

Date: March 21, 2006
Claimant: John Doe
File Number: 05-0042
OPM Contact: Robert D. Hendler

The claimant is employed as an intelligence officer by the Defense Intelligence Agency. The agency submitted the claim on the employee's behalf to the U.S. Office of Personnel Management (OPM). We clarified the underlying basis of the claim with the agency on February 21, 2006. For the reasons discussed herein, the claim is denied.

The record shows the claimant and the agency agree with regard to the facts presented. The claimant worked more hours than his normal work schedule in support of the agency's mission and was "allowed to accrue [compensatory hours] after the value of those hours exceeded the pay cap." This was due to payroll system software which "allows the biweekly cap to be exceeded but does not prevent the annual premium pay cap from being exceeded or provide notice that has occurred." Although the payroll office "had established a manual review process, there was a break down in that internal mechanism." As described by the agency: "In May 2004, he had reached the point where he would exceed the annual premium pay limitation, as defined in 5 U.S.C. §5547(b), by receiving his normal salary for the remainder of the calendar year."

The record shows the claimant was initially notified on November 3, 2004, that he had exceeded the annual premium pay cap, was asked to "acknowledge the validity of the overpayment," and was advised on how to "submit a written request for waiver of the \$13,104.60." In his November 4, 2004, reply, the claimant states:

I accept that any additional compensatory time accumulated after I received your 03 Nov 04 notification will be forfeited. I would like to strongly suggest, however, that you would be doing me a grave disservice to force me to forfeit compensatory time that I legally earned prior to notification. The compensatory time that I earned prior to notification was earned in good faith, documented in accordance with existing policies, and was properly credited to me, without any caveats, on each of my Leave and Earnings Statements throughout 2004....If this cannot be done due to the Annual Pay Limitation, I would request that your office obtain an exception to policy to allow the excess compensatory time from 2004 to be rolled over to 2005.

The agency's report supports the claimant's request for a waiver; however, the documentation submitted indicates that no indebtedness exists. An April 5, 2005, e-mail on the matter states:

Please disregard our 3 Nov letter stating that you had a debt of \$13,104.60. In actuality compensatory time was inadvertently posted to your account to the extent that you were in excess of the annual premium pay cap even though you had not been paid for those hours. By reducing your compensatory time balance we were able to prevent an overpayment. Our intent was to notify you of the reduction in your compensatory time balance.

OPM's authority to adjudicate compensation and leave claims flows from 31 U.S.C. §3702. The authority in §3702 is narrow and limited to adjudication of compensation and leave claims. As a result of legislative and executive action, the authority to waive overpayments of pay and allowances now resides with the heads of agencies, regardless of the amount. See the General Accounting Office Act of 1996, Pub. L. No. 104-316, 110 Stat. 3826, approved October 19, 1996, and the Office of Management and Budget (OMB) Determination Order dated December 17, 1996. Neither Pub. L. No 104-316 nor OMB's Determination Order of December 17, 1996, authorizes OPM to make or to review waiver determinations involving erroneous payments of pay or allowances. Therefore, we must reject this part of the claim for lack of jurisdiction.

In this case, our authority is limited to determining whether the agency's action to reduce erroneously credited compensatory time to prevent an overpayment was appropriate. In this regard, the claimant seeks to estop the Federal Government from denying him benefits; i.e., reducing his compensatory time balance to prevent an overpayment, but the agency declined to do so. The claims jurisdiction of this office is limited to consideration of legal liability. OPM has no authority to authorize payment based solely on equitable considerations. 63 Comp. Gen. 50 (1983). Detrimental reliance is not a legal basis for the payment of appropriated funds. 56 Comp. Gen. 943 (1977). It is well established that the Government cannot be estopped from denying benefits that are not permitted by law, even where the claimant relied on mistaken advice from a Government official or agency. A claim for payment of money from the U.S. Treasury contrary to a statutory appropriation is prohibited by the Appropriations Clause of the Constitution, Art. I, 9, cl. 7. Recognition of equitable estoppel could nullify the clause if agents of the Executive branch were able, by their unauthorized oral or written statements, to obligate the U.S. Treasury contrary to the wishes of Congress. See *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), *Falso v. Office of Personnel Management*, 116 F.3rd 459 (Fed Cir. 1997), and *Melvin Ackley, Jr*, B-200817, April 21, 1981. Therefore, the claimant's rationale for equitable estoppel preventing compensatory time offset to preclude violating the statutory provisions of 5 U.S.C. §5547(b) must be rejected.

OPM does not conduct investigations or preside over adversary hearings in adjudicating claims, but relies on the written record submitted by the parties. See *Frank A. Barone*, B-229439, May 25, 1988. Where the record presents a factual dispute, the burden of proof is on the claimant to establish the liability of the United States; and where the agency's determination is reasonable, OPM will not substitute its judgment for that of the agency. See, e.g., *Jimmie D. Brewer*, B-205452, March 15, 1982, as cited in *Philip M. Brey*, B-261517, December 26, 1995.

The agency's action to recoup compensatory time to offset salary and compensatory time credited in excess of the premium pay limitation under 5 U.S.C. § 5547(b) conforms to established precedent that "payments for the salary paid for excess compensatory time off [over the premium pay limit] must be recovered." See 58 Comp. Gen. 571 (1979). The aggregate limits are statutory; and OPM does not have any authority to disregard those limits, make exceptions to the limits, or waive the restrictions in compensation that it imposes. Therefore, the claimant's request for "an exception to policy" must be disallowed.

Although we have no jurisdiction to waive payment due the Government, we note that a waiver only attaches to a situation of indebtedness. Based on the record, it appears that the agency reduced the claimant's compensatory time balance to offset compensation erroneously credited to the claimant in excess of the statutory premium pay cap; i.e., pay and compensatory time credited to the claimant in excess of the cap. Therefore, contrary to the agency's rationale, there was no indebtedness to be waived. This is based on the well-established precedent articulated in the related *Carl H.L. Barksdale*, B-219505, November 29, 1985:

We have consistently held that when an employee's leave account must be adjusted to correct a previous error and the employee has sufficient leave to his credit to cover the adjustment, there is no overpayment of pay which may be considered for waiver. Where the employee has insufficient leave to his credit to cover the adjustment, then to the extent that such leave reduction produces a negative leave balance, the employee has received pay to which he is not entitled. Only that amount is subject to possible waiver. This is based on the fact that the statute authorizing waiver, 5 U.S.C. §5584, extends to overpayments of pay and allowances. *Daniel F. Cejka*, 63 Comp.Gen. 210 (1984); *Bessie P. Williams*, B-208293, August 15, 1983.

This settlement is final. No further administrative review is available within the OPM. Nothing in this settlement limits the claimant's right to bring an action in an appropriate United States Court.