

KEYWORDS: waiver of indebtedness; notification

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

CASENO: 2010-WV-010810.3

DATE: 5/24/2010

DATE: May 24, 2010

In Re: [REDACTED] Claimant)))))	Claims Case No. 2010-WV-010810.3
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**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to an administrative error, an employee’s overtime pay was set at the incorrect rate causing him to be overpaid. He was unaware he was being overpaid until he was notified on March 27, 2009. Under 5 U.S.C. § 5584, the amounts he received before notification may be waived. However, the amounts he received after notification may not be waived because he knew or had reason to know that the overtime payments were questionable, and he 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-010810. 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 December 7, 2008, the employee was authorized to perform temporary duty (TDY) overseas. As a result, the employee's status under the Fair 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, he erroneously received overtime pay at the rate of one and one-half times his basic salary, instead of his overtime being capped at the GS-10, step 1 rate. Due to this administrative error, during the pay period ending (PPE) January 17, 2009, through PPE March 28, 2009, the employee's overtime pay and night differential pay were miscalculated causing an overpayment in the amount of \$5,487.79.

The record shows that on March 27, 2009, the employee was notified by on-site management of the error and his indebtedness. In DOHA Claim No. 2010-WV-010810, the adjudicator waived \$3,646.64, the portion of the erroneous salary payments the employee received before notification of the error, but denied waiver of \$1,841.15, the erroneous salary payments he received after notification.

In his request for reconsideration, the employee requests further waiver in the amount of \$394.35. He states that this amount was issued to him retroactively for work performed during the pay period ending March 14, 2009. He states that management told him on March 27, 2009, that beginning March 29, 2009, his rate of overtime would be changed from FLSA nonexempt to FLSA exempt. Therefore, he states that when he was paid retroactively at the FLSA nonexempt rate for work performed during PPE March 14, 2009, he did not know he was being overpaid. He states that based on the advice given to him by management on March 27, 2009, he believed his 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 his reconsideration as two-fold. First, although he does not dispute that he was notified of a change in pay by on-site management on March 27, 2009, he asserts that he was not told about his resulting indebtedness. Second, he suggests that the retroactive payment he received after notification should be waived because it compensated him for overtime work performed prior to notification.

On March 27, 2009, the employee was notified by on-site management that he was being overpaid. 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 he 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 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. 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 he did not understand the indebtedness to include compensation for overtime work already performed, he was at least put on notice that the overtime payments he received were questionable. Therefore, he was aware that any further payments owed to him for overtime work already completed were questionable. Even though the employee was retroactively paid for overtime work completed prior to notification, he should have been aware that he was being overpaid at the incorrect overtime rate when he 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 \$1,841.15.

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 \$1,841.15. 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