

KEYWORDS: waiver of indebtedness

DIGEST: When an employee is aware or should be aware that he is receiving payment in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

CASENO: 2017-WV-121201.2

DATE: 05/10/2018

DATE: May 10, 2018

In Re:)	
[REDACTED])	Claims Case No. 2017-WV-121201.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When an employee is aware or should be aware that he is receiving payment in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

DECISION

An employee of the Department of Defense requests reconsideration of the decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2017-WV-121201, dated March 28, 2018. In that decision, DOHA waived \$1,915.31 of the government’s claim and denied waiver of \$13,137.04.

Background

In 2008 the employee was a GS-12, step 8, earning an annual salary of \$80,558.00. During the pay period ending (PPE) October 11, 2008, he was entitled to receive overtime (OT) pay in the amount of \$509.52, but received no OT causing an underpayment of \$509.52. During the PPE October 25, 2008, the employee properly received the \$509.52 retroactively for the PPE October 11, 2008. Due to an administrative error, during the PPE October 11, 2008, the

employee erroneously received \$14,473.20 in OT for 132 hours but was only entitled to receive \$8,218.68 in OT for 132 hours, causing the employee to be overpaid \$6,254.52 (\$14,473.20 - \$8,218.68).

On February 4, 2007, a *Notification of Personnel Action*, SF-50, was issued granting the employee Administrative Uncontrollable Overtime (AUO) at the rate of 10 percent of his total salary, effective October 12, 2008. During the PPE October 25, 2008, he properly received AUO in the amount of \$308.80. It was later determined that the employee's entitlement to AUO should have terminated effective October 26, 2008. However, due to an administrative error, during the PPE November 8, 2008, through January 31, 2009, the employee continued to receive AUO causing him to be overpaid \$2,182.40. In addition, during the PPE December 6, 2008, the employee's OT pay was miscalculated causing him to be overpaid \$52.11. Therefore, the employee's indebtedness increased to \$8,489.03 (\$6,254.52 + \$2,182.40 + \$52.11).

In February 2009 multiple SF-50s were issued to correct the employee's AUO, and during the PPE February 14, 2009, through February 28, 2009, he received his proper salary. However, the corrective actions caused the employee to be erroneously paid \$6,563.32 (\$6,254.52 in OT + \$308.80 in AUO) during the PPE March 14, 2009, which was retroactively paid to him for the PPE October 25, 2008. As a result, the employee was overpaid \$15,052.35 (\$8,489.03 + \$6,563.32).

The DOHA adjudicator waived \$1,915.31 of the overpayment which represented 1) the erroneous AUO he received during the PPE November 8, 2008, through January 17, 2009, in the amount of \$1,863.20; and 2) the erroneous payment of OT he received in PPE December 6, 2008, in the amount of \$52.11. The adjudicator denied waiver of \$13,137.04 of the overpayment and specifically detailed in her decision why the employee knew or should have known he was being overpaid for that portion of his debt. The adjudicator denied waiver of the erroneously paid OT the employee received for 132 hours (at the rate of \$109.65 per hour) in the PPE October 11, 2008, in the amount of \$6,254.52. The adjudicator determined that the employee should have questioned such a large retroactive payment of OT during this pay period, especially since he had previously received OT in three pay periods prior at the rate of only \$63.69 per hour. The adjudicator also determined that since the employee acknowledged that he knew he was no longer entitled to receive AUO as of February 1, 2009, waiver of the overpayment of AUO he received on February 6, 2009, for the PPE January 31, 2009, in the amount of \$319.20 was not appropriate. Finally, the adjudicator denied waiver of the overpayment the employee received on March 20, 2009, in the amount of \$6,563.32, which erroneously compensated him for AUO and OT during the PPE October 25, 2008. The adjudicator noted that the employee was advised by email on March 20, 2009, that he had been overpaid for this pay period.

In the employee's request for reconsideration, he objects to the use of the language "should have" in the application of the standards for waiver to his case. He states he did not question his OT for the PPE October 25, 2008, based on his receipt of leave and earnings statements (LES), because he did not realize he was being overpaid. He states that this was the first time he received AUO and did not understand how his entitlements were calculated. He states that from the start of his employment in February 1983 through the period of overpayment, he had never identified a problem with his LES. Therefore, he states that he believed that when

he provided his Human Resources Office and DFAS the correct hours he worked, the information then reflected on his LES was accurate. He also states that he never knew what his OT rate was, and therefore, he had no reason to question the increase from \$63.69 per hour to \$109.65 per hour in the PPE October 25, 2008. He argues that although he was notified by his supervisor that he was overpaid on February 1, 2009, this did not alert him to the fact that he was again overpaid in the PPE March 14, 2009. He also disputes the amount of the debt and the time it took for DFAS to collect it.

Discussion

Under 5 U.S.C. § 5584, we may waive a claim by the government for the erroneous payment of pay or allowances to an employee if collection would be against equity and good conscience and not in the best interests of the United States, provided there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. This statute is implemented within the Department of Defense by DoD Instruction 1340.23 (Instruction) (February 14, 2008). The Standards for Waiver Determinations are found at Enclosure 4 of this Instruction. In relevant part, persons who receive a payment erroneously from the government acquire no right to it and are bound in equity and good conscience to make restitution, no matter how careless the act of the government may have been. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. Waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant.

Generally, debts may be waived only when collection would be against equity and good conscience and would not be in the best interest of the United States. *See* Instruction ¶ E4.1.2. The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not sufficient basis in and of itself for granting a waiver. *See* Instruction ¶ E4.1.3. A waiver is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. In such instances, the recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government. *See* Instruction ¶ E4.1.4.

Waiver is precluded if the employee is aware or should have been aware that he was being overpaid. *See* DOHA Claims Case No. 2011-WV-030802.2 (August 24, 2011); DOHA Claims Case No. 05072804 (August 23, 2005); and B-252830, June 25, 1993. An employee is considered to be aware of erroneous payments when he possesses information which reasonably suggests that the validity of the payments may be in question. *See* DOHA Claims Case No. 2011-WV-100702.2 (January 31, 2012).

In this case, at the time of the overpayment, the employee had been employed by the government for 25 years. In addition, the employee was entitled to receive and was in proper receipt of AUO beginning in February 2007, a year and a half prior to the beginning of the overpayment. Although he states that he did not know his OT rate, as the adjudicator pointed out in her decision, in three pay periods prior to erroneously receiving OT at the rate of \$109.65 per hour, the employee worked OT, and received it at the rate of \$63.69 per hour. Although the specific rate for the OT was not reflected on the employee's LES, his LES for the PPE October

25, 2008, listed that he worked 132.00 hours of OT and received \$14,473.20 for it. A proper examination of his LES would have alerted the employee to the fact that he was receiving OT at a much higher rate than the previous three pay periods. We have consistently held that an employee who receives documents, such as LES and SF-50s, that on their face show an error in the computation of their pay is considered to be on notice of the error, and the employee will be held at least partially at fault for failing to seek corrective action. *See* DOHA Claims Case No. 2011-WV-041102.2 (January 20, 2012); and DOHA Claims Case No. 05072804, *supra*. The employee states that since he had never experienced an error in his pay before, he accepted that his LES were accurate. However, the LES are issued to employees so that they can verify the accuracy of their pay. We cannot stress enough the importance of careful review by each employee of the LES provided by the agency. An employee has a duty to carefully examine their LES and report any errors. If the employee fails to fulfill this obligation, we have held that the employee is at fault and waiver is precluded. *See* DOHA Claims Case No. 2010-WV-020206.2 (May 26, 2010).

The employee contends that although he was notified that he was being overpaid by his supervisor on February 1, 2009, and then received a corrected SF-50 on February 9, 2009, this did not alert him to the fact that he was overpaid in March 2009. However, when the employee received the retroactive payment in the amount of \$6,563.32 in the PPE March 14, 2009, erroneously compensating him for AUO and OT for the PPE October 25, 2009, he certainly should have questioned it, especially since he was already on notice that he was indebted for OT payments. In addition, the employee received the \$6,563.32 payment on March 20, 2009, on the same date he received an email from his civilian payroll office. In the email, he was told that the retroactive payment was erroneous because he had essentially been erroneously overpaid twice for the same pay period. Under the circumstances, it is not against equity and good conscience to deny the erroneous payment of \$6,563.32. *See* DOHA Claims Case No. 2011-WV-0411022, *supra*.

Our authority in this matter pertains only to the availability of the equitable remedy of waiver. The establishment of a debt and collection of it are separate issues from the waiver process. Moreover, DOHA has no authority to adjudicate the validity of debts that arise from disputes involving civilian employees. If the employee wishes to dispute the validity of his debt, he should contact his agency and DFAS.

Conclusion

The employee's request for relief is denied, and we affirm the March 28, 2018, decision. In accordance with the Department of Defense Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

Signed: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

Signed: Ray T. Blank, Jr.

Ray T. Blank, Jr.
Member, Claims Appeals Board