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

B-197582 (RJH)

February 25, 1980

The Honorable Gladys Noon Spellman
Chair, Subcommittee on Compensation
and Employee Benefits
Committee on Post Office and
Civil Service
House of Representatives

MSB02906

Dear Madam Chair:

We refer to your letter of January 15, 1980, enclosing a copy of a letter and newspaper article you received from one of your constituents regarding two decisions of this Office.

The two decisions referred to are Donald C. Leavens, B-194793, August 14, 1979, and Victor M. Valdez, Jr., B-191977, August 17, 1979, 58 Comp. Gen. 734. A copy of each is enclosed for your information. Although the newspaper article indicates that the employees had knowledge, or should have had knowledge, that they were receiving money to which they were not entitled, the record does not support this contention. As more fully discussed below, we believe the two cases were correctly decided.

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The Donald C. Leavens Decision

The Leavens decision was issued because of an appeal of the denial by our Claims Division of his request for waiver of a claim against him by the United States for recovery of \$25,666 in erroneous salary payments. Mr. Leavens was a reemployed annuitant at the Department of Transportation (DOT). The overpayments were due to an administrative error in that DOT failed to deduct Mr. Leavens' annuity payments from his salary as required by 5 U.S.C. § 8344 (1976).

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Our authority to waive overpayments of pay and certain allowances is contained in 5 U.S.C. § 5584 (1976). The Comptroller General may waive a claim of the United States if the collection of the claim would be against equity and good conscience and not in the best interests of the United States. The standards for waiver are published in subchapter G, Parts 91, 92, and 93, of title 4 of the Code of Federal Regulations. Generally, the criteria for waiver will be met by a finding that the erroneous payment of pay or allowances occurred through administrative error and that

[Comments on the Occurrence of
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there is no 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. 4 C.F.R. § 91.5(c) (1978).

There was no dispute in this case that an administrative error had occurred since DOT did not deduct the amount of the annuity from Mr. Leavens' salary. We can assure you that the entire record in this case was examined very closely and we found no evidence to indicate that Mr. Leavens had actual or constructive knowledge that the amount should have been deducted. Accordingly, under the statute and the implementing regulations, we concluded that Mr. Leavens was entitled to a waiver of his indebtedness of \$25,666.

The Victor M. Valdez, Jr. Decision

The Valdez case was an appeal of our Claims Division's denial of his claim for payment of 1 weeks salary and 57 hours of accrued annual leave.

The facts in this case, simply stated, are that a son was interviewed and selected for a Government job that was supposed to be offered to his father. No one noticed the error until the temporary job was almost over. The issue presented was whether or not an employee, whose appointment was found to have been improper, was entitled to receive his unpaid compensation and payment for unused annual leave. We ruled that an employee who performs services for the Government is entitled to receive any unpaid compensation and credit for good-faith service for purposes of accrual of annual leave and to a lump-sum payment for unused leave upon separation, unless--

- (1) the appointment is made in violation of an absolute statutory prohibition, or
- (2) the employee is guilty of fraud in regard to the appointment or has deliberately misrepresented or falsified a material matter.

There was no statutory bar to Mr. Valdez, Jr.'s employment and the record showed that he acted honestly and in good faith and was not responsible for the mistake regarding his identity. The matter had been investigated by the Civil Service Commission and an affidavit had been prepared by Mr. Valdez, Jr. In the affidavit

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he stated that he had been out of work and had many job applications on file. Further, he stated that his father told him the position was apparently his since the father was not interested in temporary work. Thus, we found no fraud or misrepresentation on the part of Mr. Valdez, Jr. In fact, his employer, the Air Force, offered him another position at a higher grade. AGC00035

Your letter also requested our comments on steps that can be taken to improve procedures and prevent such overpayments from occurring in the future.


Although this Office has decided cases involving de facto employees in the past, we believe that the facts in the Valdéz, Jr. decision were unique and probably not recurring. Further, we have established a rule for entitlement to payment in this type of situation as outlined above.

We also note that the regulations on retirement annuities have been strengthened to prevent a recurrence of the situation in the Leavens case. Federal Personnel Manual (FPM) Supplement 831-1, subchapter S15-7d (December 10, 1971), in effect at the time of Mr. Leavens' retirement and subsequent reemployment, provided for notice to the Civil Service Commission. Apparently, DOT failed to do this, or did it informally, since there was no record of notification to the Commission. However, FPM Supplement 831-1, subchapter S15-7c(3), issued May 15, 1978, requires in addition that the agency ask the annuitant for his or her most recent Civil Service Annuity Statement or Notice of Annuity Check Adjustment. Thus, any request made for annuity information by an agency to an annuitant would put the annuitant on notice of a pending deduction, and such actual knowledge would in turn prevent the granting of a waiver under our established criteria.

We trust this will serve the purpose of your inquiry.

Sincerely yours,

Deputy


Comptroller General
of the United States

Enclosures