

KEYWORDS: Waiver of Indebtedness

DIGEST: A waiver is not appropriate under 5 U.S.C. § 5584 when the employee receives a significant, unexplained payment of pay or allowances. In such a case, the recipient has a duty to ascertain the reason for the payment and to set aside the funds for eventual repayment to the government.

CASENO: 2011-WV-020101.2

DATE: 9/14/2011

DATE: September 14, 2011

In Re:)	
[REDACTED])	Claims Case No. 2011-WV-020101.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A waiver is not appropriate under 5 U.S.C. § 5584 when the employee receives a significant, unexplained payment of pay or allowances. In such a case, the recipient has a duty to ascertain the reason for the payment and to set aside the funds for eventual repayment to the government.

DECISION

An employee of the Department of Defense requests reconsideration of the July 14, 2011, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2011-WV-020101. In that decision, DOHA denied waiver of an overpayment in the amount of \$46,701.60.

Background

The record shows that the employee, a GS-14/Flight Surgeon, signed a two-year Physician's Comparability Allowance (PCA) Service Agreement effective September 19, 2005. As a result, he was entitled to receive PCA pay in the amount of \$14,000.00 per year for the period September 19, 2005, through September 18, 2007. On February 19, 2006, the employee received a career conditional appointment to a GS-15, step 8/Medical Officer (Occupational Health) at the adjusted basic pay (basic pay and locality pay) of \$132,607.00 per annum. He was paid correctly through pay period ending (PPE) April 29, 2006.

The record further shows that effective April 30, 2006, the employee was reassigned from the General Schedule (GS) Pay System (\$132,607.00 per annum) to the National Security Personnel System (NSPS) as YG-2/Physician (Occupational Health) (\$146,803.00 per annum). Since PCA is not allowed under NSPS, the annual PCA amount was incorporated into his basic salary when he was reassigned so he would not experience any loss of pay under NSPS. Accordingly, the employee's salary increased to \$146,803.00, on a Standard Form (SF) 50 as of that date. However, due to an administrative error the employee was also erroneously paid a further PCA during the PPE May 13, 2006, through August 29, 2009. This essential doubling of the PCA payment caused an overpayment of \$46,701.60.

In his request for reconsideration, the member argues that he was not aware that NSPS prohibited the payment of PCA; that he relied on the expertise of his human resources office who reviewed his pay on at least two occasions; there was no finding in the Appeal Decision of fraud, misrepresentation, or lack of good faith on his part; and there were reasonable and logical explanations for the apparent increase in pay. He notes that he was a new federal employee, and neither he nor anyone at his agency realized he was not eligible for PCA. As a new federal employee, he states he had his pay carefully scrutinized a total of four times by supervisors and human resources personnel. The member states that the difference in his pay was attributable to the inclusion of the Local Market Supplement (LMS). He argues that a reasonable person would not have been aware he was receiving payments in excess of proper entitlements. The member contends that since his pay had been fully investigated and he had been given reasonable assurances for the discrepancies by pay officials, he had therefore met his fiduciary responsibilities and should not be held at fault.

Discussion

Title 5, United States Code, § 5584, 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. This statute is implemented within the Department of Defense under Department of Defense Instruction 1340.23 (February 14, 2006) (hereinafter Instruction). Generally, persons who receive a payment erroneously from the government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing.

While an administrative error did occur, our Office has consistently held that the waiver statute does not apply automatically to relieve the debts of all members who, through no fault of their own, have received erroneous payments from the government. Waiver action under 10 U.S.C. § 2774 is a matter of grace or dispensation, and not a matter of right. If it were merely a matter of right, then virtually all erroneous payments made by the government to members would be excused from repayment. *See* Instruction ¶ E4.1.1.

The member argues that the overpayment was not based on fraud, misrepresentation, fault, or lack of good faith. The legal definition of “fault” does not imply any ethical lapse on the part of the member. It merely indicates that he is not entirely without some responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to him. The standard we employ to determine fault is that of a reasonable person: if such a person knows or reasonably should know that he is receiving money to which he is not entitled, he is at fault if he fails to bring the excess payments to the attention of appropriate officials. In such a situation, waiver is precluded. *See* Instruction ¶ E4.1.4.

The member argued that he did give his relevant information to appropriate officials, but he was wrongly advised. In his request for reconsideration, the member contends that he was advised on four different occasions that he was entitled to the PCA. However, our decisions and those of the Comptroller General have consistently held that there is no basis for waiver unless the official(s) providing the faulty advice indicating that the member was entitled to what he received are identified, and the member’s version of the events is corroborated in detail in the written record by pay and disbursing officials. *See* DOHA Claims Case No. 02120917 (December 20, 2002). However, even if we accept the member’s contention that he received misinformation, we do not believe that he is entirely without fault. A review of the member’s Leave and Earnings Statement (LES) indicate that he received an increase of over \$500.00 per pay period when NSPS began. While he might have expected some change in pay, there is no indication in the record that he should have expected an increase of that magnitude. Moreover, the increased pay he was then receiving was at variance with the SF 50 which was issued to the member when he entered NSPS.

The member properly brought this to the attention of finance officials. However, in light of the significant difference between his pay and the total salary indicated on his SF 50, he should not have relied upon verbal assurances. He should have required finance to provide him a written explanation, because at this point he reasonably should have known that the payments were at least questionable. Regardless of whether members were notified that PCA payments were not allowed under NSPS, or whether the member thought his pay increased due to the inclusion of LMS, he simply could not reasonably have expected his salary to increase over \$14,000.00 a year when he was not expecting a promotion. It is not against equity and good conscience and is in the best interests of the United States, for the above reasons, to require collection of the debt.

Conclusion

The employee's request for reconsideration is denied, and we affirm the July 14, 2011, decision. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

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Gregg A. Cervi
Member, Claims Appeals Board

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