

KEYWORDS: waiver of indebtedness

DIGEST: When an employee is aware or reasonably should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

CASENO: 2010-WV-082601.2

DATE: 11/3/2010

DATE: November 3, 2010

)	
In Re:)	
[REDACTED])	Claims Case No. 2010-WV-082601.2
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When an employee is aware or reasonably should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

DECISION

A former employee of the Department of the Army requests reconsideration of the September 27, 2010, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2010-WV-082601. In that decision, this Office denied waiver of \$10,373.92.

Background

The record shows the employee sustained a job-related injury. He subsequently requested, and was granted, 45 days continuation of pay (COP), and should have been placed on COP during the pay periods November 8, 2008, through December 20, 2008. This would have entitled him to receive salary payments in the amount of \$12,720.40. However, due to an

administrative error, the employee was placed on leave without pay (LWOP) effective October 29, 2008. Due to this administrative error, he was only paid salary payments in the amount of \$11,084.92, causing an underpayment of \$1,635.48.

The record shows that the employee was in a LWOP status on December 21, 2008. As a result, he was not entitled to receive any current salary earnings, and did not receive any salary payments during the pay period ending (PPE) January 3, 2009. He was still entitled to receive his underpayment, and the agency attempted to issue payment for that during the PPE January 17, 2009. Due to an administrative error, he was issued a payment for \$10,873.48 (\$3,786.40, regular salary and \$7,087.08, retroactive pay), causing an overpayment of \$9,238.00. Additionally, the employee was on LWOP during the PPE January 31, 2009, and the agency determined he was not entitled to receive a payment of \$378.64 (\$47.33 x 8 hours).

The record also shows that the employee returned to duty on May 9, 2009, for limited hours. During the PPE June 6, 2009, the employee received a payment of \$757.28 (\$47.33 x 16 hours). However, the Human Resource Department of his agency advised that the employee was not entitled to the payment, because he did not perform duties during PPE June 6, 2009. As a result, the total claim against the employee is \$10,373.92.

In the appeal decision, the employee stated that his leave and earnings statement (LES) for PPE January 17, 2009, did not reflect a retroactive COP payment and that his LES for PPE January 17, 2009, showed only a payment of \$3,786.40. The Defense Finance and Accounting Service (DFAS) provided our adjudicator with the employee's master pay histories showing the information which was listed on the employee's LES. The adjudicator determined that a review of the documentation showed that during the PPE January 17, 2009, the employee's gross pay was reflected as \$10,873.48, with a net pay of \$6,067.84. The adjudicator determined that the employee presented no evidence that the net payment was not deposited directly into his bank account. Additionally, the adjudicator determined that the employee provided no documentation explaining why he could have anticipated payments in excess of \$10,800.00, or any information which would have led him to believe he was entitled to receive payments in that amount during that pay period; and, as such, the waiver of overpayment should be denied. The adjudicator also determined that the employee indicated that he received \$378.64 during PPE January 31, 2009, but offered no documentation showing he was anticipating a payment in that amount, or an explanation which would have led him to believe that he was entitled to receive a payment in that amount during that pay period; and, as such, the overpayment should be denied. Finally, the adjudicator also determined the overpayment of \$757.28 resulting from the employee erroneously receiving a payment for 16 hours during the PPE June 6, 2009, should be denied. The employee stated he worked the 16 hours during PPE June 6, 2009. However, the Human Resources Department of the employee's agency advised that the employee worked 16 hours during PPE May 23, 2009, and was correctly paid for those hours, but did not work 16 hours during PPE June 6, 2009.

The employee requests reconsideration of the denial. He argues that because he had sustained an injury while on travel on behalf of the agency, it was not unreasonable to believe he had received some sort of lump sum payment. He also continues to argue that he did work the 16 hours during PPE June 6, 2009.

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive collection of erroneous overpayments of pay and allowances if collection would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee. *See* Department of Defense Instruction 1340.23 (hereinafter Instruction), ¶ E4.1.2, *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances* (February 14, 2006). As a general rule, the government is neither bound nor estopped by the erroneous advice or unauthorized acts of its officers, agents or employees even though committed in the performance of their official duties. In this case, the member has offered no new evidence to indicate that the decision of the adjudicator was arbitrary, capricious, or an abuse of discretion. *See* DOHA Claims Case No. 2009-WV-011605.3 (July 28, 2010); DOHA Claims Case No. 03061247 (June 17, 2003); DOHA Claims Case No. 03050907 (May 15, 2003); and DOHA Claims Case No. 00100331 (January 29, 2001).

The employee filed an application for debt waiver, but waiver consideration at the appellate level in this Office does not include an adjudication of the validity of the debt. Moreover, our Office has no authority to adjudicate the validity of such debts that arise from disputes involving civilian employee compensation and leave. The validity of such debts must be resolved by the agency concerned, and ultimately by the Office of Personnel Management (OPM). *See* 31 U.S.C. § 3702(a)(2).

While the employee disagrees with various factual findings in the record before us, our Office accepts the findings of fact of the agency's administrative report in the absence of clear and convincing contrary evidence. *See* DOHA Claims Case No. 03121101R (March 31, 2004). In this case, our adjudicator had sufficient record evidence to conclude that the employee knew or should have known that the \$10,873.48 was an overpayment and he was not entitled to the \$378.64. Also it was reasonable on the record for the adjudicator to conclude that the employee received an overpayment of \$378.64, and to accept the agency's findings that the employee did not work 16 hours in June for a debt of \$757.28. The employee may continue to dispute his debt with OPM; but, in any event, there is no basis for waiver relief.

Conclusion

The employee's request for reconsideration is denied, and we affirm the September 27, 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

///Original Signed///

Jean E. Smallin
Member, Claims Appeals Board

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Natalie Lewis Bley
Member, Claims Appeals Board