

KEYWORDS: waiver of indebtedness

DIGEST: Due to an administrative error, an employee’s salary was miscalculated causing him to be overpaid. He was unaware he was being overpaid until he was notified of an indebtedness on September 5, 2008. 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 did not acquire title to the excess amounts and has a duty to return them to the government.

CASENO: 2010-WV-02102.2

DATE: 7/08/2010

DATE: July 8, 2010

In Re:)	
[REDACTED])	
Claimant)	Claims Case No. 2010-WV-020102.2

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to an administrative error, an employee’s salary was miscalculated causing him to be overpaid. He was unaware he was being overpaid until he was notified of an indebtedness on September 5, 2008. 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 did not acquire title to the excess amounts and has a duty to return them to the government.

DECISION

An employee of the Army requests reconsideration of the June 14, 2010, decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2010-WV-020102. In that decision, DOHA waived \$1,547.58 of the government’s claim and denied waiver of \$7,433.87.

Background

The employee was a GS-09 at an Army post in the United States. In December 2007, he reported for service to a location outside of the United States under a temporary promotion or reassignment to GS-12, with temporary change of station orders, and he remained there until January 2009. During his temporary tour, he was paid danger pay, post differential, and post allowance because his family remained housed in the United States. In February 2008, the employee was converted to the National Security Personnel System (NSPS). At conversion, the employee's position was classified as a YA-02, and his annual salary was established as \$57,709, the same amount he received as a temporary GS-12 prior to conversion.¹ On September 5, 2008, the Civilian Human Resources Agency, Europe Region, notified the employee that they had discovered that the employee's salary under NSPS was incorrectly established at \$57,709, because the proper nature of the action was a reassignment, not a temporary promotion, and salary increases on reassignment in NSPS cannot exceed 5 percent. They determined that his salary should have been \$51,538. They advised the employee that he was indebted and would have to repay the amount he owed. The record indicates that the employee received this notice on September 8, 2008.

Nevertheless, as the January 25, 2010, administrative report explains, the majority of the relevant debt is from payments that the employee received retroactively. The amount already waived by DOHA's adjudicator (\$1,547.58) is not in issue. Thus, in relevant part, the debt still in issue resulted primarily from: (a) a retroactive payment (\$2,088.17) in the pay period ending (PPE) September 13, 2008, in which the employee was retroactively paid post allowance, which he had already been paid, for PPE March 1, 2008 through August 30, 2008; and (b) in PPE September 27, 2008, the employee was retroactively paid basic salary, overtime, post differential, post allowance, and danger pay for PPE April 12, 2008, through August 30, 2008 (\$5,345.70), even though he had been paid correctly for this time frame previously.

In his reconsideration request, the employee questions his indebtedness, and asserts that "this is not an appeal." The employee suggests that the confusion is due to the conversion of his position to NSPS, and believes that error occurred when he was administratively returned to his parent unit, where he was previously a GS-09. As we understand his claim, he thinks that because the system did not recognize him as a GS-12, but as a GS-09, it treated him as a new hire and determined he was limited to a 5 percent increase. In any event, the employee argues that the indebtedness is incorrect, and that all amounts already deducted from him should be returned.

Discussion

Preliminarily, as we construe the employee's reconsideration request, it appears that the employee is, in effect, abandoning his application for waiver. Essentially, a uniformed service member, employee or other eligible applicant who requests waiver of an indebtedness under one of the debt waiver statutes is asking the government to forgo collection of an otherwise legal debt

¹ In a Notification of Personnel Action (SF-50) approved on February 14, 2008, the employee was returned effective February 17, 2008, to his position at the post in the United States as a GS-09, step 8, with an adjusted basic pay of \$55,553 (he did not physically return to his home station). His salary had been established at \$57,709 as a GS-12 prior to that time. In a SF-50 approved on February 28, 2008, the employee was reassigned, effective February 18, 2008, as a YA-02 with an annual salary of \$57,709, at the overseas installation.

for reasons of equity.² Here, the employee is challenging the legal premises of the debt. For purposes of addressing the employee's concerns, we will treat this as a reconsideration request.

Section 5584 of title 5, United States Code, provides authority for waiving claims for erroneous payments to an employee of pay and allowances if collection would be against equity and good conscience and not in the best interests of the United States. The fact that an erroneous payment is solely the result of an administrative error or mistake on the part of the government is not sufficient basis in and of itself for granting waiver. *See* Department of Defense Instruction 1340.23 (hereinafter Instruction), ¶ E4.1.3. Waiver 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 ¶ E4.1.4.

The basis of most of the indebtedness appears to be duplication of entitlements already properly paid, and not so much overpayments resulting from a salary raise exceeding 5 percent. However, whether or not the reason for denying waiver was properly articulated in the decisions prior to this one, the clear message that the employee should have received from the September 5, 2008, correspondence is that he was overpaid and should expect the government to try to recover some amounts already paid to him. Instead, within days of receiving this correspondence, he receives a retroactive payment over \$2,000, and in the pay period succeeding that, another retroactive payment exceeding \$5,000. The employee should have raised this matter with appropriate officials, and at a minimum, set aside those two retroactive payments. Even if the employee had continued to support his own waiver application, granting waiver would not be appropriate considering this record. *See* DOHA Claims Case No. 2009-WV-111601.2 (February 19, 2010), and DOHA Claims Case No. 08061603 (June 24, 2008).

If the employee believes that he has a financial entitlement to the two payments, he should pursue his claim with the Defense Finance and Accounting Service, and on appeal, with the Office of Personnel Management.

Conclusion

For the reasons stated in this decision, we affirm the June 14, 2010, decision denying waiver in the amount of \$7,433.87. In accordance with ¶ E8.15 of the Instruction, this is the final administrative action of the Department of Defense concerning this waiver application.

///Original Signed///

Michael D. Hipple
Chairman, Claims Appeals Board

///Original Signed///

² The three statutes are 5 U.S.C. § 5584 for civilian employees, 10 U.S.C. § 2774 for uniformed service members, 32 U.S.C. § 716 for service members under title 32.

Catherine M. Engstrom
Member, Claims Appeals Board

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board