

KEYWORDS: waiver of indebtedness

DIGEST: Due to an administrative error, an employee's salary was miscalculated, causing him to be overpaid. He was unaware he was being overpaid until he was notified of the indebtedness on October 29, 2010. Under 5 U.S.C. § 5584, the amounts he received before notification may be waived. However, the amounts he received after notification may not be waived because he did not acquire title to the excess amounts and has a duty to return them to the government.

CASENO: 2011-WV-022307.2

DATE: 7/11/2011

DATE: July 11, 2011

In Re:)	
[REDACTED])	Claims Case No. 2011-WV-022307.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to an administrative error, an employee's salary was miscalculated, causing him to be overpaid. He was unaware he was being overpaid until he was notified of the indebtedness on October 29, 2010. Under 5 U.S.C. § 5584, the amounts he received before notification may be waived. However, the amounts he received after notification may not be waived because he did not acquire title to the excess amounts and has a duty to return them to the government.

DECISION

An employee of the Navy requests reconsideration of the June 10, 2011, decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No. 2011-WV-022307. In that decision, DOHA waived \$8,030.68 of the government's claim and denied waiver of \$2,665.36.

Background

The record shows that the employee, a GS-12, step 07, received a Standard Form (SF) 50, effective August 14, 2010, which reassigned him for support of Operation Enduring Freedom, for a period not to exceed November 30, 2010. As a result, his status under the Fair Labor Standard Act (FLSA) should have been changed from non-exempt to exempt. However, due to an administrative error, his FLSA status remained non-exempt. Therefore, when the employee worked overtime he erroneously received time and a half of his basic salary, instead of his overtime rate being capped at the GS-10, step 1 rate. This administrative error caused the employee's overtime pay to be miscalculated from August 15, 2010, through October 23, 2010, causing an overpayment of \$10,696.04.

The employee became aware of the overpayment on October 29, 2010, when he received a notification from his Human Resources Office. He stated that he was unaware of the error and could not have reasonably been expected to question his rate of overtime pay. The Defense Finance and Accounting Service (DFAS) in their administrative report dated February 18, 2011, agreed that the employee accepted the funds in good faith prior to his becoming aware of the overpayment on October 29, 2010, and recommended waiver for the period prior to that. DFAS recommended denial of the overpayment for PPE October 23, 2010, since he should have been aware prior to receipt of this payment that he was not entitled to the funds. They recommended denial in the amount of \$2,665.23. Our Office agreed with the recommendation of DFAS. The employee requests reconsideration, contending that after he was deployed for two months he was told he was classified as "exempt" versus being told by government personnel prior to leaving that he would remain "non-exempt." He believes he has been deceived by the federal government and should have remained in the non-exempt status for the remainder of his tour. He also argues that due to a step increase after he was informed of the misclassification, that he is actually due additional monies.

Discussion

The employee seeks waiver of the debt under title 5, United States Code, § 5584. 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 employees who, through no fault of their own, have received erroneous payments from the government. Waiver action under 5 U.S.C. § 5584 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 employees would be excused from repayment. *See* Instruction, ¶ E4.1.1.

Generally, debts may be waived only when collection would be against equity and good conscience and would not be in the best interest of the United States. *See* Instruction, ¶ E4.1.2.

The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not sufficient basis in and of itself for granting waiver. *See* Instruction, ¶ E4.1.3. A waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. In such instances, the recipient has a duty to notify an appropriate official and set aside funds for eventual repayment to the government. *See* Instruction, ¶ E4.1.4.

As stated above, waiver is inappropriate if the employee is aware he is being overpaid. *See* DOHA Claims Case No. 07100102 (October 11, 2007), and DOHA Claims Case No. 05090603 (September 14, 2005). Once the employee was notified on October 29, 2010, that he was being overpaid, he did not acquire title to any overpayments he received after that point, and has a duty to return the excess amounts to the government. *See* DOHA Claims Case No. 2009-WV-111601.2 (February 19, 2010); DOHA Claims Case No. 02030501 (April 18, 2002); and DOHA Claims Case No. 00030709 (April 28, 2000).

As to the employee's contention that he is owed more in compensation, he is free to file a claim if he believes he has a legal entitlement to the additional funds. Our focus is limited to whether waiver of the indebtedness under 5 U.S.C. § 5584 is appropriate here.

Conclusion

The employee's request for reconsideration is denied, and we affirm the June 10, 2011, decision to grant waiver in the amount of \$8,030.68, and deny waiver in the amount of \$2,665.36. In accordance with the Instruction, ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board

