

KEYWORDS: Waiver of Indebtedness

DIGEST: 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 interests of the United States. Generally, these criteria are met by a finding that the claim arose from 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.

CASENO: 2012-WV-030904.2

DATE: 08/23/2012

DATE: August 23, 2012

In Re:)	
[REDACTED])	Claims Case No. 2012-WV-030904.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

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 interests of the United States. Generally, these criteria are met by a finding that the claim arose from 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.

DECISION

An employee of the Defense Finance and Accounting Service (DFAS) requests reconsideration of the June 19, 2012, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-030904. In that decision, this Office granted waiver of the government's claim in the amount of \$2,230.40, and denied waiver of \$306.00.

Background

The record shows that on November 23, 2009, the employee received orders to perform temporary duty (TDY). In conjunction with his TDY, under § 541(a) of the Department of State Standardized Regulations (DSSR), the employee was entitled to receive post hardship differential (PHD) retroactive to the first day of a deployment to a footnote “n” post after serving 42 days at a qualifying differential post. After an audit by the Department of Defense Office of Inspector General, DFAS conducted audits of its personnel who had been deployed in support of contingency operations. DFAS found that many of their employees who performed TDY in Southwest Asia were retroactively paid PHD differential from the first day they arrived in Kuwait or Qatar in error.

DFAS advised this Office that DSSR § 541(a) specifies that PHD may be paid retroactively to the first day of a deployment to a footnote “n” post after an employee serves 42 days at a qualifying foreign differential post. Footnote “n” posts are ones where there is widespread warfare, U.S. combat troop involvement in the hostilities, and danger pay has been authorized for Federal civilian employees. The country of Afghanistan was designated a footnote “n” post effective December 16, 2001, and the country of Iraq received the designation effective March 3, 2003. Neither Kuwait nor Qatar has been designated as a footnote “n” country. Therefore, any payments of PHD for the first 42 days of deployment made to individuals on TDY in those countries were in error. While the employees were not entitled to the retroactive payment of PHD, they were entitled to, and were subsequently paid, imminent danger pay (IDP), authorized by DSSR § 652(g), for the qualifying days prior to the start of their entitlement to PHD.

In this case, the employee received PHD in the amount of \$2,536.40, on pay period ending (PPE) January 16, 2010, for the PPE December 5, 2009, through January 16, 2010. The employee arrived in Kuwait on November 28, 2009, and performed his entire TDY duties there. Kuwait is not a footnote “n” country; thus, the employee was not entitled to the payment of PHD until January 9, 2010. Therefore, DFAS determined the retroactive payment PPE January 16, 2010, for the first 42 days of duty was paid in error. DFAS recommended that \$2,230.40 of the \$2,536.40 be waived as there was no fault of the employee and he accepted it in good faith. This Office agreed with this recommendation and the adjudicator waived the \$2,230.40 overpayment of PHD.

In his request for reconsideration, the employee requests that the additional amount of \$306.00, which was denied for IDP, be waived. He argues that his appeal contains a misinterpretation of PHD and DPA, which is not considered to be the same type of payment. Also, he argues that IDP and PHD would not be considered as duplicate payments based on the guidance in the Department of Defense Financial Management Regulation (DoDFMR). He states the \$306.00 was compensation for IDP for the initial 42 days in Kuwait and was accepted in good faith based on appropriate guidance.

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:

¶ E4.1.4. 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 was issued IDP on June 4, 2011, well after he returned from his deployment on February 7, 2010. The employee is a Supervisory Financial Specialist with DFAS. He certainly should have questioned why he was issued a payment relating to his deployment at such a late date and retained the funds for possible repayment to the Government until he received a reasonable explanation for the payment. Had he requested such an explanation, he would have been informed that he had incurred a debt, but was entitled to payment of IDP for the same days he was erroneously paid PHD. Paragraph 030402(F)(2) of Volume 8, Chapter 3, DoDFMR, states that an employee may not receive IDP and PHD that would duplicate political violence credit. Nor may an employee receive IDP and DPA at the same time. DFAS believed that the employee should have been aware that the retroactive payment of the PHD was in error because of his position, and the payment of the IDP was only possible because he was not entitled to the retroactive payment of PHD.

Because this Office waived the PHD overpayment which the employee was not entitled to in the amount of \$2,230.40, it is not against equity and good conscience, or contrary to the best interest of the United States, since at the time he received it he was indebted, to deny waiver of the \$306.00 of IDP. Additionally, the employee acknowledges that he was aware of the erroneous payment as of May 18, 2011, when he received notification of the indebtedness from DFAS Human Resources Center and another notification from DFAS Civilian Pay on June 5, 2011.¹

Conclusion

The employee's request for reconsideration is denied and the appeal decision of January 23, 2012 is sustained. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

¹ We note that the record contains a May 24, 2011, memorandum detailing the policy misinterpretation of the DSSR from DFAS Human Resources Center, Subject: Notification of DFAS Civilian Payroll Audit. DFAS has advised this Office that the employee received this memorandum.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

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Gregg A. Cervi
Member, Claims Appeals Board

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