

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: Claims Case No. 2011-WV-032105.2

DATE: 09/29/2011

DATE: September 29, 2011

In Re:)
 REDACTED) Claims Case No. 2011-WV-032105.2
))
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 September 1, 2011, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2011-WV-032105. In that decision, DOHA denied waiver of an overpayment in the amount of \$33,887.88.

Background

The record shows that the employee, who transferred to the Army, U.S. Southern Command, was assigned a term appointment not to exceed March 12, 2012, as a YA-02 with an annual salary of \$61,625.00. Effective October 26, 2008, the employee's initial probationary period was completed and she was converted to reinstatement career. As a result, she was entitled to receive a 5% increase in base pay under the National Security Personnel System (NSPS), increasing her salary from \$61,625.00 per annum to \$64,707.00 per annum. However, due to an administrative error, the *Notification of Personnel Action*, Standard Form (SF) 50 effecting this change erroneously established the employee's salary as \$77,071.00 per annum. As a result, the employee was overpaid \$17,788.84 from pay period ending (PPE) November 8, 2008, through June 5, 2010. In addition, during PPE January 16, 2010, the employee received an incentive award payment in the amount of \$6,807.00. However, she was only entitled to receive an incentive award payment in the amount of \$297.00. As a result, the employee was overpaid \$6,510.00.

The record further shows that during PPE June 19, 2010, the employee was underpaid \$251.20. However, during this same pay period, the employee erroneously received a retroactive payment in the amount of \$6,807.00. As a result, the employee was overpaid \$6,555.80. Finally, during PPE July 3, 2010, the employee received retroactive payments totaling \$3,033.24 for PPE January 16, 2010, through June 19, 2010. Therefore, the Defense Finance and Accounting Service (DFAS) determined in their administrative report, dated December 30, 2010, that the employee was overpaid in the total amount of \$33,887.88 (\$17,788.84 + \$6,510.00 + \$6,555.80 + \$3,033.24).

The employee stated in her initial appeal that she did question her salary on two occasions. When she first transferred to the Army, U.S. Southern Command in March 2008, she immediately notified her Civilian Personnel Office (CPO) of an error and they corrected it. She states she also questioned the performance award she received in the fall of 2009 because she believed it was too high, but she was assured by CPO that the amount was correct. The adjudicator in the appeal decision determined that although the employee indicates she questioned her salary in the fall of 2009, and was assured it was correct, the record reflects that the overpayment began in October 2008 when she was converted to reinstatement career under NSPS. She was entitled to receive a 5% increase in base pay, which would have equaled approximately \$3000.00. However, her pay increased over \$15,000.00. In addition, while a SF-50 was issued that reflected that change, three more SF-50 were subsequently issued reflecting different, lower annual salaries. The adjudicator determined that she should have questioned her salary based on the large increase and the documentation that reflected various discrepancies. The adjudicator also determined that the employee should have questioned the incentive award that she received, as well as the retroactive payments. The adjudicator determined that the employee did not articulate a reason why she believed she was entitled to any of these payments. Therefore, the appeal decision sustained the recommendation of DFAS that the waiver of the overpayment in the amount of \$33,887.88 be denied.

In her request for reconsideration, the employee contends that she honestly did not have knowledge that she was being overpaid for the pay periods in question. She states that she was able to identify the first error immediately as the amount referenced was not the salary that was negotiated at the time of her appointment. She states that the amount of her salary after that

initial amount was set by percentages and formulas. She states that she did question the amount to her Human Resources Office, but they assured her that the amount was correct.¹ The employee states that she questioned the different amounts again in January 2009 to her Human Resources Office, and was told they were just adjustments and not to worry. She also states that she was unable to access the electronic civilian personnel system (MyBiz). The employee contends that she had her yearly evaluation with her supervisor, who advised her of her performance, and he gave her a copy of the Employee Notice of Pay Pool Decisions (Addendum to DD 2906). The amount received for the shares earned was \$7,041.00; a lump sum payment of \$6,807.00 and \$216.00 towards her basic salary as outlined in the analysis on the DD 2906. The employee indicates that on May 11, 2010, she was told she needed to go to the Human Resources Office. At that time, she was told that her pay had been incorrectly factored and she would be receiving letters from DFAS outlining the amount of the debt. The employee contends that she did everything in her power to get her pay corrected once she had knowledge of the overpayment. She requests the waiver of the overpayment be granted, and provides a breakdown of her monthly income and expenses for FY2008 through FY2010. She states that she has had to live off her savings since her salary was adjusted. She requests in the alternative to a grant of waiver, that her present salary be maintained.

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 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 members would be excused from repayment. *See* Instruction ¶ E4.1.1.

The employee argued that she did give her relevant information to appropriate officials, but she was wrongly advised. In her request for reconsideration, the employee contends that she was advised on numerous occasions that everything was correct. However, while the employee might have expected some change in pay with an increase of 5% (approximately \$3000.00), there is no indication in the record that she should have expected an increase of the magnitude

¹ The employee states that a named Human Resources Office employee told her that the salary increase was correct because of the 5% increase in pay (approximately \$3,000.00). However, the employee should have questioned this advice because the increase was almost 30% (over \$15,000.00).

she received (over \$15,000.00). Moreover, the increased pay she was receiving was at variance with several SF 50s which were issued to her.

The employee properly brought this to the attention of finance officials. However, in light of the significant differences indicated on her SF 50, she should not have relied upon verbal assurances. She should have required her Human Resources Office to provide her a written explanation, because she reasonably should have known that the payments were at least questionable. This same rationale is applicable to the retroactive payments. Regardless of the employee's knowledge, she has still provided no articulated reason as to why she might reasonably believe she would be entitled to the retroactive payments. As to the incentive award of \$6,807.00, her explanation of the discussion with her supervisor of her performance and inclusion in the record of the DD 2906 is sufficient evidence to suggest that the employee reasonably believed that she was entitled to the incentive award. Therefore, waiver of \$6,510.00 (\$6,807.00 - \$297.00) is granted.

Financial hardship is not a factor for consideration in determining whether waiver is appropriate. *See* DOHA Claims Case No. 07102205 (October 25, 2007). The employee may contact DFAS to request an adjustment in the amount of the overpayment she is required to repay monthly. This is a matter strictly within the discretion of DFAS. The employee has complained that the error in her salary caused her to be in a higher tax bracket. The Comptroller General and our Office have consistently held that application of 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 her tax liability. For the above reasons, collection of the remainder of the debt is not against equity and good conscience and is in the best interests of the United States.

Conclusion

The employee's request for reconsideration is granted as to the overpayment of the incentive award in the amount of \$6,510.00, and denied as to the remaining amount of the overpayment of \$27,377.88. 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

///Original Signed///

Gregg A. Cervi
Member, Claims Appeals Board

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board