

KEYWORDS: waiver of indebtedness

DIGEST: Under 5 U.S.C. § 5584, when an employee is aware that he is receiving overpayments, he does not acquire title to the excess amounts, and he has a duty to hold the money for eventual repayment. In such circumstances, waiver is not proper.

CASENO: 2010-WV-032201.2

DATE: 5/27/2010

DATE: May 27, 2010

---

In Re: )  
          [REDACTED] )     Claims Case No. 2010-WV-032201.2  
                                  )  
Claimant                                     )  

---

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Under 5 U.S.C. § 5584, when an employee is aware that he is receiving overpayments, he does not acquire title to the excess amounts, and he has a duty to hold the money for eventual repayment. In such circumstances, waiver is not proper.

**DECISION**

An employee of the Department of Defense requests reconsideration of the May 12, 2010 decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2010-WV-032201. In that decision, DOHA sustained the recommendation of the Defense Finance and Accounting Service (DFAS) to deny waiver of the employee’s debt in the amount of \$9,266.67.

**Background**

The record shows that the employee, a security specialist, was converted to an excepted appointment as an intelligence specialist in the same grade and step, effective February 17, 2008.

At the time of his conversion, his payroll account was improperly coded for him to receive a Base Realignment and Closure (BRAC) leave payment. Due to this administrative error, the employee received a retroactive BRAC leave payment during the pay period ending April 12, 2008, in the gross amount of \$9,266.67 (189.00 hours x \$49.03 per hour). Thus, the employee became indebted to the United States in the amount of \$9,266.67.

At the time the erroneous payment was made, the employee knew it was erroneous, since he e-mailed his human resources office on April 24, 2008, asking if any reassignment actions had triggered full payment of all the BRAC leave he had accumulated. On April 25, 2008, the employee inquired as to how he could return the erroneous BRAC payment. The employee has stated that he has retained the erroneous payment, less taxes, in his bank account. The DOHA adjudicator concurred with DFAS that waiver was not appropriate, because when an employee is aware that he is receiving erroneous payments, he has a duty to retain such amounts for subsequent refund to the government. The adjudicator stated the long-held principle of this Office that collection of an overpayment is not against equity and good conscience, and not contrary to the best interest of the United States, when an employee is aware that he has been overpaid.

In his request for reconsideration, the employee continues to argue that since he only received \$6,018.69 in net overpayment (\$3,247.98 was paid in taxes), he does not think it is fair that he should have to repay the gross debt of \$9,266.67. He had argued during the appeal that this is especially true since this matter had not been resolved within the same tax year as it originally arose, thus causing his family economic hardship. In his request for reconsideration, he has a special request. He says rather than asking for waiver to repay the debt of \$9,266.67, he asks that his current BRAC leave be reduced by 189.00 hours. He argues this is not against equity and good conscience as this entire situation is due to an unfortunate error solely on the part of DFAS and his agency. He argues that approving this option is simply the right thing to do for an exceptional and dedicated 27-year federal employee, and therefore in the best interests of the United States.

### **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. 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. This Office cannot consider the employee's request that rather than repaying the debt, we deduct 189 hours from his current BRAC leave balance. This Board does not have the authority to consider such an action. We are concerned with the debt that has been identified, \$9,266.67, due to an erroneous BRAC leave payment in 2008, and our authority extends to whether waiver is appropriate or not.

Waiver under 5 U.S.C. § 5584 is not simply a matter of right whenever an employee innocently receives pay to which he is not entitled, but is decided on the principles of equity and

fairness under the circumstances presented in each case. In this case, the employee clearly knew that the payment he had received was erroneous, and so stated in the record. Waiver is not appropriate if an employee knows or should know that he is receiving payments in excess of his entitlements. *See* DOHA Claims Case No. 07072501 (July 31, 2007); and DOHA Claims Case No. 98040113 (July 8, 1998), *aff'd* by the Deputy General Counsel (Fiscal) (February 14, 2001). In such a circumstance, he does not acquire title to the payments and should be prepared to return them. *See* DOHA Claims Case No. 03072812 (July 30, 2003).

As to the argument that he should not be responsible for payment of the taxes, the employee is responsible for the gross amount of the 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); B-272278, Dec. 2, 1996; and B-261699, Oct. 25, 1996. The employee should contact the Internal Revenue Service and 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 May 12, 2010, appeal decision. In accordance with Department of Defense Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

*///Original Signed///*

---

Jean E. Smallin  
Acting Chairman, Claims Appeals Board

*///Original Signed///*

---

William S. Fields  
Member, Claims Appeals Board

*///Original Signed///*

---

Natalie Lewis Bley  
Member, Claims Appeals Board

