

KEYWORDS: Waiver of Indebtedness

DIGEST: Under 5 U.S.C. § 5584, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for repayment of 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, provided that there is no evidence of fraud, fault, misrepresentation or lack of good faith on the part of the employee.

CASENO: 2011-WV-092706.2

DATE: 12/15/2011

DATE: December 15, 2011

In Re:)
 [REDACTED]) Claims Case No. 2011-WV-092706.2
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 5 U.S.C. § 5584, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for repayment of 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, provided that there is no evidence of fraud, fault, misrepresentation or lack of good faith on the part of the employee.

DECISION

An employee of the U.S. Navy requests reconsideration of the November 14, 2011, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2011-

WV-092706. In that decision, DOHA waived in part the collection of a debt owed by the employee. The employee seeks waiver of the remaining indebtedness.

Background

The record reflects that effective April 30, 2010, the employee was reassigned in support of Operation Enduring Freedom. As a result, the employee's status under the Fair Labor Standards Act (FLSA) should have been changed from nonexempt to exempt. However, due to an administrative error, the employee's FLSA status remained nonexempt. Therefore, when the employee worked overtime, he erroneously received overtime pay at the rate of one and one-half times his basic salary, instead of his overtime being capped at the GS-10, step 1 rate. Due to this administrative error, during the pay period ending (PPE) June 5, 2010, through March 12, 2011, the employee's overtime pay was miscalculated causing an overpayment in the amount of \$34,764.76.

The record shows that on September 9, 2010, the employee was notified by the on-site civilian pay advisor that civilian employees deployed to the country where he was stationed should be coded as exempt under the FLSA. In DOHA Claim No. 2011-WV-092706, the adjudicator waived \$9,606.35, the portion of the erroneous salary payments the employee received from his overtime rate being miscalculated from PPE June 5, 2010, through August 28, 2010. However, the adjudicator denied waiver of \$25,158.41, the overtime payments he received after notification.

In the employee's reconsideration request, his command provides previously omitted information in support of waiver of the remaining indebtedness. His command provides specific information regarding the employee's discussions concerning his FLSA status with his stateside human resources office and his supervisor after September 9, 2010. This new information reflects that the employee immediately contacted his stateside human resources office and supervisor concerning his FLSA status, as advised by the on-site civilian pay advisor in the September 9, 2010, email. His stateside human resources office and supervisor erroneously assured the employee that his FLSA status was correct and that the September 9, 2010, email did not apply to him.

Discussion

The employee seeks waiver of the debt under title 5 of the United States Code, Section 5584 (5 U.S.C. § 5584). This statute is implemented within the Department of Defense under Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006). Under 5 U.S.C. § 5584, we have the authority to waive the government's claims for repayment of erroneous payments of pay and allowances, provided there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee. A waiver usually is not appropriate when an employee knows, or reasonably should know, that a payment is erroneous. The employee has

a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government. *See* DoD Instruction 1340.23 (Instruction) ¶ E4.1.4. However, as stated in the Instruction, whether waiver will be granted depends on the facts in each case. *See* ¶ E4.1.8.

In this case, the employee's command has provided detailed information concerning the information that was told to the employee by his supervisor and his stateside human resources office after he contacted them concerning his FLSA status in September 2010. When an agency has affirmed an employee's pay with a reasonable explanation after inquiry and the employee has no reason to doubt the agency's response, the employee is without fault and waiver should be granted. *See* DOHA Claims Case No. 09082002 (August 27, 2009); and the Comptroller General's decisions in B-255550, Feb. 25, 1994, and B-240393, Jan. 31, 1991. Based upon this new information, we agree with the employee's command that he reasonably may have believed that his FLSA status was correct at that time. However, we note that in his original waiver, the employee states that he received an email on January 21, 2011, from his pay comptroller informing him that he should "indeed be exempt from the FLSA and they were doing the change in the system." Although the employee states that he believed the error was then corrected, the error continued until March 12, 2011. Once the employee was notified on January 21, 2011, 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. 2011-WV-022806.2 (September 16, 2011); DOHA Claims Case No. 2011-WV-022307.2 (July 11, 2011); and DOHA Claims Case No. 2010-WV-062805.2 (July 15, 2010). Therefore, under these circumstances, we waive an additional \$17,020.17, which represents the overpayments the employee received during the period August 29, 2010, through January 15, 2011. Since the employee has acknowledged that he knew his FLSA status was incorrect after notification from his pay comptroller, waiver is not appropriate for the overpayments he received during the period January 16, 2011, through March 12, 2011, in the amount of \$8,138.24.

Conclusion

For the reasons stated above, we hereby waive an additional \$17,020.17. In accordance with DoD 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