

KEYWORDS: waiver of indebtedness; Physicians Comparability Allowance Service Agreement

DIGEST: A physician who ceased providing services under a Physicians Comparability Allowance Service Agreement was required to refund the total amount of comparability allowance payments she received prior to the termination of her service. Under 5 U.S.C. § 5584, the resulting debt may not be considered for waiver since the payments were proper when made.

CASENO: 2010-WV-122201.2

DATE: 7/08/2011

DATE: July 8, 2011

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In Re:)
	[REDACTED])
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Claimant)
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Claims Case No. 2010-WV-122201.2

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A physician who ceased providing services under a Physicians Comparability Allowance Service Agreement was required to refund the total amount of comparability allowance payments she received prior to the termination of her service. Under 5 U.S.C. § 5584, the resulting debt may not be considered for waiver since the payments were proper when made.

DECISION

The employee requests reconsideration of the Defense Office of Hearings and Appeals (DOHA) decision in DOHA Claim No. 2010-WV-122201, dated June 7, 2011. In that decision, DOHA determined that \$22,463.36 could not be considered for waiver.

Background

On September 9, 2008, the employee executed a Physicians Comparability Allowance Service Agreement by which she agreed to serve as a Medical Officer (Pathology) at the Armed Forces Institute of Pathology (AFIP) from October 1, 2008, through September 30, 2010. In the agreement, the employee agreed to the following:

If, my employment as a physician is terminated during the period of the agreement at my request, or as a result of my misconduct, I will be required to refund the total amount received under the agreement if I have completed less than one year of the agreement, or if I have completed one year or more of the agreement, I will be required to refund the amount of allowance earned during the 26 weeks prior to termination.

On September 4, 2009, the employee resigned prior to completing the period of time specified in the agreement. Because the employee terminated her service after completing 11 months (less than one year) of the two-year agreement, the Defense Finance and Accounting Service (DFAS) required her to refund the total amount of the allowance she received under the agreement. DFAS calculated the amount to be collected from the employee as \$22,463.36, which represents the total amount of the allowance she received from pay period ending (PPE) October 11, 2008, through PPE September 12, 2009.

In the appeal decision, the DOHA adjudicator determined that the debt could not be considered for waiver. In her request for reconsideration, the employee states that she agrees with the adjudicator, that her case does not involve an erroneous payment. However, she states that the Department of Defense was closing the AFIP due to Base Realignment and Closure (BRAC). She was instructed by her immediate supervisor, the Director of Advanced Pathology, to find another job because of the uncertainty of whether her job was going to be eliminated as a result of the BRAC with only a sixty-day notice of termination. She contends that waiver is appropriate in her situation since the AFIP administration was aware of the imminent closing of AFIP at the time she signed the PCA. She further notes that she signed the PCA on September 9, 2008, which was only four working days prior to the completion of one year under the agreement. She also suggests that not allowing waiver of the debt could have a chilling effect on the government's ability to hire and retain board certified physicians. Finally, the employee states that the request she is making appears to be outside the authority of our Office. She requests that her claim be forwarded to the office in the Government who has the authority to make a decision in the matter.

Discussion

Under the applicable statute, 5 U.S.C. § 5948, physicians comparability allowances (PCA) are payable to certain qualified Government physicians who enter into written service agreements with the head of an agency to complete a specified period of service in such agency. The amounts of PCS shall be determined by the agency head subject to such regulations, criteria, and conditions as the President or his designee may prescribe. *See* 5 U.S.C. § 5948(c). Any

agreement under the statute shall specify, subject to regulations as the President or his designee may prescribe, the terms under which the head of the agency and the physician may elect to terminate such agreement, and the amounts, if any, required to be refunded by the physician for each reason for termination. *See* 5 U.S.C. § 5948(f). Therefore, a physician's entitlement to such payments is subject to these statutory provisions, applicable regulations, and the provisions of the written agreement. *See generally* paragraph 030501 of Volume 8 of DoD 7000.14R, DoD Financial Management Regulation (DoDFMR), Civilian Pay Policy and Procedures; and Physicians' Comparability Allowances, 5 C.F.R. part 595.

Our authority in this case is restricted to a consideration of whether the employee's debt may be waived under 5 U.S.C. § 5584. Under 5 U.S.C. § 5584, we have the authority to waive claims of erroneous overpayment of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. By definition, a payment must be erroneous when made if it is to be considered for waiver under 5 U.S.C.

§ 5584. Based on the facts in this record, the claim of the United States against the employee is not one "arising out of an erroneous payment of pay or allowances." *See* 5 U.S.C. § 5584(a). Therefore, the statutory precondition for waiver consideration is not satisfied. *See* DOHA Claims Case No. 2010-WV-110103.2 (January 19, 2011), DOHA Claims Case No. 08052701 (May 30, 2008), and DOHA Claims Case No. 07050113 (May 17, 2007).

Although waiver is not available as a remedy in this case, we note that under 5 U.S.C. § 5948(e), the head of the agency involved has discretion not to collect the payments in question from a physician if he determines that failure to complete the agreed period of employment was necessitated by circumstances beyond the control of the physician.¹ The employee may wish to pursue this remedy.

Conclusion

The employee's request for waiver relief is denied, and we affirm the June 7, 2011, appeal decision. In accordance with DoD Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense concerning the employee's request for waiver under 5 U.S.C. § 5584.

¹Under ¶ 030501 of Volume 8 of the DoDFMR, the head of the agency by which the physician is employed (here the Secretary of the Army) would be the deciding official for determining that the failure was necessitated by circumstances beyond the control of the physician.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: William S. Fields

William S. Fields
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board