

KEYWORDS: Waiver of indebtedness

DIGEST: Under 5 U.S.C. § 5584, when an employee is aware that he is receiving overpayments, he does not acquire title to the excess amounts, and he has a duty to hold the money for eventual repayment. In such circumstances, waiver is not proper.

CASENO: 2011-WV-040401.2

DATE: 09/30/2011

DATE: September 30, 2011

In Re:)	
REDACTED)	Claims Case No. 2011-WV-040401.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

1. Under 5 U.S.C. § 5584, when an employee is aware that he is receiving overpayments, he does not acquire title to the excess amounts, and he has a duty to hold the money for eventual repayment. In such circumstances, waiver is not proper.

2. Under the provisions of the Department of Defense Instruction 1340.23, the Defense Office of Hearings and Appeals generally must receive a claimant's request for reconsideration of an appeal decision within 30 days of the date of the appeal decision. Upon request, this period may be extended for an additional 30 days for good cause shown. In the absence of such a request, the decision becomes final 30 days after the date of the appeal decision.

DECISION

An employee of the Department of Defense requests reconsideration of the August 18, 2011 decision of the Defense Office of Hearings and Appeals (DOHA), in DOHA Claim No.

2011-WV-040401. In that decision, DOHA sustained the recommendation of the Defense Finance and Accounting Service (DFAS) to grant waiver of the employee's debt in the amount of \$90,345.48, and deny waiver in the amount of \$7,575.20.

Background

The record shows that the employee was stationed in Egypt from 1995 to 1998. As a result, the employee was entitled to receive post differential (PD). On June 7, 1998, the employee was transferred to Germany, and over the next decade was stationed in several communities in Germany. Upon his transfer to Germany, the employee was not authorized PD; however, due to an administrative error he continued to receive it. From pay period ending (PPE) June 20, 1998, through October 25, 2008, the employee received erroneous payments of PD causing an overpayment of \$97,920.68. DFAS recommended that \$90,345.48 of the overpayment be waived, as they believed the employee may have been unaware that he was not entitled to the payment of PD after leaving Egypt. Prior to March 15, 2008, the location for which an employee was receiving PD was not listed on the Leave and Earnings Statement (LES). Had the employee reviewed his LES for the PPE March 15, 2008, or any one thereafter, he would have noticed that he was receiving PD for Egypt. For this reason, DFAS determined that the employee was not without fault in the matter and recommended that the remaining amount of the overpayment, \$7,575.20, not be waived. Therefore, the DOHA adjudicator concurred with DFAS that waiver was not appropriate for the remaining amount. The adjudicator stated the long-held principle of this Office that waiver is not appropriate when an employee is aware or should be aware that he has been overpaid. In such a situation, he has a duty to retain such amounts for subsequent refund to the government.

Discussion

A request for reconsideration should have been received by this Office by September 19, 2011, (due to the 30 days expiring on the weekend) unless a request to extend the period for up to 30 days for good cause had been received, by that time. However, even if the request had been timely, the member's arguments would not have changed our decision.

Section 5584 of title 5, United States Code, 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 interest of the United States. Generally, these criteria are met by a finding that the claim arose from an administrative error with no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee or any other person having an interest in obtaining the waiver.

Waiver under 5 U.S.C. § 5584 is not simply a matter of right whenever an employee innocently receives pay to which he is not entitled, but is decided on the principles of equity and fairness under the circumstances presented in each case. In this case, the employee should have known that the payments he received for PPE March 15, 2008, and thereafter were erroneous. Waiver is not appropriate if an employee knows or reasonably should know that he is receiving payments in excess of his entitlements. *See* DOHA Claims Case No. 07072501 (July 31, 2007); and DOHA Claims Case No. 98040113 (July 8, 1998), *aff'd* by the Deputy General Counsel

(Fiscal) (February 14, 2001). In such a circumstance, he does not acquire title to the payments and should be prepared to return them. *See* DOHA Claims Case No. 03072812 (July 30, 2003). The employee acknowledged receiving LES during the period of overpayment. We have consistently held that when an employee is furnished documentary evidence or information, which, if reviewed, would cause a reasonable person to be aware or suspect the existence of an error, but he fails to review such documents or otherwise fails to take corrective action, waiver will generally be denied. This Office cannot stress enough the importance of a careful review by each employee of the pay data provided by the employing agency. This pay data is provided to employees in order that they can verify the accuracy of their salary.

Additionally, the employee submitted no new evidence except to state that repayment of the debt would be a financial hardship. 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 he is required to repay monthly. However, this is a matter strictly within the discretion of DFAS.

Conclusion

The reconsideration request is untimely, and the appeal decision of August 18, 2011, is the final decision of the Department of Defense with respect to a waiver under 5 U.S.C. § 5584. *See* Department of Defense Instruction 1340.23, ¶ E8.10.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

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Gregg A. Cervi
Member, Claims Appeals Board

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Natalie Lewis Bley
Member, Claims Appeals Board