

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FRANCIS X. SNEE,
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Agency.
(CSA 1 375 287)

DOCKET NUMBER
BN831M8710035

DATE: DEC 15 1988

Edward F. Grouke, Esquire, Pawtucket, Rhode Island, for
the appellant.

Raymond J. Kirk, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Samuel W. Bogley, Member

OPINION AND ORDER

This case is before the Board upon the petition of the Office of Personnel Management (OPM or agency) for review of an initial decision issued on February 18, 1987. In that decision the administrative judge reversed the agency's reconsideration decision which denied appellant's request for waiver of collection for an overpayment of an annuity. For the reasons below, the Board GRANTS the petition for review and AFFIRMS the initial decision as MODIFIED in this Opinion and Order.

BACKGROUND

Appellant had been receiving payments from the Office of Worker's Compensation Program (OWCP) since 1966. Appellant had elected OWCP payments in lieu of an annuity from the Civil Service Retirement System. In 1985, OWCP notified appellant that it had determined that he was not entitled to OWCP for the years 1974 through 1978. Although appellant appealed OWCP's determination, he wrote to OPM inquiring about his eligibility for a disability retirement annuity for those years in the event his appeal of the OWCP determination was denied.

In August 1985, appellant received retroactive annuity payments from OPM in the amount of \$75,191. Checks in the amount of \$61,578.12 were issued to appellant as after-tax net, the remaining \$13,612.88 were withheld and filed with the Internal Revenue Service (IRS) to meet appellant's expected tax debt. Appellant realized an error had been made and immediately wrote to the agency advising them of the erroneous payments and asking for its advice on the appropriate course of action.

The appellant did not receive a reply from the agency until May 1986. In its response the agency asked the appellant to remit the amount of overpayment. Appellant returned \$58,834, the total amount he received less the last four monthly checks of \$685.88 each to which he believed he

was entitled.¹ Appellant pointed out to the agency that he had never received the remaining amount of \$13,612.88 because the agency had withheld that amount and forwarded it to the IRS.

In its reconsideration decision of November 26, 1986, the agency stated that "income tax collected and remitted to the IRS may only be recredited if repayment of debt is made within the same calendar year," and that because the appellant had failed to return the money during the same calendar year (1985), it could not recredit his account for the amount of the income tax withheld. OPM found that since the appellant knew that he was not entitled to the annuity payments, collection would not be against equity or good conscience. OPM reasserted that appellant personally owed the overpayment balance of \$13,612.88 and denied his request for waiver of collection.

The appellant filed a timely petition for appeal. In the initial decision, the administrative judge found that the appellant was without fault in the receipt of the overpayment and that he wanted to return the money in a timely manner in 1985 but did not because the agency failed to respond to his September 1985 request for information as to whom and how he should send the money until May 1986. She found that under the circumstances of the case, it would be unconscionable to require the appellant to file the necessary paperwork in an

¹ OPM agrees that the appellant was entitled to keep the last four checks of \$685.88 each because he did not receive any OWCP payments during that time.

attempt to obtain a refund of \$13,612.88. She found that it would be more appropriate for OPM to inform the IRS that it had erroneously forwarded the funds and thereby have the money reccredited to the retirement fund. The administrative judge noted that the agency had submitted no evidence in support of its argument that income tax remitted to the IRS may only be reccredited if repayment of the debt is made within the same calendar year.

ANALYSIS

In its petition for review the agency argues that the administrative judge erred in suggesting that OPM should look to the IRS, rather than the appellant, for recovery of the money remitted to IRS. OPM argues that it is not permitted by law to recover from the IRS. Although the agency cites to no law, regulation or court opinion, it submitted a copy of Revenue Ruling 79-311, which addresses the tax treatment of amounts advanced to an employee in excess of remuneration earned where the excess is repaid by that employee.² The ruling submitted by the agency is of uncertain applicability to the facts in this case.

Recovery of an overpayment may not be made from an individual when the individual is without fault and recovery would be against equity and good conscience. 5 U.S.C. § 8346(b); 5 C.F.R. §§ 831.1402, 831.1403. Upon review of the

² The agency provides no explanation for its failure to provide this information to the administrative judge. See 5 C.F.R. § 1201.115; *Avansino v. United States Postal Service*, 3 M.S.P.R. 211, 214 (1980).

record developed in the regional office, the Board finds it insufficient on which to make a reasoned decision whether the waiver of collection from appellant would be against equity and good conscience. On the one hand, the appellant raises legitimate issues of equity in pointing out that the issues arose as a result of error by the agency. In addition, the appellant has been diligent and responsible in efforts to correct the error; whereas, the agency had been dilatory in responding to appellant's inquiries concerning the erroneous payments. In any case, it was clear that appellant was being asked to expend a considerable amount of time and energy to resolve a problem which was not of his making. On the other hand, if it were true, as the agency alleges, that the appellant is the only one who can recover the money which rightfully belongs to the Civil Service Retirement Fund, then waiver of collection would result in a permanent loss of the money to the Retirement Fund and a possible windfall to appellant.³

It has been held that when the interests of the public are involved, an agency would not be doing its duty were it to merely decide upon a poor or unrepresentative record. *Isbrandtsen Co. v. United States*, 96 F.Supp. 883 (S.D.N.Y. 1951), *aff'd sub nom., Rederi v. Isbrandtsen Co.*, 342 U.S. 950 (1952) (per curiam). The contentions and arguments of the parties, particularly the agency, are based on certain

³ As the agency describes it, the money is held by IRS on behalf of the appellant and the appellant has constructive receipt of the money.

assumptions concerning the manner in which IRS accounts for money withheld from income and the appropriate methods for recovering the money erroneously remitted to IRS. The assumptions are not supported by evidence. There is no evidence in the record to show whether the agency ever attempted to recover the remittance directly from IRS before requesting the appellant to pay it. The Board determined, therefore, that it would be necessary to supplement the record before deciding this case. '

On September 20, 1988 the Board issued an order to IRS, pursuant to 5 C.F.R. § 1201.73(b), directing the IRS to provide certain information concerning the manner in which the money is accounted for and the appropriate procedures for recovering the money.

On October 27, 1988, the IRS filed a report stating that the agency may recover the money which was erroneously paid to IRS by filing with IRS an amended Form 941, an Employers Quarterly Tax Return, for the third quarter of 1985. That report stated as follows:

[W]here a tax payment has been reported on a Form 941, and it is later discovered that the payment was excessive, the proper procedure is for the party who filed the original Form 941 (the employer) to file an amended Form 941 claiming a refund of the excessive tax paid. Additional steps may be required if the individual was issued a Form W-2 for the erroneous payment. If the individual claimed a credit for the erroneous estimated tax payment on his income tax return and submitted the Form W-2 to the Service, then the employer must issue an amended Form W-2 to the individual reflecting the reduction in gross income resulting from the return of the erroneous payment, and the individual must file an amended tax return with the

amended Form W-2. However, if the individual did not submit the erroneous Form W-2 to the Service, the employer must seek the refund by submitting an amended Form 941 as discussed above.

The report also noted that the Revenue Ruling on which OPM relied is inapplicable to the circumstances of this case.

The agency submitted a response stating that on the basis of the information received from IRS, it is "prepared to follow the procedures prescribed by IRS to recover the funds." The agency asks, however, that the appeal be held in abeyance until OPM has recovered the funds or has received assurance from IRS that it will refund the amount in question to OPM.

In view of the additional evidence provided by IRS, the Board finds that because the agency failed to make an attempt to recover the money directly from IRS or, at a minimum, to make adequate inquiry of IRS as to the procedure which would be most effective and least burdensome to the appellant, and because there exists a means by which OPM can recover the remittance, it would be against equity and good conscience to require collection from appellant of the overpayment erroneously made by OPM. In addition, the agency has not shown good cause for holding the appeal in abeyance and further holding the appellant liable for the money. If the agency does not recover the funds because of an action by the appellant (such as having filed a claim for a refund), which precludes recovery of all or part of the funds, the agency may request that the Board reopen the appeal on the basis of the new evidence.

The initial decision is AFFIRMED as MODIFIED.

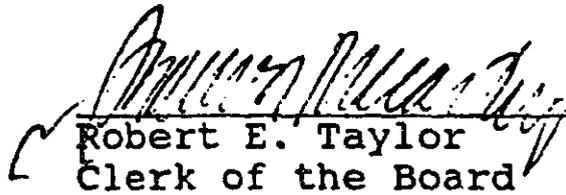
NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:


Robert E. Taylor
Clerk of the Board

Washington, D.C.