

MODEL STATEMENT FOR WAIVER OR COMPROMISE

Department of the Treasury

Office of D.C. Pensions

Attention: Employee Relations Team

1500 Pennsylvania Avenue N.W.

Washington, D.C. 20220

*I am retired from the District of Columbia Fire Department (DCFD). I hereby request a full and complete waiver from any obligation to repay funds, salary, previously paid to me. (Attached demand letter dated March 2, 2016). I predicated my retirement on the basis of the retirement estimate provided to me by the District of Columbia Government and my decision to retire was irrevocable (Detrimental Reliance). I am without fault in receiving any overpayment, as any error in the calculation of my benefits or in the interpretation of the applicable law is the error committed jointly by the United States and the District of Columbia Governments. To the extent any overpayment has been made to me, recompense should be sought solely from the D.C. Government which has acknowledged its errors and liability in this matter. The D.C. Government's public acknowledgment of its error is a matter of public record and known to the officials of the Federal Government.*

*Denial of my request for a full waiver of the overpayment is contrary to public policy and would cause undue hardship to me and to similarly situated retirees. The decrease in retirement benefits has caused a devastating hardship to me and my family and the proposed recoupment would cause additional financial stress. This comes after more than twenty-five years of a senior adjusted life style that will have require further cutbacks due to Government incompetency and through no fault of my own. Had the correct calculations been provided and the United States and the D.C. Government not been negligent in the pre-retirement information provided, I may have made other choices regarding the timing of my retirement. However, through no fault of my own I have been denied that opportunity. I relied, to my detriment, on the information provided to me by the Government entities, and am now unable to return to my job to secure additional benefits for myself and my family.*

*31 CFR Section 29.521 (b)(1) and (2) expressly authorize waiver of an overpayment if it is established by substantial evidence that the individual from whom recovery is sought is without fault for causing or contributing to the overpayment, and the overpayment is not the result of Fraud, misrepresentation or lack of good faith. The District of Columbia and Federal Government have admitted that there is no fraud and that the fault for the alleged overpayment is entirely the Governments responsibility. This is*

*not a double payment such as occurred in Grabis v. OPM, 424 F.3d 1265 (Fed. Cir. 2005); Friedman v. OPM, 153 Fed. Appx. 719 (Fed Cir. 2005); or Prasch v. OPM, 499 Fed. Appx. 968(Fed. Cir. 2013). This is akin to the result in Cartledge v. OPM, 2009 WL 89674 (Fed. Cir. 2009) in which detrimental reliance played a significant role in the finding that equity and good conscience would be violated by repayment. Like Cartledge, I relied on the representations of government which I may presume are lawful.*

*In closing, I have complied with the requirements for a full and complete waiver, as there has been no fraud, no fault on my part, and I have justifiably relied to my detriment on the information provided to me prior to my retirement. Any attempt by the District of Columbia or Federal Government to recover payments would be in violation of public policy and contrary to the Doctrine of Detrimental Reliance. In addition, it would be against equity and would be unconscionable for the Government to seek restitution after this period of time and knowingly delayed taking any action which exacerbated the claim. My request for a full waiver fulfills the requirements under 5 U.S.C. Sec. 5584.*

*For your information, I have attached several cases, one from a firefighter (2009) and two from Federal Government employees where the employees relied on erroneous information and after years of battling bureaucracy were granted full waivers.*

*Thank you for your attention to this matter*

*Treasury Response to Firefighter 2009*

*File: B-260843 October 24, 1996*

*File: B-243315.3 November 5, 1992*



DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

you requested a full waiver of the current debt that resulted from overpayment of benefits for service performed under the D.C. Police Officers' and Firefighters' Retirement Plan. Your request for a full waiver of such debt is granted.

In addressing the concerns raised in your letter, Title XI of the Balanced Budget Act of 1997 (as amended) gives the Federal government responsibility for payment of benefits based on service accrued as of June 30, 1997, under the retirement plans for District of Columbia teachers, police officers, and firefighters. Congress granted the Secretary of the U.S. Department of the Treasury (the Secretary) broad discretion in administering this Federal benefit program and selecting a benefits administrator. At this time, the Benefits Administrator is the D.C. Retirement Board (DCRB).

Additionally, the Secretary has delegated to ODCP the authority and responsibility to collect debt for all plan members who have performed service under in the Police Officers' and Firefighters' Retirement Plan prior to June 30, 1997. Since all of your service was performed prior to June 30, 1997, Treasury has the responsibility to review your request and to collect any outstanding debt that results from erroneous benefit payments, regardless of fault.

ODCP has reviewed your request for appeal and the facts surrounding your case and agrees that you were not at fault in causing or contributing to the overpayment of benefits that you received. Moreover, after careful review and consideration, ODCP concludes, based upon the totality of the circumstances, that there is substantial evidence that recovery would be unconscionable under the circumstances. Therefore, we have determined that it would be against equity and good conscience to deny your request for a full waiver of the current overpayment debt that resulted from overpayment of benefits for service performed under the D.C. Police Officers' and Firefighters' Retirement Plan.



## **Matter of: Alan D. Zempel-Salary Overpayments-Waiver File: B-260843 Date: October 24, 1996**

GS-13 employee was temporarily promoted to GM-14 for the period April 1989 through April 1991, when he was returned to his previous GS-13 position. In February 1992, he was again temporarily promoted to the GM-14 position, until February 1993, when he was returned to GS-13. In March 1993 the agency advised him that due to several errors in setting his pay during these periods, he had been overpaid for which he would be in debt. At about the same time, he was permanently promoted to GM-14, and his pay was again erroneously set at a higher rate which caused him to receive overpayments through November 1993 when the agency corrected the error. Waiver was granted for overpayments he received during the period through February 1993, but denied for the subsequent period on the basis that the advice he received in March should have put him on notice that his pay was incorrect. On appeal, waiver is granted for the additional period since record supports employee's contention that the March advice related only to prior problems with his pay, and he was not aware that upon his subsequent promotion it again was set erroneously.

### **DECISION**

This is in response to Mr. Alan D. Zempel's appeal of our Claims Group's partial denial of his request for waiver of a debt which arose from overpayments of pay he received in various positions over several years as an employee of the Internal Revenue Service. [1] Upon review of the matter, as explained below, we overrule the portion of the Claims Group's settlement denying waiver and waive the additional amount.

### **BACKGROUND**

Mr. Zempel's debt resulted from several personnel and pay setting actions that took place between April 1991 and November 1993, which were determined by the agency to have resulted from administrative errors. Specifically, the agency reports that Mr. Zempel was temporarily promoted from a GS-13 Statistician position to a GM-14 Supervisory Statistician position effective April 23, 1989, at the salary rate of \$55,072, for a period that was not to exceed April, 22, 1990. In April 1990, that appointment was extended for an additional year at a salary rate of \$57,894. In April 1991 he was returned to the GS-13 position at a salary of \$54,694, which the agency subsequently determined should have been set at the rate of \$57,650. This error was corrected and he was paid the correct amount.

In February 1992, an agency staffing specialist incorrectly determined that Mr. Zempel was entitled to pay retention upon his return to the GS-13 position in April 1991, based on his previous temporary promotion. Consequently, the agency erroneously "corrected" his pay rate to increase his then current pay rate to \$61,143 and to pay him retroactively to April 1991 for the extra amount erroneously determined due him. This pay setting error was compounded when Mr. Zempel was given another 1-year temporary promotion to the GM-14 position, effective February 9, 1992. Because of the error in setting his GS-13 pay at a higher rate, his GM-14 pay was set erroneously at \$65,433, when it should have been set at \$63,707.

On February 8, 1993, Mr. Zempel's temporary appointment expired and he was to be

returned to his GS-13 position. However, later that month he was selected for permanent promotion to the GM-14 position and his return to the GS-13 position was cancelled. The agency states that in processing the permanent promotion, a personnel specialist discovered the series of mistakes in Mr. Zempel's pay that had occurred over the April 1991 to February 1993 period, and Mr. Zempel was notified of that problem verbally in a meeting on March 3, 1993. It was not until over 4 months later that he was officially notified, by memorandum dated July 23, 1993, that after careful review of his personnel file, it was discovered that "you were not entitled to pay retention. This administrative error resulted in your being overpaid for the periods of April 21, 1991, through February 6, 1993." The memorandum also stated that a personnel action had been processed correcting his change to a lower grade from the temporary promotion, effective February 7, 1993, which set the correct pay and step for his GS-13 position, and "this corrective action prevents the continuation of the overpayment." Finally, the memorandum advised him of the approximate amount of the overpayment, that the National Finance Center would be taking collection action in the form of a notice of intent to offset his salary, and advised him of how to request waiver of the debt. The July 23 memorandum made no mention of any problem with the GM-14 rate at which he was then being paid as a result of his permanent promotion.

Shortly after receiving the July 23 memorandum, Mr. Zempel replied by memorandum stating that he was not informed on March 3 that he had been overpaid as a GS-13; that he was informed only that he was not entitled to retained pay at the GM-14 rate; that the first he learned he had been overpaid was when he received the July 23 memorandum in early August; and that all the pay setting changes that had been made in his pay were made by the agency's personnel specialists, and he had no reason to believe they were incorrect.

It appears that the next written communication Mr. Zempel received regarding this matter was a notice from the National Finance Center dated October 1, 1993, that as a result of an "internal adjustment" processed during pay period 18 [September], records showed that he had been overpaid \$2,992.00, and that his salary would be offset to collect the debt. He subsequently received another similar Finance Center notice, dated December 24, 1993, advising him that as a result of a "corrected or late" personnel action processed during pay period 24 [November - December], he had been overpaid \$872.59, and that his salary would be offset to collect that amount. No specific information was provided in either notice as to the underlying errors that had been discovered that led to these collection actions. However, the October notice apparently related to the net indebtedness arising out of the erroneous payments addressed in the agency's July 23 memorandum to Mr. Zempel, and the December notice apparently related to the net indebtedness incurred after his pay was erroneously set when he received the permanent promotion in late February or early March 1993, the latter error having been discovered in November.

In September 1994, the agency referred a request for waiver to our Claims Group recommending that Mr. Zempel's debt for the overpayments he received for the period from April 21, 1991, through March 2, 1993, be waived since they resulted from administrative errors regarding which there is no evidence that Mr. Zempel had any knowledge nor any reason to question the accuracy of the pay setting procedures which led to the errors.

As to the indebtedness that resulted from overpayments Mr. Zempel received for the period March 3 through November 13, 1993, however, the agency recommended denial of waiver, stating that Mr. Zempel was verbally notified at the March 3, 1993, meeting that "an error had been made in pay setting," and that he was officially informed by the July 23, 1993 memorandum that "action was taken to correct his salary from April 21,

1991 - February 6, 1993." Although no corrective action was taken for the March-November overpayments until November 1993, the agency stated that the advice he received at the March 3 meeting made him aware that he was receiving these overpayments, which he should then have set aside for refunding when the error was corrected. The agency stated that he made no further attempts to have the error corrected, and thus the agency concluded he accepted these payments with knowledge of their erroneous nature, which constitutes a lack of good faith on his part, precluding waiver. [2]

Our Claims Group agreed with the agency and waived the gross amount of the overpayments received during the first period, \$4,512.80, and denied waiver for the gross amount of the overpayments received for the second period, \$1,271.20.

Mr. Zempel has appealed the denial of waiver of the \$1,271.20, asserting that the March 3, 1993, meeting was held at his request because he had been informed that upon his return to the GS-13 position effective February 8, he would not be entitled to retained pay as he had been upon return to the GS-13 position from the previous 2-year temporary promotion. He states that he wished to clarify why he would not be granted retained pay upon return from the second temporary promotion. He also states that he left that meeting believing that he had no right to pay retention either for the current reduction to GS-13 or for the previous reduction to that grade, but he was not informed that he was then receiving erroneous payments. He indicates that the first he heard that agency personnel thought he had been informed of an overpayment was in the July 23 memorandum, to which he responded promptly to set the record straight. He states that he was surprised to hear that his pay had been incorrectly set during the earlier period, but that he was not aware that his GM-14 pay had been incorrectly set when he received the permanent promotion, and he was not informed of that until his pay was reduced in pay period 23 (November 1993). He argues that he did everything a reasonable and prudent person could have done to act in good faith, and that the remainder of his debt should be waived also.

#### ANALYSIS

Upon review of the record, we agree with Mr. Zempel. The errors that occurred in his pay during the April 1991 through February 1993 period, relating to granting him retained pay when he first returned to his GS-13 position, appear to have been the primary subject of the March 1993 meeting. The language of the July 23, 1993, agency memorandum supports Mr. Zempel's assertion in that regard. As noted above, the memorandum indicates that, although he would be placed in debt for the resulting overpayments that occurred during the period of April 1991 - February 1992, action had been taken that corrected the matter and that "prevents continuation of the overpayment." The record contains no other indication that he was advised his salary had been set at an incorrect rate incident to his permanent promotion and that he was receiving additional overpayments, until November 1993 when action was taken to reduce his GM-14 pay rate.

In these circumstances, we find that it was not unreasonable for Mr. Zempel to have been unaware that he was receiving erroneous payments during the March - November 1993 period. Accordingly, the remaining portion of his debt in the amount of \$1,271.20 qualifies for waiver under 5 U.S.C. Sec. 5584, and it is hereby waived.

/s/

Seymour Efros  
Robert P. Murphy  
General Counsel

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1. Claims Group Settlement Z-2927659-050, Nov. 29, 1994.
2. The waiver statute, 5 U.S.C. Sec. 5584, provides that the waiver authority may not be exercised if there exists "an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee" seeking waiver.



GAO

U.S. Government Accountability Office

**Matter of: David L. Williams - Waiver of Overpayment -  
Reemployed Annuitant - Reconsideration File: B-  
243315.3 Date: November 5, 1992**

Upon reconsideration, waiver of collection of an overpayment resulting from the agency's failure to deduct an annuity from the pay of a reemployed annuitant is granted. The record shows that the employee had questioned the correctness of his pay but a cognizant agency employee assured him that his pay was correct. Almost 3 years later the agency discovered that there was a computer programming error that had caused the overpayment. In these circumstances, the employee was not at fault and collection of the overpayment would be contrary to equity and good conscience. David L. Williams, B-243315, Sept. 6, 1991 (70 Comp.Gen. 699), reversed.

**DECISION**

Mr. David L. Williams, a reemployed annuitant of the Department of Labor, requests reconsideration of our denial of his request for waiver of repayment of salary overpayment made to him from July 5, 1987, to June 16, 1990. Upon reconsideration, we reverse our decision in David L. Williams, B-243315, Sept. 6, 1991 (70 Comp.Gen. 699), and grant waiver to Mr. Williams.

Mr. Williams was hired as a reemployed annuitant in Region IV (Atlanta), Occupational Safety and Health Administration (OSHA), U.S. Department of Labor (DOL), on July 5, 1987. His pay was subject to reduction by his Civil Service Retirement annuity (5 U.S.C. Sec. 8344 (1988)), but due to a computer error in the Department's automated payroll system, Mr. Williams' salary was not reduced for almost three years. During this period, Mr. Williams was overpaid \$75,693.28.

The authority to waive the government's claim for an overpayment of pay and allowances is contained in 5 U.S.C. Sec. 5584 (1988). Waiver may only be granted when collection would be against equity and good conscience and not in the best interests of the United States. The implementing regulation provides that the standard for granting waiver is met by a finding that the erroneous payment occurred through administrative error with no indication of fraud, misrepresentation, fault, or lack of good faith by the employee. 4 C.F.R. Sec. 91.5(b) (1992). Waiver ordinarily will not be granted when an employee knew or should have known of the error and failed to make inquiry or bring the matter to the attention of the appropriate officials. Id.

We have held that the employee who knows or suspects that he has received an overpayment should be prepared to return any overpayment he has received, since it is not against equity or good conscience to collect an overpayment from such an employee. Hawley E. Thomas, B-227322, Sept. 19, 1988; Richard W. DeWeil, B-223508, Dec. 24, 1986. However, where responsible agency officials assure the employee that his pay is correct, but the agency later discovers that it made an overpayment, waiver may be granted if the employee relied on the erroneous assurances and it was reasonable for him to do so. Joanne B. Fuesel, B-229394, Feb. 2, 1988; Lula F. Fones, B-203196, Dec. 29, 1981.

For example, in Lula F. Fones, the employee, also a reemployed annuitant at DOL, reported a suspected overpayment to her Personnel Office and to the Liaison officer for

the Payroll Department. Both advised her that her pay was correct. This advice was erroneous as it was based on her Notification of Personnel Action form, which incorrectly listed her monthly annuity as a yearly annuity. We granted waiver on the basis that the employee's acceptance of the erroneous advice was reasonable.

In his request for reconsideration, Mr. Williams compares himself to the employee described in Lula F. Fones and asks to be treated alike. He states that he first notified his timekeeper and then his supervisor who advised him to alert the Management Office for OSHA, which he did immediately. Mr. Williams further states that he also contacted the individual in DOL's Office of the Assistant Secretary for Administration and Management (OASAM) "who dealt with my reemployment because of the unique requirements of the reemployed annuitant.

According to Mr. Williams, he attempted to contact this individual repeatedly, but it was difficult to reach her. He states that he "would leave messages and she would return my call, each time I would tell her my pay was excessive and she would say she would check it but I would never get a call back. In a few days I would call her and she would say everything was correct that the pay had been adjusted. This went on for months." Finally, Mr. Williams says, he accepted her advice that his pay was correct.

Almost 3 years later, OASAM informed him that "a system problem has resulted in an overpayment in [his] salary." Because of a programming error in the agency's computerized payroll system, Mr. Williams' pay records in Personnel showed that his annuity was being deducted from his salary when, in fact, the payroll computer system was not recording any such deduction.

Mr. Williams has submitted statements from his timekeeper, his supervisor, and several other individuals. The timekeeper states that Mr. Williams brought his pay problem to her attention, and that she directed him to his supervisor. The supervisor recalls Mr. Williams talking to him about this problem a few times and that he referred him to OASAM. He also recalls that Mr. Williams "later told me that he was discussing the matter with the regional OSHA management office and with OASAM. I remember Dave specifically referring to discussions with [the individual] of OASAM. I recall Dave saying that [she] had no problem with Dave's pay and that the payroll records were accurate." A fellow employee states that Mr. Williams discussed with him his frustration in trying to resolve his pay problem, in that the people to whom he took the problem told him that they would get back to him and one person told him that the amount he was getting was correct. There are also statements from individuals who admit to having little or no personal knowledge of Mr. Williams' pay problem, but who vouch for his honesty and good character.

Mr. Williams states that he also attempted to obtain a statement from the individual in OASAM who had advised him that his pay was correct--she was no longer with the agency by that time--but she told him that she was unable to recall the events. He has submitted a copy of a memo that he addressed to her several months after he became a reemployed annuitant, as a "follow-up to the number of phone calls I have made to you over the past few months" regarding his concern as to the "excessive" amount of his pay. Mr. Williams states that he does not remember if she ever replied to his memo.

Finally, in support of his claim, Mr. Williams states that repayment of the debt now "would place an undue hardship on me and my family." He explains that since he is no longer employed with the government his income is limited to his retirement annuity and a small salary from a part time job. He further states that his only assets are the family residence, an automobile, miscellaneous personal property, and other assets of modest value.

Based on the evidence presented, DOL concluded that Mr. Williams should have been more diligent in his efforts to correct the error and that, had he done so, the error would have been corrected earlier. Before coming to this conclusion, DOL attempted to contact the former OASAM employee cited by Mr. Williams to obtain written corroboration of his contacts with her. Although the record is silent whether DOL contacted her, we may assume that DOL either was unable to do so, or did contact her and received the same response that Mr. Williams' had received. In any event, it does not appear that she contradicted what Mr. Williams had reported.

We view Mr. Williams' efforts to correct the error in a more positive light than does the agency. The submitted statements show that Mr. Williams was concerned about the amount of his pay. The supervisor's statement also contains a report of Mr. Williams' contemporaneous comments to the effect that he had tried to find out if his pay was excessive and was told that there was no problem with his pay. We think the supervisor's statement lends support to Mr. Williams' assertion that he had made an effort to correct the error and had been assured that his pay was correct. Since the error was hidden in the DOL payroll computer system, we think it is plausible that the OASAM employee would not have detected the error based on Mr. Williams' inquiry.

Finally, we think that considerable weight should be accorded to Mr. Williams' own unrefuted statement of the facts. Where the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty is to be drawn. Donald C. Leavens, B-194793, Aug. 14, 1979. There is every reason to apply an inference of honesty in this case. We note in this connection the statement from Mr. R. Davis Layne, the OSHA Regional Administrator, that Mr. Williams "has demonstrated the highest degree of professionalism and ethical behavior." In sum, we find it creditable that Mr. Williams did report to OASAM that his paycheck appeared excessive but received assurances that his pay was correct.

A further point needs to be addressed. In our prior decision, we denied Mr. Williams' waiver request based on a finding that, while he had questioned his pay on numerous occasions, he had continued to be aware that he was being overpaid. We stated that Mr. Williams should have set aside the overpayment for refund whenever the error was corrected. *Id.*

As stated in our waiver regulation, whether waiver will be granted ultimately depends upon the facts existing in the particular case. 4 C.F.R. Sec. 91.5(b). On reconsideration, we think that waiver should be granted upon the facts existing in this case. Mr. Williams obviously was not aware of the computer system problem. He only was aware that his biweekly paycheck appeared excessive in amount. It is true that he continued to be concerned about the amount of his pay even after he was assured that his pay was correct. Nevertheless, we think it is understandable that Mr. Williams eventually did come to accept and rely on the agency's assurances. Had he set aside an estimated amount each pay period, awaiting the day when an error in his pay might be discovered, he would have been doing so for almost three years. An employee in Mr. Williams' situation should not be expected to set aside an estimated amount each pay period for an indefinite period of time based on a suspicion that he is being overpaid. Given the assurances he received and the length of time during which the error continued undetected, we think that Mr. Williams reasonably accepted and relied on the agency's assurances that his pay was correct.

We therefore find that Mr. Williams acted in good faith in this matter. We do not find fault with him because he eventually relied on the agency's assurances that his pay was correct. Moreover, as he points out, repayment of this debt would impose a severe hardship on him and his family.

Accordingly, we conclude that collection of the debt would be contrary to equity and good conscience. We reverse our prior decision and grant waiver of Mr. Williams' indebtedness of \$75,693.28 under 5 U.S.C. Sec. 5584.