

KEYWORDS: waiver of indebtedness

DIGEST: Under 5 U.S.C. § 5584, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for erroneous payment of pay and 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, provided that there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the employee.

CASENO: 2009-WV-112401.2

DATE: 4/28/2010

DATE: April 28, 2010

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In Re: )  
[REDACTED] ) Claims Case No. 2009-WV-112401.2  
Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Under 5 U.S.C. § 5584, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for erroneous payment of pay and 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, provided that there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the employee.

**DECISION**

A U.S. Army employee requests reconsideration of the February 19, 2010, decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2009-WV-112401. In that decision our Office granted waiver of \$151.32, and denied waiver of \$10,570.99, of the collection of the debt the employee owes the government.

## Background

The record shows that the employee was released from federal service as a GS-08, step 2 (\$40,187.00 per year) due to a Base Realignment and Closure (BRAC), effective August 31, 2006. The employee was reinstated to federal service as a GS-05 (\$40,914.00 per year) on January 8, 2007. The employee was informed, and the SF-50 effecting her reinstatement reflects, that she was entitled to retain the grade of GS-08 through January 7, 2009. The employee received the appropriate amount she had been informed her position rated for the first two pay periods; and the amount decreased by \$129.60 for the third pay period. The employee immediately made telephone calls and went in person to her Civilian Personnel Advisory Center (CPAC). The individual at the CPAC told the employee that her pay had been entered incorrectly by the pay clerk for the third pay period, *i.e.*, the pay period ending (PPE) March 3, 2007. The CPAC personnel reviewed her information and created a remedy ticket, and her pay was returned to the amount it had been set at for the first two pay periods, which the CPAC personnel informed her was the correct amount she was entitled to receive. The employee was notified on February 26, 2009, that she was not entitled to the grade retention which had been granted upon her reinstatement, thus creating an incorrect annual salary. The employee requested that the overpayment be waived by DD Form 2789, dated June 12, 2009. The Defense Finance and Accounting Service (DFAS) determined in their Administrative Report on November 18, 2009, that the employee was unaware of the indebtedness until February 26, 2009. DFAS believed, however, that the employee should have been alerted to some type of issue when her pay decreased during the third pay period (PPE March 3, 2007) after reinstatement. The adjudicator at DOHA concurred with DFAS.

In requesting reconsideration, the employee disagrees with the position of DFAS and DOHA that she did not question her pay or LES, but insists that the issue of her salary was never considered in error by anyone. She states that after the first two pay periods, when her pay decreased slightly, and she brought it to the attention of CPAC, her pay was fixed, it was explained to her the decrease was an error, and it was not raised again as an issue until February 2009. To support her argument that she was watching her pay, the employee provided a series of emails covering the greater part of 2007 regarding other pay issues. At no time in this series of emails was there any indication that her salary was incorrect. Additionally, the employee provides an email from her CPAC dated December 17, 2008, confirming that she was on retained grade. The email states that while her retained pay would terminate two years after her reinstatement, she would then have "safe pay" protection. The employee has also provided this Office with a copy of an email containing the commitment offer to the employee for the reinstatement job. It is dated December 29, 2006, and notably states "retained grade: Yes" and the salary is listed as "Basic: \$35,715.00, Locality: \$4,472.00, Total Salary: \$40,187.00." The same individual from CPAC sent the last two emails almost two years apart. The employee has also provided memoranda from the Acting Director and Supervisor, respectively, of her CPAC, on April 2, 2010, and March 16, 2010, indicating that their office misadvised the employee in explaining her pay entitlements and in setting her pay incorrectly. They are both quite adamant that since the employee's pay was set incorrectly from the beginning, she would have no way to

know that an error had occurred.<sup>1</sup> Each SF-50 that the employee received throughout the period until the error was discovered noted in Sec. 45. Remarks: “Employee is entitled to retain grade of 08-GS through 07-JAN-2009.”

### Discussion

Under 5 U.S.C. § 5584, we have the authority to waive a claim for an erroneous payment of pay and 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, provided that there is no evidence 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 legal definition of “fault” does not imply any ethical lapse on the part of the employee. It merely indicates that she is not entirely without some responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to her. The standard we employ to determine fault is that of a reasonable person; if such a person knows or should know that she is receiving money to which she is not entitled, she is at fault if she fails to bring the excess payment to the attention of the appropriate authorities. In such a situation, waiver is precluded. *See Standards for Waiver Determinations*, Department of Defense Instruction (Instruction) 1340.23, ¶ E4.1.4 (February 14, 2006), *codified at* 32 C.F.R. Part 284, Appendix B.

In this instance, the employee’s pay was set incorrectly at her reinstatement. DFAS and DOHA’s adjudicator believe that the employee should have been aware that there was an error with her pay due to the decrease in her pay in PPE March 3, 2007. However, it is difficult to see how a reasonable person could have determined that her pay was incorrect in the employee’s situation. The employee points to her commitment offer which states her salary and clearly states that she will retain her grade. When any error in her pay or allowances occurred during the time in question, this employee was fastidious in ensuring corrections were made. In this case, the employee provides a commitment letter from CPAC which states she will receive retained grade. She includes an email from that same individual in CPAC almost two years later, asking him to confirm the advice he had previously given her, and he does. That email is a mere three months before the government finally determines that there was an error in setting the employee’s pay. Every official document this employee received (SF-50s) noted she was entitled to retained grade until January 7, 2009. Accordingly, the record reflects that the employee acted in good faith in accepting overpayments prior to her notification, on February 26, 2009, that she was being overpaid.<sup>2</sup> *See* DOHA Claims Case No. 09051302 (May 21, 2009). It is appropriate to waive overpayments to the employee paid prior to that date. The employee is indebted for the overpayments which accrued after notification on February 26, 2009.

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<sup>1</sup> The employee also provides a memorandum, dated April 12, 2010, from an individual who works in her office, position unknown, who states, “I talked to Mr. [redacted] in CPAC in May 08 and was told that [the employee] would be o.k. under ‘safe pay’.” This is the same individual noted in the two emails.

<sup>2</sup> As noted above, the employee had been informed that when her grade retention ended on January 7, 2009, she would continue to be entitled to “safe pay.” Waiver is appropriate until the employee was notified on February 26, 2009.

## Conclusion

The member's request for relief is partially granted and this file is returned to DFAS to determine the actual debt. In accordance with the Instruction at ¶ 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

