

KEYWORDS: waiver of indebtedness; notification of debt

DIGEST: Due to administrative error, an employee's salary was miscalculated causing him to be overpaid. He was unaware he was being overpaid until he was notified on January 29, 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-111601.2

DATE: February 19, 2010

In Re:)	
[REDACTED])	Claims Case No. 2009-WV-111601.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to administrative error, an employee's salary was miscalculated causing him to be overpaid. He was unaware he was being overpaid until he was notified on January 29, 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 United States Air Force requests reconsideration of the January 22, 2010, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2009-WV-111601. In that decision, DOHA allowed in part waiver of collection of the overpayment of salary in the amount of \$2,000.75, but denied waiver of \$2,529.14.

Background

The employee accepted a term appointment from the Air Force as a security guard effective September 4, 2007. The employee's initial pay was erroneously calculated. The hiring official, however, had approved the employee's pay without proper approval from the Pay Pool Manager. This was discovered and the employee was informed of the error on January 29, 2008. The Defense Finance and Accounting Service (DFAS) recommended that since the employee had never been informed of his hourly wage prior to his appointment, the employee accepted the erroneous salary in good faith prior to his notification of the error. Based on that analysis, they recommended that \$2,000.75, of the claim be waived, and the remaining \$2,529.14 be denied due to the employee's awareness on January 29, 2008, that the pay was improperly calculated. In the appeal decision, the DOHA adjudicator agreed with this analysis and supported the recommendation of DFAS. In his request for reconsideration, the employee agrees that any work that he performed after being notified of the erroneous calculation should be subject to the new pay rate, but he argues that the amount that is being denied waiver is for work that was performed prior to January 29, 2008. He states that the individuals who certified the timesheets were inexperienced and were constantly submitting corrections. He states that the money received was for work performed prior to January 29, 2008, but the pay was received retroactively. Thus, even though he was notified of the error, he had already performed the work and should be paid under the salary rate that was set when he started his employment (\$36,619). To do otherwise, according to the employee, was a breach of his contract with the Air Force as stated in the initial notification of personnel action (SF-50), his leave and earnings statements, and discussions with the official who hired him.

Discussion

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, misrepresentation, fault, or lack of good faith on the part of the employee. Waiver is inappropriate if the employee is aware he is being overpaid. *See* DOHA Claims Case No. 05090603 (September 14, 2005), and DOHA Claims Case No. 07100201 (October 10, 2007). Once the employee was notified on January 29, 2008, that he was being overpaid, he did not acquire title to any overpayments he received after that point, and has a duty to return the excess amounts to the government. *See* DOHA Claims Case No. 00030709 (April 28, 2000).

An employee's salary is based on statutes and regulations rather than on contract principles. *See* Comptroller General decision B-226173, Aug. 20, 1987. *See also* *Kizas v. Webster*, 707 F.2d 524 (D.C. Cir. 1983) *cert. denied* 464 U.S. 1042 (1984); *Danoff v. United States*, 2 Cl.Ct. 729 (1983). An officer or agent of the government cannot obligate the government to pay an employee more than the relevant statutes and regulations allow. *See* B-226173, *supra*. *See also* *Federal Crop Insurance v. Merrill*, 332 U.S. 380 (1947). Therefore, the employee was overpaid for the entire period in question, even though he did not become aware of the error until January 29, 2008. Since waiver is an equitable remedy, the adjudicator

correctly waived the erroneous salary payments the employee received prior to notification and denied the amounts received after that time, regardless of when the salary was earned.

Conclusion

The employee's request for relief is denied, and we affirm the January 22, 2010, decision. 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.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board