

KEYWORDS: waiver of indebtedness; notification

DIGEST: Due to an administrative error, an employee's overtime rate was set at the incorrect rate causing her to be overpaid. She was unaware she was being overpaid until she was notified on March 27, 2009. Under 5 U.S.C. § 5584, the amounts she received before notification may be waived. However, the amounts she received after notification may not be waived because she knew or had reason to know that the overtime payments were questionable and she had a duty to return them to the government.

CASENO: 2010-WV-010807.3

DATE: 4/30/2010

DATE: April 30, 2010

In Re:)	
[REDACTED])	Claims Case No. 2010-WV-010807.3
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to an administrative error, an employee's overtime rate was set at the incorrect rate causing her to be overpaid. She was unaware she was being overpaid until she was notified on March 27, 2009. Under 5 U.S.C. § 5584, the amounts she received before notification may be waived. However, the amounts she received after notification may not be waived because she knew or had reason to know that the overtime payments were questionable and she had a duty to return them to the government.

DECISION

An employee of the Navy requests reconsideration of the March 22, 2010, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2010-WV-010807. In that decision, DOHA waived in part the collection of a debt owed by the employee. The employee seeks waiver of a portion of the remainder of the debt.

Background

Effective November 9, 2008, the employee was authorized to perform temporary duty (TDY) overseas. As a result, the employee's status under the Federal Labor Standards Act (FLSA) should have been changed from nonexempt to exempt. However, due to an administrative error, the employee's FLSA status remained nonexempt. Therefore, when the employee worked overtime she erroneously received overtime pay at the rate of one and one-half times her basic salary, instead of her overtime being capped at the GS-10, step 1 rate. Due to this administrative error, during the period November 23, 2008, through March 28, 2009, the employee's overtime pay was miscalculated causing an overpayment in the amount of \$1,886.22. In addition, the employee received a retroactive overtime payment during the pay period ending March 28, 2009, causing an overpayment in the amount of \$160.80. Therefore, the employee's debt totaled \$2,047.02.

The record shows that on March 27, 2009, the employee was notified by on-site management of the error and her indebtedness. In DOHA Claim No. 2010-WV-010807, the adjudicator waived \$1,504.32, the portion of the erroneous salary payments the employee received before notification of the error, but denied waiver of \$542.70, the erroneous salary payments she received after notification.

In her request for reconsideration, the employee states that the \$160.80 payment was issued to her retroactively for work performed during pay period ending March 14, 2009. She states that management told her on March 27, 2009, that beginning March 29, 2009, her rate of overtime would be changed from FLSA nonexempt to FLSA exempt. Therefore, she states that when she was paid retroactively at the FLSA nonexempt rate for work performed during PPE March 14, 2009, she did not know she was being overpaid. She states that based on the advice given to her by management on March 27, 2009, she believed her pay to be accurate.

Discussion

The employee seeks waiver of the debt under title 5 of the United States Code, Section 5584 (5 U.S.C. § 5584). This statute is implemented within the Department of Defense under Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006). Generally, persons who receive a payment erroneously from the government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant. *See* Instruction ¶ E4.1.1.

Generally, debts may be waived only when collection would be against equity and good conscience and would not be in the best interests of the United States. *See* Instruction ¶ E4.1.2. 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 a waiver. *See* Instruction ¶ E4.1.3. A waiver usually is not appropriate when a recipient knows, or reasonably

should know, that a payment is erroneous. In such instances, the recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government. *See* Instruction ¶ E.4.1.4.

We interpret the employee's argument in her reconsideration as two-fold. First, although she does not dispute that she was notified of a change in pay by on-site management on March 27, 2009, she asserts that she was not told about her resulting indebtedness. Second, she suggests that the \$160.80 retroactive payment she received after notification should be waived because it compensated her for overtime work performed prior to notification.

The record reflects that the employee was notified by on-site management that she was being overpaid on March 27, 2009. Specifically, the record contains a memorandum from the agency concerned stating: "The employees were notified by on-site management of this situation and their pending indebtedness on 27 March 2009." On disputed questions of fact between an employee and the agency, we accept the statement provided by the agency in the absence of clear and convincing evidence to the contrary. *See* DOHA Claims Case No. 09080410 (August 11, 2009) and DOHA Claims Case No. 02030501 (April 18, 2002).

As stated above, waiver is inappropriate if the employee is aware she is being overpaid. *See also* DOHA Claims Case No. 07100201 (October 10, 2007) and DOHA Claims Case No. 05090603 (September 14, 2005). Once the employee was notified on March 27, 2009, that she was being overpaid, she did not acquire title to any overpayments she received after that point, and has a duty to return the excess amounts to the government. *See* DOHA Claims Case No. 2009-WV-111601.2 (February 19, 2010), DOHA Claims Case No. 02030501, *supra*, and DOHA Claims Case No. 00030709 (April 28, 2000). Although the employee suggests that she did not understand the indebtedness to include compensation for overtime work already performed, she was at least put on notice that the overtime payments she received were questionable. Therefore, she was aware that any further payments owed to her for overtime work already completed were questionable. Even though the employee was retroactively paid for overtime work completed prior to notification, she should have been aware that she was being overpaid at the incorrect overtime rate when she received the retroactive payment. In this regard, the significant date is the date the employee receives the payment, not the date when the work was actually performed. Accordingly, we uphold the decision to deny waiver of the \$542.70.

Conclusion

The employee's request for relief is denied, and we affirm the March 22, 2010, decision to deny waiver in the amount of the \$542.70. In accordance with ¶ E8.15 of the Instruction, 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: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board