

KEYWORDS: Waiver of Indebtedness

DIGEST: When an employee is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts, and has a duty to hold the money for eventual repayment. In such circumstances, waiver is not appropriate.

CASENO: 2011-WV-040402.2

DATE: 10/24/2011

DATE: October 24, 2011

In Re:)	
[REDACTED])	Claims Case No. 2011-WV-040402.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When an employee is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts, and has a duty to hold the money for eventual repayment. In such circumstances, waiver is not appropriate.

DECISION

The employee requests reconsideration of the August 22, 2011 appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2011-WV-040402. In that decision this Office agreed with the determination of the Defense Finance and Accounting Service (DFAS) that \$928.11 could not be considered for waiver, and waiver of the remaining overpayment in the amount of \$718.30 should be denied.

Background

The record shows that the employee elected to participate in the Federal Employee Health Benefit Plan (FEHB) by submitting the Standard Form (SF) 2809, dated March 26, 2002. The coverage was to become effective April 7, 2002, with FEHB premiums being deducted from his pay beginning in pay period ending (PPE) April 20, 2002. However, due to an administrative error, his FEHB premiums were not withheld from PPE April 20, 2002, through February 21, 2004, causing an overpayment of \$1,646.41.

On July 24, 2004, the record shows that DFAS notified the employee that he had been overpaid \$928.11 for the non-deduction of premiums from PPE February 22, 2003, through February 21, 2004. However, for reasons that are not clear, the process of collecting the debt was suspended. On May 28, 2009, DFAS notified the employee that he was indebted for the non-deduction of FEHB premiums from PPE April 20, 2002, through February 8, 2003. On June 2, 2009, the employee requested waiver of the claim in the amount of \$718.30. DFAS advised the employee that his total indebtedness was actually \$1,646.41, representing the non-deduction of FEHB premiums from PPE April 20, 2002, through February 21, 2004. DFAS also advised the employee that the portion of the debt in the amount of \$928.11 could not be considered for waiver under 5 U.S.C. § 5584, because he had been notified of the debt on July 24, 2004, and he did not request waiver of the \$928.11 indebtedness within the three year limitation as set forth under the statute.

In the employee's initial request for waiver, he stated that he had no knowledge of any missing deductions. He also stated that he did not look at his Leave and Earnings Statements (LES), and his paycheck is deposited directly to his bank. He contends that it was DFAS' responsibility to ensure appropriate actions were taken, and that waiver should be granted because it resulted from administrative error that it took DFAS seven years to discover. The adjudicator determined that while administrative error did occur, our Office has consistently held that the waiver statute does not automatically apply to relieve the debts of employees who, through no fault of their own, have received erroneous payments from the government. The adjudicator noted that the employee acknowledged receiving LES during the period in question. The adjudicator determined that the employee should have expected a decrease in pay following the effective date of his FEHB coverage. Additionally, the decisions of our Office and those of the Comptroller General indicate that waiver is not appropriate if the employee has documents (such as LES) which, if reviewed, would indicate the existence of an error.

In his request for reconsideration, the employee offers no new evidence. He demands to know why it is considered his responsibility to check his LES. He states that he has no reason to check for deductions as he submitted the proper paperwork. He contends he was never contacted regarding the first debt, and sending a letter does not serve as an acknowledgement of receipt by him.

Discussion

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. *See* Department of Defense Instruction 1340.23 (Instruction), ¶ E4.1.2 (February 14, 2006).

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 noticed that his pay did not decrease due to the FEHB premiums from PPE April 20, 2002, through February 8, 2003. 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 specifically provided to employees in order that they can verify the accuracy of their salary.

The employee contends that an administrative error occurred, and thus he should not be responsible. This Office has consistently held 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. *See* ¶ E4.1.1 of the Instruction. Furthermore, 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* ¶ E4.1.3 of the Instruction. Therefore, it is not against equity and good conscience and is in the best interest of the United States, for the above reasons, to require collection of the debt in the amount of \$718.30.

As to the debt for \$928.11, the record reflects that DFAS sent the employee a letter dated July 24, 2004, notifying him that he was overpaid in that amount. Although the employee disputes receiving that letter, the record reflects the letter was addressed to the same address as reflected on his original waiver request, on his appeal of DFAS' determination, and on his request for reconsideration. There is no evidence in the record that the letter was returned as undeliverable; and so, in the absence of clear and convincing evidence to the contrary, we must accept DFAS's statement that it notified the employee of the discovery of the overpayment. Additionally, the date of discovery as set forth under 5 U.S.C. § 5584 is the date it is determined by an appropriate official that an erroneous payment has been made, and the date of notice to the employee is not relevant in fixing such date. Title 5, U.S.C., § 5584(b)(3) states that the head of the agency may not exercise his authority under this section to waive any claim if the application for waiver is received in his office after the expiration of three years immediately following the date on which the erroneous payment of pay or allowances was discovered. Therefore, the debt for \$928.11 may not be considered for waiver under the statute.

Conclusion

The reconsideration request is denied with respect to waiver of the debt in the amount of \$718.30, and the remaining amount of \$928.11 may not be considered by statute. This is the

final administrative decision of the Department of Defense in accordance with the Instruction ¶ E8.15.

/// Original signed ///

Jean E. Smallin
Chairman, Claims Appeals Board

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