

KEYWORDS: waiver of indebtedness

DIGEST: Waiver is not appropriate under 5 U.S.C. § 5584, when an employee is aware or should be aware that he is receiving pay to which he is not entitled.

CASENO: 2009-WV-070604.2

DATE: 10/28/2009

DATE: October 28, 2009

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In Re: )  
      [REDACTED] ) Claims Case No. 2009-WV-070604.2  
                  )  
Claimant )  
\_\_\_\_\_)

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Waiver is not appropriate under 5 U.S.C. § 5584, when an employee is aware or should be aware that he is receiving pay to which he is not entitled.

**DECISION**

An employee of the Air National Guard requests reconsideration of the September 22, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09070604. In that decision DOHA denied waiver of \$25,000, a lump sum separation incentive, which the government claimed the employee had received erroneously

**Background**

The record shows that the employee accepted an early retirement offer, due to

restructuring within his organization, and retired effective April 12, 2008. The Standard Form (SF) 50 issued on April 7, 2008, which effected his retirement, erroneously granted the employee a \$25,000 lump sum separation incentive (SI), which the employee received during the pay period ending April 12, 2008. The employee had been told prior to his separation by his commanding officer that he was being denied the SI payment due to his participation in the Weight Reduction Program. The employee took no action regarding the overpayment until written notification of the overpayment was received on October 30, 2008. The employee stated he did not feel the need to notify anyone and he did not question the payment because he assumed his "Commanding Officer had reconsidered and done the right thing by awarding me the SI payment." In his request for reconsideration the employee continues to assert that all other Voluntary Early Retirees received the SI as a matter of course. He states his commanding officer only verbally told him he was denying the SI based on his participation in the Weight Reduction Program. The employee contends he participated fully, attended all meetings and counseling, and showed progress at all junctures. In addition, he contends his work evaluations were all excellent and his service record exemplary. The only written notice he received was the SF 50 dated April 12, 2008, informing him that \$25,000 SI should be authorized. The employee is not aware of anything that makes it an erroneous payment.

### **Discussion**

Section 5584 of title 5, United States Code, 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 interests of the United States. Generally, these criteria are met by a finding that a claim arose from an administrative error with 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.

The employee was aware that his commanding officer had stated he had denied the SI payment based on his participation in the Weight Reduction Program. The employee stated in his original request for waiver that he was aware the payment might have been erroneous due to the conversation he had with his commanding officer prior to his separation, but the employee took no action until the written notification of overpayment was received on October 30, 2008. Whether to grant waiver under 5 U.S.C. § 5584, is not simply decided as a matter of right, but is decided on the principles of equity and fairness under the circumstances presented in each case. In his later correspondence the employee took the position that the payment was correct. In order to be considered for waiver, a payment must be erroneous at the time it was made. Payments that are valid when made are not erroneous for the purposes of waiver. In this case, the employee was aware the payment might have been erroneous, and should have further inquired as to its validity. We have consistently held that when an employee knows or reasonably could be expected to know he is receiving an erroneous payment, 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. Since the employee failed to do so, collection of the overpayment would not be against equity and good conscience, nor would it be contrary to the best interests of the United States. *See* DOHA Claims Case No. 07011606 (January 25, 2007); and DOHA Claims Case

No. 07100905 (October 16, 2007); and Comptroller General Decisions B-255988, May 31, 1994; and B-257862, January 17, 1995.

DOHA's decisions on this matter pertain only to the equitable remedy of waiver. As stated in DOHA's appeal decision, the employee may contest the validity of the debt by disputing it and proving his entitlement to the SI to the Department of the Air Force and the Defense Finance and Accounting Service (DFAS). Generally, an appeal of the Air Force/DFAS decision on such entitlements would be directed to the Office of Personnel Management (OPM) under 31 U.S.C. § 3702(a)(2) because the entitlement to the SI is a civilian employee compensation issue.<sup>1</sup>

### **Conclusion**

The employee's request for reconsideration is denied, and we affirm the September 22, 2009, decision to deny waiver of \$25,000. In accordance with Department of Defense Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

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Michael D. Hipple  
Chairman, Claims Appeals Board

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Jean E. Smallin  
Member, Claims Appeals Board

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Natalie Lewis Bley  
Member, Claims Appeals Board

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<sup>1</sup>Separation incentives are authorized generally under 5 U.S.C. § 9902(g).