

KEYWORDS: waiver of indebtedness

DIGEST: After an employee resigned from the Department of the Army, he continued to receive salary. The employee was aware that he had erroneously received salary after his resignation. When an employee is aware that he is being overpaid, he cannot reasonably expect to retain the overpayments, but must set them aside for eventual repayment.

CASENO: 2010-WV-113001.2

DATE: 5/03/2011

DATE: May 3, 2011

_____)
In Re:)
 [REDACTED]) Claims Case No. 2010-WV-113001.2
)
Claimant _____)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

After an employee resigned from the Department of the Army, he continued to receive salary. The employee was aware that he had erroneously received salary after his resignation. When an employee is aware that he is being overpaid, he cannot reasonably expect to retain the overpayments, but must set them aside for eventual repayment.

DECISION

A former employee of the Army requests reconsideration of the April 20, 2011, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2010-WV-113001. In the appeal decision, DOHA sustained the initial determination of the Defense Finance and Accounting Service (DFAS) denying the employee's request that the government waive the \$1,402.40 debt he incurred as a result of the erroneous payment of salary.

Background

The record shows that on April 24, 2009, the employee resigned from the Army. On April 26, 2009, he accepted employment with another federal agency. However, due to an administrative error, he received a salary payment from the Army on May 21, 2009, in the amount of \$1,402.40.

The DOHA adjudicator upheld the DFAS's denial of the employee's request for waiver because the employee acknowledged that he was aware he received erroneous salary payments. In his reconsideration request, the employee argues that he should not be held responsible because the overpayment resulted from an administrative error, with no fault on his part. He states that it has been over two years since his initial waiver request. He states that the cases cited by the DOHA adjudicator were cases where the Claims Appeals Board denied waiver. He suggests that there are no cases where the Board waived collection of an overpayment because the standards for waiver are worded too ambiguously. He asks whether anyone under the waiver statute would be worthy of grace and dispensation. He also insists that his financial situation be taken into account.

Discussion

Under 5 U.S.C. § 5584, we may waive the collection of erroneous payments of salary an employee received if collection would be against equity and good conscience and not in the best interest of the United States. However, the statute does not operate automatically to relieve debts but is a matter of grace and dispensation. *See* Comptroller General decision B-200118, Feb. 18, 1981.¹ Also, by statute, in certain situations waiver is prohibited. Therefore, if there exists in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee, waiver is precluded. *See* 5 U.S.C. § 5584(b)(1). Department of Defense (DoD) Instruction 1340.23, implements this statute within DoD, and the Standards for Waiver Determinations are found at Enclosure 4 of this Instruction. In relevant part, generally persons who receive a payment erroneously from the government acquire no right to it and are bound in equity and good conscience to make restitution, no matter how careless the act of the government may have been. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. Waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant.

Waiver is not appropriate when the employee was aware of the overpayment. *See* DOHA Claims Case No. 08051406 (May 21, 2008). When an employee receives a payment that he knows to be erroneous, he cannot reasonably expect to be able to retain the money. *See* DOHA Claims Case No. 01112701 (December 19, 2001). The employee has a duty to notify an

¹This case was decided under 10 U.S.C. § 2774 because the claimant was a service member. However, the standards for waiver are the same for civilian employees and service members.

appropriate official and to set aside the funds for eventual repayment to the government, even if the government fails to act after such notification. *See* DoD Instruction 1340.23, ¶ E4.1.4. Financial hardship is not a factor for consideration in determining whether a waiver is appropriate. *See* DoD Instruction 1340.23, ¶ E4.1.7.

In this case, the erroneous payment of salary was made as a result of an administrative error, and there is no indication of fraud, misrepresentation, or lack of good faith on the employee's part. However, the employee stated in his original waiver request that he knew of the overpayment when he received his May 29, 2009, leave and earnings statement (LES). While we appreciate the fact that the employee immediately brought the matter to the attention of the proper pay officials and was prepared to return the funds, a person who receives erroneous payments from the government does not acquire title to the money and has a duty to return the money when asked to do so. When an employee knows that he is being overpaid, he has a duty to set aside the erroneously paid funds for eventual repayment, even if the government fails to act after notification. *See* DOHA Claims Case No. 08051406, *supra*, and DOHA Claims Case No. 07110101 (November 8, 2007).²

Conclusion

The employee's request for relief is denied, and we affirm the April 20, 2011, appeal decision to deny waiver in the amount of \$1,402.40. 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.

Signed: Michael D. Hipple

Michael D. Hipple
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

²There have been cases decided by this Board where waiver of the collection of the erroneous payments has been granted. Generally, waiver is an available remedy for persons who are able to articulate a reasonable basis for expecting such payments. *See, e.g.*, DOHA Claims Case No. 2010-WV-111002.2 (December 23, 2010).

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board