

KEYWORDS: waiver of indebtedness

DIGEST: Section 5584 of title 5, United States Code, provides authority for waiving claims for erroneous payments of pay and certain allowances made to specified federal employees, if collection of the claim would be against equity and good conscience and not in the best interests of the United States, provided there is 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.

CASENO: 2010-WV-100702.2

DATE: 1/19/2011

DATE: January 19, 2011

In Re:)
[REDACTED]) Claims Case No. 2010-WV-100702.2
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Section 5584 of title 5, United States Code, provides authority for waiving claims for erroneous payments of pay and certain allowances made to specified federal employees, if collection of the claim would be against equity and good conscience and not in the best interests of the United States, provided there is 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.

DECISION

An employee of the Department of Defense Education Activity (DoDEA) requests reconsideration of the December 8, 2010, decision of the Defense Office of Hearings and

Appeals (DOHA), in DOHA Claim No. 2010-WV-100702. In that case DOHA denied waiver of an overpayment in the amount of \$1,359.60.

Background

The record shows the employee resigned from his position as an Instructor (JROTC) OCONUS. The employee's salary was prorated each school year, which entitled him to receive 22 pay periods based on a relatively even installment payment calculated in anticipation of the employee completing the full school year. However, the employee resigned on January 19, 2010, which was prior to the end of the school year, and DoDEA reconciled his pay for the pay period ending (PPE) August 29, 2009, through January 16, 2010, and determined he had been overpaid in the gross amount of \$1,359.60.

The employee resigned his position effective January 19, 2010, due to a serious medical condition of his spouse which required surgery in the United States. In conjunction with his resignation, the employee also requested waiver of his initial transportation agreement, and repayment of his living quarters allowances (LQA) received during the summer of 2009. Waiver of the employee's period-of-service requirement in his transportation agreement was approved by DoDEA, as it met the acceptable reasons to release an employee from the period-of-service requirement.¹ A waiver may be granted when completion of the period of service would result in extreme personal hardship because of circumstances beyond the employee's control, such as conditions seriously affecting the health, welfare, and safety of the employee, serious illness in the immediate family, etc. Educators are only eligible to receive LQA during the summer recess period when they agree to complete the obligation for the next school year. Collection action may only be waived if failure to complete the next school year is for circumstances beyond the control of the employee and acceptable to management.² DoDEA notified the employee by letter dated November 5, 2009, that both of these waiver requests were approved.

On February 13, 2010, the employee was informed by the Defense Finance and Accounting Service (DFAS) that he was indebted to the Government for the overpayment of salary. The letter stated the gross amount was \$1,359.60 (including taxes and other benefits) and the adjusted amount was \$1,297.72. The employee requested waiver of the overpayment on March 16, 2010. The employee argued that he was never notified he was being overpaid, and his resignation was due to his wife's medical condition and also his disability. In a letter from DoDEA dated September 15, 2010, the agency told the employee that the overpayment did not meet the criteria for waiver set out in 5 U.S.C. § 5584. DoDEA stated:

This overpayment resulted from your termination prior to the end of the school year. Teachers earn their full school year salary on the basis of 190 days of work or paid leave during a given school year. Were payment of these earnings to be paid out as earned over a teachers' [sic] seasonal work schedule, combined with recess periods, such payments

¹ These are specified in the transportation agreement and outlined in paragraph C5574-B of the Joint Travel Regulations (JTR), Volume 2.

² The conditions under which LQA may be received during the summer recess are outlined in Section 723 of the Department of State Standardized Regulations (DSSR) and paragraph SC1250.5.1.13.1 of subchapter 1250 of the Department of Defense Manual 1400.25-M. An employee who fails to complete his service agreement may request waiver of reimbursement of LQA.

would vary significantly in amount from pay period to pay period. Instead, payments are made in relatively even installments over the school year, without regard to absences during recess periods (including Federal holidays). Because there were 213 payable days (Monday through Friday) between the first duty day and last in the 2009-2010 school year, the “payout” rate at which you were paid differed from the “earnings” rate at which your entitlement to salary actually accrued. This resulted in an overpayment to you in the amount of \$1,359.60. As described above, these payments were not erroneous at the time of disbursement.

The employee appealed the decision on September 24, 2010, and requested waiver of the overpayment. He stated that he did not understand how he could be paid for 213 days, if his salary was based on 190 days. He argued that the reason for the waiver of the overpayment of his salary was the same as the reason for the waiver of the LQA, and so it should be similarly granted. He contends the number of pay periods to which he is entitled is wrongly calculated. He also points out that DFAS and DoDEA say he owes different amounts.

On December 8, 2010, our Office issued the appeal decision. The adjudicator again stated that the salary overpayment was not appropriate for consideration, as 5 U.S.C. § 5584 specifically limits the authority of our Office to consider debts which arose from an erroneous payment. If the payments were correct when made, we have no authority to relieve the employee of his obligation to repay the Government. The adjudicator explained that the salary of 190 days is paid out over 213 “payable” days to take into account recess and Federal holidays so that payments may be made in relatively even installments. The adjudicator noted that if the employee has further questions, he should contact DoDEA for a copy of the document which governs salary payment. The employee argued that the reason for the waiver of the overpayment and the LQA were the same, and it is unreasonable to approve one and not the other. The adjudicator noted the employee should contact DoDEA for the regulations concerning these matters should he have questions. The adjudicator sustained the determination of DoDEA that the overpayment could not be considered because it did not represent an erroneous payment.

The employee requests reconsideration from our Office in a letter dated January 7, 2011. He argues that the number of his pay periods is incorrect, he was paid on 21 pay periods and not 26. He states that DFAS says he owes \$1,297.72, and DoDEA says he owes \$1,359.60, and he has not received an explanation for the discrepancy. He states that if his salary is based on 190 days, why was he paid for 213 days, and he wants to know specifically what days were prorated that he is being charged for. Again he argues that the reason he returned home was the health of his wife, and he received a waiver for the LQA, and he wants to be considered for a waiver of the overpayment of salary. He contends he did not receive an answer to this from the head of the agency. However, he does recognize that codes that govern LQA are not the same as those that govern overpayment.

Discussion

Section 5584 of title 5, United States Code, provides authority for waiving claims for erroneous payments of pay and certain allowances made to specified federal employees if

collection of the claim would be against equity and good conscience and not in the best interest of the United States, provided that there is no evidence 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. While our Office has the authority to consider certain claims of the United States for waiver under the provisions of 5 U.S.C. § 5584, this statute specifically limits our authority to claims which arose from an erroneous payment to an employee. The employee contends that he has not received an answer to his request for waiver from the head of the agency, *i.e.*, DoDEA. In the letter from DoDEA to the employee dated September 15, 2010, the DoDEA Human Resources Director wrote the quoted section above and continued:

Being made in anticipation of earning full entitlement and with the express condition of reconciliation, these are advance payments. An employee's indebtedness for an advance payment ordinarily is not considered as arising out of an erroneous payment subject to waiver (B-251865, April 28, 1994).

As already stated, you apparently received biweekly payments at the correct "payout" rate throughout the period of overpayment. We cannot find the failure of the servicing payroll office to reconcile you salary entitlement, and adjust your biweekly payments accordingly, prior to the end of the duty year to be in violation of any law, regulation, policy, or negotiated agreement. Payments which are valid when made are not erroneous payments for the purpose of waiver (B-244977, March 23, 1992). As described above, these payments were not erroneous at the time of disbursement.

The letter continued to conclude that the standards for waiver had not been met. Our adjudicator agreed with this determination, and sustained DoDEA's decision in the December 8, 2010, appeal decision. Likewise, this is also the determination of this Board. *See* DOHA Claims Case No. 08101502 (October 30, 2008); DOHA Claims Case No. 07050113 (May 17, 2007); and Comptroller General Decision B-226573, April 27, 1987.

The employee continues to argue that since the LQA was approved for waiver, it is unreasonable for the overpayment of salary to not be approved. These are different waivers with two different sets of standards under two different statutes.³

The employee contends that there are different amounts being charged and he has not received an explanation for the discrepancy. This Office would suggest that the employee consult the February 13, 2010, letter from DFAS that informed him he was indebted to the Government. The letter stated the gross amount was \$1,359.60 (including taxes and other benefits) and the net amount was \$1,297.72. In addition, the record contains a worksheet that outlines the exact breakdown of the overpayments.⁴

³ The reconciliation of LQA under 5 U.S.C. § 5922(b) and DSSR §§ 113.4 and 723.1 anticipate that the agency head may waive an indebtedness owed from an advance if an employee is transferred or leaves his position in an emergency. In contrast, there is no authority to waive debts incurred by the reconciliation of salary advances under 5 U.S.C. § 5584 if the advance was proper when paid. *Cf.* DOHA Claims Case No. 02080601 (August 27, 2002), and DOHA Claims Case No. 99050610 (May 27, 1999).

⁴ A debt worksheet from DFAS indicates overpayments per PPE, resulting in a gross debt of \$1,359.60. It then further breaks the debt down to adjusted debt of \$1,297.72, with \$61.88 for overpayments on deductions. It

The establishment of a debt amount is a matter primarily for administrative determination, and our Office will ordinarily not question a determination in the absence of clear error. The employee submitted no new matters in his request for reconsideration. For answers to his specific questions regarding the calculation of his debt, the employee should contact DoDEA. DOHA's authority in this matter pertains only to the availability of the equitable remedy of waiver. Waiver consideration at the appellate level in this Office generally does not include an adjudication of the validity of the debt. Moreover, our Office has no authority to adjudicate the validity of debts that arise from disputes involving civilian employee compensation. The validity of such debts must be resolved by the agency concerned, here DoDEA, and ultimately the Office of Personnel Management (OPM). *See* 31 U.S.C. § 3702(a)(2).

Conclusion

The employee's request for reconsideration is denied. In accordance with Department of Defense Instruction 1340.23, ¶ E8.15, this is the final action by 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

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board

gives the specific amounts; they cover medicare, federal taxes, OASDI, and FERS. If the employee has misplaced this worksheet, he may request an additional printout from DFAS.