Engineers on July 1, 1973. During the previous 16 years she had been a civilian employee of the Department of the Air Force. At the time she went to work for the Army in 1973, a payroll clerk entered erroneous coding data in her automated pay records indicating that she was a temporary employee, and that her salary was therefore subject to deductions for social security taxes under the Federal Insurance Contributions Act (FICA). In fact, her salary was subject to deductions for the Civil Service Retirement Fund rather than FICA deductions. Also, her pay records were incorrectly coded to show that she was ineligible for Federal Employee Group Life Insurance (FEGLI) coverage due to her status as a temporary employee. In fact, she was eligible for and had elected to have that life insurance coverage, and the insurance premiums should have been deducted from her pay. The errors were not discovered until October 26, 1979.

In the request for an advance decision, several questions are raised concerning the correction of those errors.

First, it appears that FICA taxes totalling \$8,342.68 were erroneously paid to the Internal Revenue Service between 1973 and 1979 in [redacted] case. That sum equals amounts ranging between 5.85 and 6.13 percent of salary erroneously deducted from [redacted] pay during those years for FICA taxes, in the total amount of \$4,171.34, together with the matching contributions erroneously made by the Army. In April 1980 Army officials filed a claim with the Internal Revenue Service for a full refund of the \$8,342.68. However, on November 19, 1980, the Internal Revenue Service allowed the Army only \$4,208.36 on its claim and denied payment of the balance for the following reason:

"The statute of limitations allows that all claims for refund of FICA taxes must be filed by April 15, three years following the

year for which the return was due or three years after the date the return was actually filed. Since we did not receive your claim until April 30, 1980, we can only allow the portion pertaining to the years 1977 through 1979."

Army finance and accounting officials first of all ask whether the 3-year statute of limitations thus mentioned may properly be applied to claims for tax refunds submitted by Federal agencies, and whether there is any way the Department of the Army may recover from the Internal Revenue Service the balance of the FICA taxes erroneously paid in this case.

Second, Army finance and accounting officials note that [redacted] salary was subject by law to a 7.0 percent deduction for the Civil Service Retirement Fund between 1973 and 1979, and that the Department of the Army was subject to a requirement to make matching contributions to the Fund during those years. The officials also note that the FICA taxes refunded by the Internal Revenue Service in the case will not equal the amount that should have been paid into the Civil Service Retirement Fund between 1973 and 1979. They therefore ask whether appropriated funds of the Department of the Army may be paid into the Civil Service Retirement Fund to cover the deficiency.

Third, the finance and accounting officials indicate that \$4,879.57 should have been deducted from [redacted] salary between 1973 and 1979 for deposit in the Civil Service Retirement Fund, and they note that if the Department of the Army is permitted to correct the accounts in this case by now paying that amount into the Fund on her behalf, there will result a net \$708.23 overpayment of salary to her. That overpayment of salary will occur because corresponding FICA deductions in the lesser amount of only \$4,171.34 were actually withheld from her pay between 1973 and 1979. They ask whether that overpayment should be waived.

Fourth, the finance and accounting officials note that the erroneous entry made in [redacted] pay records which resulted in life insurance premiums not being deducted from

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her salary for FEGLI coverage between 1973 and 1979 caused her to be overpaid during those years in the total aggregate amount of \$688.42. They ask whether that overpayment should be waived.

In discussing the question of whether waivers of overpayments should be granted in this case, Army finance and accounting officials note that [redacted] was regularly furnished with Leave and Earnings Statements throughout the years between 1973 and 1979, and that she could have detected the errors in her pay records herself at any time during that period had she carefully examined those statements. They therefore suggest that granting [redacted] waivers of the overpayments may be unwarranted.

On the other hand, [redacted] has expressed the belief that the Department of the Army should be held fully responsible for all the errors that were made in her case, and that any overpayments to her resulting from those errors should be waived. She points out that she did not initially cause the errors, and she suggests that it would be unfair to hold her in any way responsible for those errors simply because she was subsequently furnished with Leave and Earnings Statements. She indicates she was unaware of the significance of those statements and never paid much attention to them and, in any event, she did not understand them because she did not know the meaning of the entries they contained labeled "FICA" and "FEGLI." She further notes that Comptroller General decision B-184003 of July 13, 1976, involved a situation similar to her own, and in that case our Office concluded the payroll errors were not the employee's responsibility and authorized a correction of accounts with waivers. She suggests that the same conclusion should be reached in her own case.

Army Claim for FICA Tax Refund

Claims for refunds of erroneously paid FICA taxes are primarily matters for consideration by the Internal Revenue Service, and not our Office. See 26 U.S.C. 3102, 3111, 3112, 6301, 6302, 6401 and 6402, Internal Revenue Code of 1954, as amended; and compare 52 Comp. Gen. 420 (1973) and 58 Comp.

Gen. 528 (1979), to similar effect concerning claims for income tax refunds. We note in passing, however, that 26 U.S.C. 3112 provides that laws making Federal agencies exempt from taxation are ineffective as to FICA taxes, and we have previously recognized the general position taken by the Internal Revenue Service that it is bound by the 3-year statute of limitations prescribed by 26 U.S.C. 6511 when acting on claims submitted by Federal agencies for refunds of erroneously paid FICA taxes. See B-184003, July 13, 1976, supra. Hence, we have no basis to question the position taken by the Internal Revenue Service in [redacted] case that it was barred by that 3-year statute of limitations from fully allowing the Army's claim for a refund of all FICA taxes erroneously paid between 1973 and 1979.

Deposits to Civil Service Retirement Fund

We have previously held that if a Federal employee through administrative error has FICA taxes instead of Civil Service retirement contributions deducted from salary, the employing agency is responsible for correcting the error and assuring that the appropriate amount of money is deposited to the Civil Service Retirement Fund as required by 5 U.S.C. 8334(a). See B-184003, July 3, 1976, supra. Prior to our July 3, 1976 decision, the employee alone was generally left with the responsibility of initiating all corrective action. As a condition to corrective action now, the employee must agree in writing to permit the agency to obtain, to the extent possible, a refund of the FICA taxes from the Internal Revenue Service; also, the employee must state in writing that he has not claimed and will not claim a refund or credit of the amount of the erroneous FICA deductions, or if he has made a claim he must identify and return to the agency any amounts refunded or credited or state that his claim has been rejected. 26 C.F.R. 31.6402(a)2 (1980); B-184003, supra. After the employee performs those necessary conditions, the agency is obligated to make arrangements with the Office of Personnel Management to deposit money in the Civil Service Retirement Fund to the extent required to restore the employee to the same position he would have been in had no error occurred. If that required deposit exceeds the FICA

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tax refund recovered by the agency, the difference is for payment from appropriated funds of the agency. And if the corrective action results in an overpayment of salary to the employee, the overpayment may be waived in an appropriate case. 5 U.S.C. 5584; B-184003, supra.

In the present case, FICA deductions of \$4,171.34 were erroneously withheld from [redacted] salary between 1973 and 1979, and matching FICA tax contributions were erroneously made by the Department of the Army. Instead, \$4,879.57 should have been deducted from [redacted] salary, and matching contributions should have been made by the Department of the Army for Civil Service retirement purposes, so that a total of \$9,759.14 should have been paid to the Civil Service Retirement Fund.

[redacted] evidently authorized the Department of the Army to obtain, to the extent possible, a refund of the FICA taxes from the Internal Revenue Service, and the Army has been paid a FICA tax refund of \$4,208.36. In accordance with the principles set forth above, the Army should now make arrangements with the Office of Personnel Management to deposit with the Civil Service Retirement Fund the amount required, apparently \$9,759.14, to restore [redacted] to the same position with the Fund that she would have been in had no error occurred. The \$4,208.36 FICA tax refund should be applied to that deposit and the balance paid from appropriated funds of the Department of the Army.

As noted earlier, these transactions will result in a net overpayment of salary to [redacted] of \$708.23 for the years 1973-1979, since \$4,879.57 deposited in the Civil Service Retirement Fund will represent retirement fund contributions that should have been deducted from her salary during those years, and this will exceed the \$4,171.34 in corresponding FICA deductions actually withheld from her salary during that time.

Waiver

The correction of the payroll deduction errors in [redacted] case will result in a conclusion that she received overpayments of salary in the total gross amount of \$1,396.65 between 1973 and 1979. That amount represents the sum of the overpayments to her caused by the underdeductions for retirement contributions (\$708.23) and FEGLI premiums (\$688.42) during that period. Those salary overpayments received by [redacted] will be subject to collection through a claim for recoupment, if not waived.

The authority for the waiver of overpayments to Federal employees of pay and allowances of more than \$500 is contained in section 5584 of title 5, United States Code. That section provides that where collection of an overpayment "would be against equity and good conscience and not in the best interests of the United States," it may be waived in whole or in part by the Comptroller General of the United States unless:

"* * * in his 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 a waiver of the claim * * *"

"Fault," as used in this statutory provision and a similar waiver law applicable to members of the uniformed services, is considered to exist if it is determined that the concerned individual should have known that an error existed but failed to take action to have it corrected. See 4 C.F.R. 91.5 (1980); and 56 Comp. Gen. 943 (1977). Thus, if an employee is furnished with records which, if reviewed, would indicate an overpayment, and the employee fails to review those documents for accuracy or otherwise fails to take corrective action, ordinarily he is not without fault and waiver will be denied. See, e.g., B-193831, July 20, 1979. However, a grant of waiver depends upon the facts existing in the particular case. 4 C.F.R. 91.5, supra.

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The decision referred to by [REDACTED], B-184003, July 13, 1976, supra, involved the case of a mentally handicapped employee who received a permanent Civil Service appointment after several months of satisfactory performance under a temporary appointment. Through administrative error FICA taxes rather than Civil Service retirement contributions continued to be deducted from his wages after he received the permanent appointment, and the eventual correction of the error by account adjustments similar to those required in [REDACTED] case produced a similar overpayment of wages to him. Although he had been furnished with Leave and Earnings Statements, we waived the overpayment on the basis of a certification from responsible agency officials that he was unable to understand those statements.

Federal employees of ordinary experience and ability, however, are expected to acquire a reasonable familiarity with Civil Service personnel principles and terminology, and they have a duty to examine employment records furnished to them and to ascertain whether the records are correct. B-193831, supra. [REDACTED] had 16 years of previous Civil Service employment experience when she began working with the Department of the Army in July 1973, and there is no indication that she lacked the ability to read and understand the Leave and Earnings Statements that were then furnished to her. It is our view that a reasonably prudent Federal employee of Mrs. [REDACTED] experience and ability would have examined those statements and would have made an inquiry to the proper officials about the meaning of any entries that were not readily understandable or that appeared to be incorrect. Had [REDACTED] exercised that reasonably prudent degree of care, the errors in her pay records would doubtless have been immediately detected and corrected in 1973. In the circumstances, we have no alternative but to conclude that [REDACTED] should have inquired about the correctness of her pay records as early as 1973 and that her failure to do so placed her in the position of being at least partially at fault in the matter. Such fault precludes us from granting any waiver of the overpayments of salary to her resulting from the payroll deduction errors.

Social Security Employment Credit

Our Office is generally without authority to make determinations on matters related to the payment of social security benefits. 42 U.S.C. 405. However, we note that the pertinent social security laws preclude social security employment credit for "(s)ervice performed in the employ of the United States or in the employ of any instrumentality of the United States, if such service is covered by a retirement system established by a law of the United States." 42 U.S.C. 410(a)(6). Social Security Administration officials have informally advised us that if the accounts are corrected in [redacted] case to place her Army employment for the years 1973-1979 under the Civil Service retirement system, then this statute may operate to preclude her from receiving any credit for social security purposes based on that same employment. The Social Security Administration has therefore asked to be notified by the Army when the necessary deposits are made to the Civil Service Retirement Fund in this case, to insure that corrections are made in the social security records to the extent permitted by 42 U.S.C. 405(c). Compare 44 Comp. Gen. 154, 157-158 (1964), concerning procedures previously followed when the employee was primarily responsible for initiating the corrective actions.

Income Tax Consequences

Our Office has no jurisdiction to issue revenue rulings, but our decision B-184003, July 13, 1976, supra, contains the following advice concerning income taxes:

"The Internal Revenue Service has informed us that any amount paid into the (Civil Service) retirement fund for the employee, over and above the amount of FICA taxes recovered, is a monetary benefit which must be reported as taxable income. Accordingly, the (employing agency) would be required to report such income to IRS and to include it as income on the Form W-2 supplied to the employee."

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The view of the Internal Revenue Service in that particular case was apparently premised in part on the fact that we waived the overpayments caused by the agency's error in not withholding sufficient amounts of retirement contributions from the employee's wages. It appears that view was also premised in part on a belief that the employee would be entitled to social security benefits based on the erroneous FICA taxes which could not be refunded due to the 3-year statute of limitations.

In the present case, we are not waiving the overpayments received when insufficient amounts were deducted from her salary for retirement contributions and life insurance premiums. Also, as mentioned, due to the operation of 42 U.S.C. 410(a)(6) it appears that [redacted] may not receive any social security employment credit whatever based on any of the FICA taxes erroneously paid in her case between 1973 and 1979, notwithstanding that there will be no refund of the erroneous FICA taxes paid during the years 1973 through 1976. It thus appears that the correction of the payroll deduction errors in [redacted] case may produce no net monetary gain or benefit to be reported as taxable income received by her. However, revenue officials have advised us that they wish to defer making any determination in this case due to its complexity, and any question concerning the income tax consequences of the account adjustments made here will therefore be a matter for submission to and final resolution by the Internal Revenue Service.

Summary and Conclusion

Army finance and accounting officials should now make arrangements with the Office of Personnel Management to deposit with the Civil Service Retirement Fund the amount required to place [redacted] Army employment for the years 1973-1979 under the Civil Service retirement system. After that is accomplished, Army officials should notify the Social Security Administration so that appropriate corrections can be made in the social security records. Also, the officials should act to recoup the salary overpayments made to [redacted] as the result of the payroll deduction errors. These steps will restore [redacted] to

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the same position she would have been in had the payroll errors not occurred.

The questions presented are answered accordingly. Any further question that may arise concerning the tax consequences of the corrective action will be a matter for submission to the Internal Revenue Service.

Harry R. Van Cleave
~~FOR~~ Comptroller General
of the United States