

KEYWORDS: waiver of indebtedness

DIGEST: When an employee knows, or reasonably should know, that he is receiving salary to which he is not entitled, he has a duty to retain such amounts for subsequent refund to the government.

CASENO: 2010-WV-030901.2

DATE: 8/24/2010

DATE: August 24, 2010

)	
In Re:)	
[REDACTED])	Claims Case No. 2010-WV-030901.2
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When an employee knows, or reasonably should know, that he is receiving salary to which he is not entitled, he has a duty to retain such amounts for subsequent refund to the government.

DECISION

An employee of the United States Air Force requests reconsideration of the July 19, 2010, decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2010-WV-030901. In that decision, DOHA waived \$8,500.80 of the government’s claim and denied waiver of \$12,364.80.

Background

The record shows that the U.S. Air Force employee was separated from the Air Force Material Command due to a reduction-in-force, effective June 30, 2007. Therefore, he was

entitled to receive severance pay in the amount of \$40,185.60, to be paid at the rate of \$772.80 per week over 52 weeks beginning July 1, 2007. The employee subsequently received severance pay in the amount of \$8,500.80 from pay period ending (PPE) July 7, 2007, through September 15, 2007.

The record further shows that the employee applied for retirement from the Office of Personnel Management (OPM), and his application was approved in September 2007. This retirement was made effective retroactive to July 1, 2007. The employee was not entitled to receive severance pay and retirement pay at the same time. The Defense Finance and Accounting Service (DFAS) determined that the employee received severance pay from PPE July 7, 2007, through September 15, 2007, and therefore, was overpaid \$8,500.80. The employee began receiving retirement pay October 1, 2007, and he erroneously continued to receive severance pay, thus causing an overpayment of \$12,364.80. The total claim against the employee was \$20,865.60. DFAS recommended that the entire claim be denied waiver. The adjudicator at DOHA determined that the decision to award the retirement retroactively was made by OPM, and there was no indication that the employee knew, or should have known, of the overpayment either when he initially received the severance pay or prior to the notification that his retirement was approved. For this reason, the adjudicator determined the employee had acted in good faith in accepting this portion of the severance pay, and waived \$8,500.80. The adjudicator also determined that once the employee knew that his retirement was approved, and he continued to receive severance pay, he should have questioned his entitlement to receive both payments and consulted the appropriate officials. Because the employee failed to do so, waiver was denied in the amount of \$12,364.80.

The employee requests reconsideration. He states that he did not have notice he was retired until October 5, 2007, and so would not have had notice that severance pay was still being paid until October 15, 2007, when the money showed up in his bank account. He argues that he did notify appropriate officials, as the date on the back of his retirement card is October 7, 2007. He states he had gone to the air base retirement office to get his retirement card, and he provided his retirement book to the personnel there. He states they took the book back into the back offices for about 30 minutes while he waited out in the waiting area. He states that he doesn't know what they were looking at, but they were aware he was retired. He states they filled out the paperwork so he could receive his retirement card from the badge office. As to the severance pay, he states that he never knew where it came from. He knew his retirement pay came from OPM, but he had no information about where his severance pay originated. He again argues that it is unfair to make him pay back the same amount of money, because he paid taxes on the money the first time he received it. If he pays it all back, he argues he would pay back money on which he already paid taxes. Additionally, the employee states that this has been very stressful, as he lost his job and now has a small retirement, medical problems, and now debt.

Discussion

Section 5584 of title 10, United States Code, provides authority for waiving claims for erroneous payments of pay and certain allowances made to specified employees, if collection of the claim would be against equity and good conscience and not in the best interest of the United States. Generally, these criteria are met by a finding that the claim arose from an administrative

error with no indication 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 adjudicator determined that the employee met the burden of proving he had acted in good faith in accepting the money that was an overpayment due to the retroactive retirement approval. As to the additional overpayment of \$12,364.80, the employee knew or should have known that his receipt of both severance pay and retirement pay was at least questionable. He may have shown the officials at the retirement office his retirement book, but he should have continued to follow up until he received a satisfactory answer. If an employee is receiving funds to which he knows or is reasonably expected to know that he is not entitled, he has a duty to retain such amounts for subsequent repayment to the government. Since the employee failed to do so, collection of this portion of the overpayment is not against equity and good conscience, nor contrary to the interests of the United States. *See* DOHA Claims Case No. 07031603 (March 27, 2007), DOHA Claims Case No. 04112605 (January 5, 2005), DOHA Claims Case No. 02072501 (August 7, 2002), and *compare* 64 Comp. Gen. 15 (1984). *See also* Department of Defense Instruction (hereinafter Instruction) 1340.23, ¶ E4.1.4 (February 14, 2006).

As to the employee's argument that the error was made by the government, this Office has consistently held that the waiver statute does not automatically apply to relieve the debts of all employees who, through no fault of their own, have received erroneous payments from the government. *See* Instruction, ¶ E4.1.3. Waiver action under 5 U.S.C. § 5584 is a matter of grace or dispensation, and not a matter of right that arises solely by virtue of an erroneous payment being made by the government. If it was merely a matter of right, then virtually all erroneous payments made by the government to employees would be excused from repayment.

Financial hardship does not provide a basis for waiver. *See* DOHA Claims Case No. 97042817 (July 1, 1997), and Instruction, ¶ E4.1.7. DFAS, at its own discretion, may take hardship into account in determining the monthly amount it collects from the employee. The employee may contact DFAS in that regard. As to the argument regarding the payment of double taxes, the employee is responsible for the payment of the gross debt. The Comptroller General and our Office have consistently held that application of the tax laws to an employee's income is a matter solely within the jurisdiction of the taxing authorities. *See* DOHA Claims Case No. 00073101 (August 21, 2000), *aff'd* by the Deputy General Counsel (Fiscal) (December 21, 2001); Comptroller General decision B-272278, Dec. 2, 1996; and Comptroller General decision B-261699, Oct. 25, 1996. The employee should contact the Internal Revenue Service and other appropriate state revenue authorities for advice on filing amended tax returns and for other information concerning adjustment of his tax liability.

Conclusion

The employee's request for reconsideration is denied, and we affirm the July 19, 2010, appeal decision. In accordance with the Instruction, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Michael D. Hipple
Chairman, Claims Appeals Board

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Jean E. Smallin
Member, Claims Appeals Board

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