

KEYWORDS: waiver of indebtedness

DIGEST: Title 5, United States Code, § 5584 provides authority for waiving claims for erroneous payments of pay and certain allowances made to specified federal employees, if collection of the claim would be against equity and good conscience and not in the best interest of the United States provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee or any other person having an interest in obtaining the waiver.

CASENO: 2006-WV-072106.3

DATE: 4/07/2011

DATE: April 7, 2011

In Re:)	
[REDACTED])	
Claimant)	Claims Case No. 2006-WV-072106.3

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Title 5, United States Code, § 5584 provides authority for waiving claims for erroneous payments of pay and certain allowances made to specified federal employees, if collection of the claim would be against equity and good conscience and not in the best interest of the United States provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee or any other person having an interest in obtaining the waiver.

DECISION

An employee of the Air National Guard requests reconsideration of the July 25, 2006, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim

No. 06072106. In that case, this Office waived \$27,609.60 of the government's claim and denied waiver of \$128,844.80 of the total claim in the amount of \$156,454.40.

Background

The record shows the employee was terminated from his position with the Air National Guard, effective March 7, 2003. As a result the employee was entitled to severance pay for 23.5 weeks (March 8, 2003 through August 9, 2003) in the biweekly gross amount of \$2,300.80, a total of \$27,034.40. However, during this period, the employee received \$27,609.60. As a result, the employee was overpaid \$575.20. Additionally, the employee erroneously continued to receive severance pay from August 10, 2003, through October 15, 2005, causing an overpayment of \$128,844.80. Therefore, the employee was overpaid \$129,420.00 (\$575.20 + \$128,844.80). The employee was notified of this debt by letter from the Defense Finance and Accounting Service (DFAS) dated November 15, 2005. After the letter was sent, DFAS reviewed the employee's record and determined that he had submitted an application for disability retirement to the Office of Personnel Management (OPM), and his application was approved on June 15, 2005. Since the employee's disability retirement was retroactive to the date of his retirement, March 7, 2003, the employee was no longer eligible for severance pay. Therefore, the employee was overpaid \$156,454.40 (\$129,420.00 + \$27,034.40).

The employee appealed to this Office requesting waiver of the claim. On July 25, 2006, this Office waived the overpayment of \$575.20, as the adjudicator believed that the employee may not have been aware that his severance pay was miscalculated. The adjudicator believed he acted in good faith in accepting this overpayment. The overpayment of \$27,034.40 was also waived. The adjudicator noted that this overpayment only occurred because OPM retroactively approved his disability retirement to the date of his termination (March 7, 2003). The adjudicator determined that there was no evidence that the employee knew or should have known of the overpayment either when he accepted the severance pay or when his disability retirement was approved. The adjudicator believed the employee was acting in good faith in accepting the overpayment.

As to the overpayment of \$128,844.80, which was the result of the employee erroneously receiving severance pay from August 10, 2003, through October 15, 2005, the adjudicator determined this should be denied waiver. The adjudicator noted that the employee received a Notification of Personnel Action (SF-50) dated March 6, 2003, which stated, "Entitled to \$27,034.40 severance pay fund to be paid at the rate of \$1,150.20 per week over 23.5 weeks beginning 09-MAR-2003." Although the employee stated he believed he was entitled to medical leave pending a disability retirement and was entitled to continue receiving severance pay, the adjudicator noted that the SF-50 which he received stated that he was terminated from his position effective March 7, 2003. Therefore, the adjudicator determined that the employee should have at a minimum questioned his entitlement to severance pay during the period of the overpayment. The adjudicator cited the long-standing principle that if an employee knows or reasonably could be expected to know that he is receiving salary to which he is not entitled, he has a duty to retain such amounts for subsequent refund to the government, and to make prompt inquiry to the appropriate officials regarding his pay. The employee did neither. Therefore, the adjudicator found it would not be against equity and good conscience to collect this portion of

the overpayment, and denied waiver of \$128,844.80. The adjudicator also addressed the employee's arguments that the error was the fault of the government and that the debt would be a financial hardship.

The employee requested reconsideration of this decision from our Office in a memorandum dated March 21, 2011. The employee presented no new evidence. In his letter requesting reconsideration the employee stated:

I have no new relevant evidence to present, to support this injustice. This debt is a Financial Hardship for me, I believe the omission in the record was an error and unjust. I stand-alone [sic], and that is my story. The applicant's DD form 149, Jun 2010 is included for your review.

The employee requests waiver of the indebtedness of \$127,580.08.¹ He also requests that his Standard Form (SF) 50 be amended to show that his request for disability has resulted in a disability retirement from OPM.

Discussion

The employee's request for reconsideration is timely.² Under 5 U.S.C. § 5584, we have the authority to waive collection of erroneous overpayments of pay and allowances if collection would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. See Instruction, ¶ E4.1.2. In this case, the employee has offered no new evidence to indicate that the decision of the adjudicator was arbitrary, capricious, or an abuse of discretion. See DOHA Claims Case No. 2010-WV-082601.2 (November 3, 2010); DOHA Claims Case No. 2009-WV-011605.3 (July 28, 2010); DOHA Claims Case No. 03061247 (June 17, 2003); DOHA Claims Case No. 03050907 (May 15, 2003); and DOHA Claims Case No. 00100331 (January 29, 2001). It was reasonable for the adjudicator to conclude that the employee knew or should have known that the \$128,844.80 was an overpayment and he was not entitled to it, and in any case, financial hardship is no basis for waiver under 5 U.S.C. § 5584. See Instruction, ¶ E4.1.7.

Regarding the employee's request to amend his records, this Office has no authority in this matter. The DD Form 149 (BACK) indicates the appropriate address to which such applications are to be mailed. The employee states that he is also seeking debt forgiveness as opposed to waiver, and again our Office has no authority in this matter.³ The employee may

¹ This appears to be the employee's current debt balance.

² As a procedural note, Department of Defense Instruction 1340.23 (hereinafter Instruction) *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances* (February 14, 2006), ¶ E8.2.2 requires that DOHA receive a request for reconsideration within 30 days of the date of the initial determination, in this case, July 25, 2006. However, since this Office did not include the notice of appeal rights in the letter to the claimant, subsequently standard practice, this request is considered timely.

³ DFAS forwarded to this Office on February 10, 2011, what they termed a "request for waiver of indebtedness" on behalf of the employee, and we returned it to DFAS on February 16, 2011. The file contained the

continue to pursue forgiveness of the debt with DFAS, but there is no basis for waiver relief under 5 U.S.C. § 5584.

Conclusion

The employee's request for reconsideration is denied, and we affirm the July 25, 2006, appeal decision. In accordance with the Instruction, ¶ E8.15, this is the final administrative action of the Department of Defense concerning the employee's waiver request under 5 U.S.C. § 5584 .

///Original Signed///

Michael D. Hipple
Chairman, Claims Appeals Board

///Original Signed///

Jean E. Smallin
Member, Claims Appeals Board

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board

employee's Application for Financial Hardship and his completed U.S. Department of Justice Financial Statement of Debtor. This office stated the file appeared to indicate the employee was seeking debt forgiveness under the authority of the Debt Collection Act and appropriate regulations. This Office stated in the cover letter returning the file that we were somewhat confused that in the file was a promissory note with the employee's signature for \$1000 a month more than the employee's monthly income. This note was signed at the direction of DFAS. Finally, this Office stated that if the employee desired waiver, he would have to request reconsideration on his own behalf.