

KEYWORDS: waiver of indebtedness

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 for overtime 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-010816.3

DATE: 8/18/2010

DATE: August 18, 2010

In Re:)
[REDACTED]) Claims Case No. 2010-WV-010816.3
Claimant)

**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 for overtime 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 June 16, 2010, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2010-WV-010816. 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

The record reflects that two administrative errors resulted in the employee being overpaid during the period January 2009 through April 2009. The first error occurred when on December 29, 2008, a Notification of Personnel Action (SF-50) reduced the employee's grade from a GS-12, step 5 (\$78,322.00 per annum) to a GS-11, step 9 (\$73,033.00 per annum) due to the termination of a temporary promotion effective on that date. However, due to an administrative error, the SF-50 issued on January 2, 2009, granting the employee a general pay adjustment effective January 4, 2009, erroneously established his salary as \$81,472.00 per annum from \$78,322.00 (GS-12, step 5), instead of \$75,968.00 per annum from \$73,033.00 (GS-11, step 9). As a result, the employee's basic salary was miscalculated during the pay period ending (PPE) January 17, 2009, through PPE March 28, 2009, causing an overpayment in the amount of \$1,267.20. In addition, due to this error, the employee's night differential pay was miscalculated during PPE January 17, 2009, through PPE March 28, 2009, causing an overpayment in the amount of \$36.66.¹

The second error occurred when effective January 25, 2009, 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 PPE January 31, 2009, through PPE April 11, 2009, the employee's overtime pay was miscalculated causing an overpayment in the amount of \$3,836.83.

The record shows that on March 27, 2009, the employee was notified by on-site management of an error in his salary and his indebtedness. In DOHA Claim No. 2010-WV-010816, the adjudicator waived \$3,376.89, the portion of the erroneous salary payments the employee received from his basic salary and overtime rate being miscalculated from PPE January 17, 2009, through PPE March 14, 2009, and his night differential pay being miscalculated from PPE January 17, 2009, through PPE March 28, 2009. However, the adjudicator denied waiver of \$1,763.80, the erroneous salary and overtime payments he received after notification.

In his request for reconsideration, the employee states that \$386.40 of the remaining \$1,763.80 was issued to him retroactively for work performed during PPE 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

¹ Specifically, the employee was overpaid night differential pay in the amount of \$0.52 in PPE January 17, 2009. He was overpaid night differential pay in the amount of \$36.14 in PPE March 28, 2009.

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. He further argues that the \$211.20 overpayment for basic salary and the \$36.14 overpayment for night differential he received during PPE March 28, 2009, should also be waived. He states that the adjudicator did waive the \$36.14 overpayment for night differential, but did not include this amount in the final calculation of the waived amount. He further states that these payments were attributable to the first error, and had nothing to do with the FLSA notification that occurred on March 27, 2009. In that regard, although the termination of his temporary promotion was effective December 29, 2008, he states that he was told by his supervisor that he would be temporarily promoted back to a GS-12, step 5, on January 8, 2009. He states that his LES for the January 2009 pay period reflected that the promotion did indeed occur. In addition, he states that on March 29, 2009, he was competitively selected for a temporary GS-12 position, which subsequently became permanent on December 6, 2009. He attaches his SF-50s reflecting the temporary promotion and subsequent permanent promotion.

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.

In this case, the employee argues that the retroactive payment for overtime worked prior to notification should be waived. The record shows that 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.” 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 (April 18, 2002) 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.

As for the overpayment of night differential pay the employee received in PPE March 28, 2009, in the amount of \$36.14, we agree that this amount was not included in the adjudicator's final calculation of the amount waived at the end of her decision. Therefore, we waive an additional \$36.14, since the adjudicator clearly intended this amount to be included in the amount waived.

Based on the record in this case, it is not clear why the adjudicator waived the overpayment of erroneous basic salary resulting from the employee continuing to be paid at the grade of a GS-12, step 5, after termination of his temporary promotion on December 29, 2008. In our view, the SF-50s that the employee received should have alerted him to the fact that he was being overpaid.² In keeping with the equitable considerations contained in 5 U.S.C. § 5584, in the absence of any further evidence, we will not disturb the adjudicator's decision to waive the amounts the employee received during PPE January 17, 2009, through PPE March 14, 2009. However, we also will not extend waiver to the overpayment the employee received in the amount of \$211.20, in PPE March 28, 2010.

Conclusion

For the reasons stated above, we hereby waive an additional \$36.14. 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

² We note that the record contains three significant SF-50s. On August 31, 2008, an SF-50 was issued temporarily promoting the employee from a GS-11, step 9, to a GS-12, step 5, not to exceed December 28, 2008. On December 29, 2008, an SF-50 was issued changing the employee back to a GS-11, step 9. Even though the error occurred when an SF-50 was issued on January 2, 2009, giving the employee a general adjustment at the GS-12, step 5 level, a subsequent SF-50 was issued on January 4, 2009, giving the employee a general adjustment at the correct grade, a GS-11, step 9.

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board