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**DECISION**



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

**FILE:** B-200295

**DATE:** April 28, 1981

**MATTER OF:** Lee A. Kirsch - Request for Waiver of Overpayment

**DIGEST:** Employee received excess foreign allowances through administrative error. Though foreign allowances owed to the employee fluctuated, the employee should have been on notice of possible overpayment when he began to receive allowance approximately 3 1/2 times the amounts he had been receiving. Request for waiver is denied since his failure to make inquiry about such large discrepancies indicates that he was partially at fault. Gross amount of overpayment must be considered under our waiver authority.

Mr. Lee A. Kirsch has appealed the partial denial by our Claims Division of his application for waiver of the claim of the United States against him. The claim resulted from an overpayment to Mr. Kirsch of foreign allowances in the amount of \$4,722.87.

Mr. Kirsch was employed, during the relevant time, by the Department of the Army as an Assistant Principal at Weisbaden High School, Weisbaden, Germany. Mr. Kirsch was overpaid and underpaid various foreign post allowances for the pay periods extending from August 6, 1977, through March 17, 1979. The overpayments amounted to a total of \$4,722.87 and the underpayments totaled \$916.86. The errors in payments occurred due to changes in the foreign currency rates and administrative and computation errors made by the Civilian Personnel Office of the Army.

Mr. Kirsch maintains that due to the constantly fluctuating rates of pay, post allowances, and living allowances, his checks were rarely the same amount. He found it "virtually impossible to compute my just pay and have long since quit trying." Of the 43 relevant pay periods, Mr. Kirsch notes that in all but 11 of them, he was either underpaid or overpaid.

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Applying the provisions of 5 U.S.C. § 5584 (1976), the Claims Division denied waiver for all but \$9.30. While acknowledging that Mr. Kirsch may have had difficulty in determining with precision the amounts owed him, it believed he should have been put on notice of possible overpayment when he received his pay for the pay period ending on March 4, 1978. Prior to that time he had received approximately \$200-\$210 per pay period. (The highest pay he received during this period was \$283.98 in August of 1977.) However for the period ending on March 4, he received \$747.38. His pay for the next several pay periods ranged from \$715.88 to \$929.87, when it then dropped dramatically to about \$230. The Claims Division stated that Mr. Kirsch should have, after receiving the March 4 payment, immediately contacted the appropriate officials. Since he did not, he was at least partially at fault. Thus, the Claims Division stated that it was statutorily precluded from waiving the major part of the claim.

Under 5 U.S.C. § 5584(a), a waiver of a claim arising out of erroneous payment may be granted by the head of an agency or the Comptroller General, as the case may be, if the collection of the claim "would be against equity and good conscience and not in the best interests of the United States." (A claim may not be waived if there is "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.") 5 U.S.C. § 5584(b) (1976). The regulations implementing 5 U.S.C. § 5584, contained in 4 C.F.R. chapter I, subchapter G, state in pertinent part:

"Any significant unexplained increase in pay or allowances which would require a reasonable person to make inquiry

concerning the correctness of his pay or allowances, ordinarily would preclude a waiver when the employee or member fails to bring the matter to the attention of appropriate officials. 4 C.F.R. § 91.5(c).

[We have consistently held that an employee has the responsibility to verify the correctness of the payments he receives, and where a reasonable person would have made an inquiry but the employee did not, then he is not free from fault, and the claim may not be waived.] Edward A. Mike, B-191772, December 19, 1978; Cathy R. Mattingly, B-188804, July 1, 1977.

[The huge increase in Mr. Kirsch's pay, starting with the pay period ending on March 4, and lasting for several pay periods thereafter, should have put him on notice of a possible overpayment.] It is true that the amounts Mr. Kirsch had received for the pay periods prior to the one ending March 4 did fluctuate. However, no increase or decrease during that time came close to the magnitude of the increase in the pay periods beginning with the one which ended on March 4 and continuing to the one ending on June 24, 1978. During that time Mr. Kirsch was receiving about 3-1/2 times (and for one pay period about 4-1/2 times) the amounts he previously had received. Additional evidence of error was the huge decrease in Mr. Kirsch's pay beginning with the pay period ending July 8, 1978.

[We have previously waived overpayment in cases where an employee's pay has fluctuated. However, the overpayments have been considerably less than those involved here.] In Mrs. Norma E. Bisk, B-180454, October 18, 1974, we waived a series of overpayments in part because the employee's pay had fluctuated as a result of overtime work and the overpayments

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could have been reasonably attributed to overtime compensation. The overpayments had been \$8.65 per pay period. In B-172975, October 27, 1971, we waived total overpayment because the employee's pay had been erratic in the period just preceding that of the overpayments due to night differential hours, a general pay raise and Sunday premium pay. The overpayment had accumulated at a gross rate of \$14.89 per pay period. In Max R. Walton, B-189691, November 1, 1977, we waived overpayment because the employee's pay varied so greatly from one pay period to the next. The employee was a consultant who worked irregular hours. Nothing in the record before us indicates that Mr. Kirsch worked on an irregular basis, and his failure to make inquiry about such large discrepancies indicates that he was partially a fault.

Mr. Kirsch [also questions the inclusion in our Claims' Division Settlement of the gross overpayment of \$4,722.87, since he was also underpaid \$916.86 during the same period. Such inclusion by our Claims Division is correct since it is the total amount of an overpayment that must be considered under our waiver authority, and the agency has correctly collected the lesser amount of \$3,798.71 back from Mr. Kirsch (the gross overpayment less the waived amount and the underpayment).]

Accordingly, [we affirm the denial of waiver by our Claims Division] for all but \$9.30. The \$9.30 overpayment occurred before the March 4 increase and reasonably could have been considered as part of the adjustment in Mr. Kirsch's allowances.



Acting Comptroller General  
of the United States