

KEYWORDS: Waiver of Indebtedness

DIGEST: When an employee is aware that she is receiving payments in excess of her entitlements, she does not acquire title to the excess amounts and has a duty to retain them for eventual repayment to the government.

CASENO: 2011-WV-041102.2

DATE: 01/23/2012

DATE: January 20, 2012

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In Re: )  
          [REDACTED] ) Claims Case No. 2011-WV-041102.2  
                                  )  
Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

When an employee is aware that she is receiving payments in excess of her entitlements, she does not acquire title to the excess amounts and has a duty to retain them for eventual repayment to the government.

**DECISION**

An employee of the Defense Contract Management Agency (DCMA) requests reconsideration of the November 25, 2011, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2011-WV-041102. In that decision, this Office waived \$1,866.77 of the amount of the overpayment and denied \$24,942.17.

**Background**

The record shows that the employee's indebtedness resulted from overpayment of her pay and entitlements during pay periods ending (PPE) May 26, 2007, through June 20, 2009. During part of that period, from January 2008 until April 2008, she was deployed overseas. The debt

consists of overpayment of her Basic Salary, Overtime Premium, Danger Pay (DP), and Post Differential (PD). The overpayment of her Basic Salary was negligible, with the bulk of the overpayment (more than half the debt) arising from the debt from overtime premium overpayments. The Overtime Premium debt was incurred as a result of the miscoding of her Fair Labor Standards Act (FLSA) status which caused her overtime premium to be paid at a rate higher than allowed by law. When the employee changed agencies, she was changed from exempt to non-exempt; however, she should have remained in an exempt status. Each of these overpayments was due to administrative error and was outlined very specifically by the adjudicator in the appeal decision. This decision will note those overpayments which are at issue.

The erroneous miscalculation of the employee's overtime pay from PPE May 26, 2007, through March 1, 2008, caused an overpayment of \$7,997.52. During the PPE March 2, 2008, through April 12, 2008, the employee's entitlements were miscalculated causing her to be underpaid in the amount of \$6,239.84. The underpayment was applied to the overpayment, thereby reducing it to \$1,757.68. The Defense Finance and Accounting Service (DFAS) recommended waiver of the overpayment in the amount of \$7,997.52 as the employee was notified on March 19, 2008 that her overtime rate of pay was questionable. The adjudicator disagreed with this recommendation, reducing the recommended waiver to the amount of \$1,757.68. The adjudicator noted that when the employee was notified that her overtime pay rate was questionable, it was likely that she was also unaware of the underpayment. Therefore, the adjudicator determined that the employee acted in good faith in accepting the overpayment in the amount of \$1,757.68, and that all other conditions necessary for waiver of this portion of the claim have been met.

The adjudicator also determined that because the employee had been underpaid DP and PD in the amount of \$3,214.13, during the PPE March 2, 2008, through April 26, 2008, she may not have known that the \$109.09 retroactive DP payment during the PPE April 26, 2008, was paid to her in error. Therefore, the adjudicator determined that the employee acted in good faith in accepting the \$109.09 overpayment, and that all other conditions necessary for waiver of this portion of the claim have been met.

In her request for reconsideration, the employee continues to contend that the errors and miscalculations were all DFAS's fault for which knowledge cannot be imputed to her. She continues to contend that promises concerning her employment situation were made and should be honored, but they are not supported by the record, nor are they germane to the issues at hand. The employee has essentially offered no new evidence in her request for reconsideration.

### **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 interest of the United States provided there is 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. This statute is implemented within the Department of Defense under Department of Defense

Instruction 1340.23 (February 14, 2006) (hereinafter Instruction). The following paragraphs of the Instruction are particularly relevant to the member's situation:

¶ E4.1.1. 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. . . . A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant.

¶ E4.1.4. A waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient has a duty to notify an appropriate official and to set aside funds for eventual repayment to the Government, even if the Government fails to act after such notification.

The employee knew in March 19, 2008, that her FLSA code had been entered incorrectly, and had been corrected from non-exempt to exempt, and that DFAS would be sending her a debt letter. The employee contends that she did not receive a debt letter due to the duration of the error by DFAS. This is irrelevant to the fact that the employee had knowledge of the error. Therefore, when she received a retroactive payment in April 12, 2008, in the amount of \$15,832.00, erroneously compensating her for overtime for PPE February 2, 2008, through March 29, 2008, she certainly should have questioned it. Since the employee knew she was already indebted for overtime payments, this payment (specifically listed as retroactive for overtime) should have seemed excessive. Therefore, it would not be against equity and good conscience to deny the erroneous salary payment in the amount of \$15,832.00. *See* DOHA Claims Case No. 09080701 (August 12, 2009).

As for the overpayments of PD and DP, the employee contends that she was too busy with her deployment to be able to keep track of the errors that were being made. It should be noted that virtually all the overpayments made to the employee for PD and DP were made when she was no longer deployed. The employee states she attempted to stop the payments in a timely manner just before she returned home to deal with family issues on April 26, 2008. She states that when she found out the payments had not ceased, she again attempted to stop the payments in June 2008. The employee states that she did not realize her Leave and Earnings Statements (LES) were incorrect until PPE July 5, 2008, because she was dealing with family matters and did not receive her LES. She states she also did not check her bank statement. However, the employee admits that she received leave and earning statements (LES) during the period of overpayment. When asked in Block No.17.a., on her *Waiver/Remission of Indebtedness Application*, DD Form 2789, dated March 25, 2010, if she had received LES(s), she checked "yes". Our decisions and those of the Comptroller General stress the importance of an employee's monitoring of her LES and other finance and personnel documents. *See* DOHA Claims Case No. 98120401 (March 4, 1999); and Comptroller General decision B-188822, June 1, 1977. We have consistently held that waiver is not appropriate when an employee has records which indicate an overpayment and fails to review such documents for accuracy or otherwise

fails to take corrective action. *See* DOHA Claims Case No. 98120401, *supra*, and DOHA Claims Case No. 98112018 (January 11, 1999).

The employee argues that due to the continual corrections caused by DFAS to her pay, she began to rely on DFAS to get the corrections right. She had no way of knowing that they would continue to make erroneous payments. There was no fraud, fault, misrepresentation, or lack of good faith. The Board finds no indication of fraud, misrepresentation, or lack of good faith on the part of the member. However, the Board is unable to say that the employee is entirely without fault.<sup>1</sup> The standard we employ to determine fault is that of a reasonable person: if such a person knows or reasonably should know that she is receiving money to which she is not entitled, waiver is precluded. *See* Instruction, ¶ E4.1.4. However, the legal definition of “fault” does not imply any ethical lapse on the part of the member. It merely indicates that she is not entirely without some responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to her.

The employee states that she has had to spend several thousand dollars in CPA (Certified Public Accountant) fees because DFAS has not issued her corrected W-2 forms in a timely fashion. She contends that she has also had to spend several thousand dollars in taxes on money that she did not receive. She argues that this is against equity and good conscience. 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.

There are other amounts of overpayments not specifically mentioned in this reconsideration request which were spelled out in detail in the appeal decision. We affirm the appeal decision. The employee knew or should have known that she was receiving money to which she was not entitled. Moreover, the employee did not present any new evidence. Therefore, collection of the remainder of the debt is not against equity and good conscience and is in the best interest of the United States.

### **Conclusion**

The employee’s request for reconsideration is denied and the appeal decision of November 25, 2011 is sustained. Accordingly, under the authority of 5 U.S.C. § 5584, we hereby waive \$1,866.77 (\$1,757.68 + \$109.09) of the government’s claim and deny waiver of \$24,942.17. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

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<sup>1</sup> The employee alleges that DOHA only grants waivers to those they favor. This Board operates under the statutes and regulations that authorize it, as well as the precedents set by this Board and the Comptroller General. We have no knowledge of the individuals who request reconsideration from this Board, and we make our decisions based upon the record before us. Should any members of the Board have personal knowledge of an individual requesting reconsideration from this Board, they would recuse themselves from taking any action on that case, and other members would be appointed.

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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