

KEYWORDS: waiver of indebtedness

DIGEST: Due to an administrative error, an employee's salary was miscalculated causing him to be overpaid. He was unaware he was being overpaid until he was notified in March 2008. Under 5 U.S.C. § 5584, the amounts he was paid before notification may be waived. However, the amounts he received after notification may not be waived because he did not acquire title to the excess amounts and has a duty to return them to the government.

CASENO: 2009-WV-090804.2

DATE: 4/14/2010

DATE: April 14, 2010

In Re:)
[REDACTED]) Claims Case No. 2009-WV-090804.2
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to an administrative error, an employee's salary was miscalculated causing him to be overpaid. He was unaware he was being overpaid until he was notified in March 2008. Under 5 U.S.C. § 5584, the amounts he was paid before notification may be waived. However, the amounts he received after notification may not be waived because he did not acquire title to the excess amounts and has a duty to return them to the government.

DECISION

An employee of the U.S. Army requests reconsideration of the January 27, 2010, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09090804. In that decision, DOHA allowed, in part, waiver of collection of the overpayment of salary in the amount of \$563.65, but denied waiver of \$3,298.88.

Background

The employee was overpaid in the amount of \$4,848.18. However, the Defense Finance and Accounting Service (DFAS) was able to recover \$985.65 for amounts deducted from his pay for items such as Federal Employees' Group Life Insurance (FEGLI) and Thrift Savings Plan (TSP), leaving a net debt of \$3,862.53. The overpayments occurred January 7, 2007, through June 7, 2008. During that period, there were multiple changes to his pay for which he received documentation from his finance office (SF-50s) that contained numerous errors. These errors were compounded. For example, the employee, a police officer, was granted a pay adjustment. The SF-50 effecting the action erroneously changed the employee's duty station from a city under the "rest of the United States" pay table to an area under a higher pay table. This was compounded when the employee received a realignment, within grade increase, special salary rate, and a pay adjustment. These errors took place under the General Schedule (GS) pay rate. The employee then was selected for promotion under the National Security Personnel System (NSPS), and the errors continued, but at this time the employee was underpaid. The employee's underpayment was applied to the overpayment, reducing the debt substantially. However, the employee then began to receive erroneous retroactive payments. The adjudicator found that the employee accepted the retroactive payments in good faith until the date he was notified that the payments were in error. The employee, in fact, stated that March 27, 2008, was the "first time I am aware of exactly what has been going on with my pay problems and the delay of my promotion." The adjudicator found that although the employee's promotion and special salary rate were delayed, he should have questioned his entitlement to receive the retroactive payments, because he was aware prior to the receipt of the retroactive overpayments, from April 2008 through June 2008, that he was indebted.

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 the collection of the claim would be against equity and good conscience and not in the best interest of the United States. Generally, these criteria are met by a finding that the claim arose from an administrative error with no indication of fraud, fault, or misrepresentation, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of this claim. *See* DOHA Claims Case No. 04020909 (February 12, 2004); and DOHA Claims Case No. 03072812 (July 30, 2003). We have consistently held that waiver is inappropriate if an employee is aware that he is being overpaid. In such a case the employee does not acquire title to the overpayments, and has a duty to retain such amounts for subsequent repayment to the government. *See* DOHA Claims Case No. 05090603 (September 14, 2005); and DOHA Claims Case No. 04082704 (September 20, 2004).

The record in this case reflects that the employee acted in good faith in accepting overpayments prior to his notification on March 27, 2008, that he was receiving erroneous retroactive repayments. Any payments received after notification may not be waived. The employee argues that the error was made by the government. However, 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 waiver. *See* Department of Defense Instruction (Instruction) 1340.23, ¶ E4.1.3 (February 14, 2006). A waiver is not

appropriate when a recipient knows, or reasonably should know, that the payment is erroneous. Instruction at ¶ E4.1.4. Waiver action under 5 U.S.C. § 5584 is a matter of grace or dispensation, and not a matter of right that arises solely by virtue of an erroneous payment being made by the government. If it were merely a matter of right, then virtually all erroneous payments made by the government to employees would be excused from repayment.

The employee notes that the appeal decision did not take into account the amount that he has so far repaid to the government. This decision involves only the issue of waiver. The collection of debt is within the purview and responsibility of DFAS. If the employee has any questions regarding that matter, he should direct them to DFAS. Finally, the employee requested that our Office contact his Civilian Personnel Activity Center (CPAC) and obtain any additional documentation we require. Our Office does not have the authority to perform investigations. We base our decisions on the written record. *See* DOHA Claims Case No. 07111603 (November 30, 2007).

Conclusion

The member's request for relief is denied, and we affirm the January 27, 2010 decision that grants waiver in the amount of \$563.65, and denies waiver in the amount of \$3,298.88. In accordance with the Instruction at ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Michael D. Hipple
Chairman, Claims Appeals Board

///Original Signed///

Jean E. Smallin
Member, Claims Appeals Board

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Natalie Lewis Bley
Member, Claims Appeals Board