

KEYWORDS: Waiver of Indebtedness

DIGEST: When an employee is 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 retain them for eventual repayment to the government.

CASENO: 2012-WV-060101.2

DATE: 08/21/2012

DATE: August 21, 2012

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In Re: )  
          [REDACTED] ) Claims Case No. 2012-WV-060101.2  
                                  )  
Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

When an employee is 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 retain them for eventual repayment to the government.

**DECISION**

An employee of the US Naval Facilities Command (NAVFAC) requests reconsideration of the June 23, 2012, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-060101. In that decision, this Office denied waiver of the overpayment in the amount of \$8,828.76.

**Background**

The record shows that the employee sustained a job-related injury on March 6, 2010. He requested, and was granted, 45 days continuation of pay (COP), and he continued to receive

salary payments. The employee was approved for a Office of Workmen's Compensation Program (OWCP) claim. Since the employee was granted 45 days COP, he should have been placed on leave without pay (LWOP) status on April 21, 2010. After that time, if his disability continued beyond 45 days, he would receive OWCP compensation for lost wages. However, due to an administrative error, the employee's records were not coded correctly to place him in LWOP status. On July 2, 2010, the employee properly received OWCP payments totaling \$7,828.42 for the period April 21, 2010, through June 11, 2010. However, the employee also received salary payments for the same period in the amount of \$10,950.40. Since he was only entitled to \$2,121.64 in salary for that period, he became indebted to the government in the amount of \$8,828.76.

The employee stated that he was unaware he was being overpaid, although he stated that he did become aware of the error the first part of June 2010. He stated that he spoke to his supervisor, and was advised, "upon my return, that all would be taken care of by a corrected timecard." The adjudicator determined that there was no evidence in the record that the employee questioned his pay officials, or was advised that he could retain the dual compensation. Additionally, the adjudicator determined that the employee should have been aware of the overpayment due to the receipt of his Leave and Earnings Statements (LES). Finally, the employee argued that he was in pain from a severe back injury and heavily medicated. The adjudicator determined that there was no evidence in the record that his medical condition precluded him from monitoring his pay or managing his financial affairs.

In his request for reconsideration, the employee provides a statement from his physician that he was under his care for the period of time in question for a back injury, and lists two medications that were prescribed for the employee during that time.

### **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 June 2010 that the overpayment was in error. The employee states he advised his supervisor of the overpayment, but as noted there is no evidence in the record to support this contention. The employee states that he was not aware of the overpayment initially. However, the employee admits that he received LES during the period of overpayment. When asked in Block No.17.a., on his *Waiver/Remission of Indebtedness Application*, DD Form 2789, dated January 11, 2011, if he had received LES(s), he checked “yes”. Our decisions and those of the Comptroller General stress the importance of an employee’s monitoring of his 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 Board finds no indication of fraud, misrepresentation, or lack of good faith on the part of the employee. However, the Board is unable to say that the employee is entirely without fault. The standard we employ to determine fault is that of a reasonable person: if such a person knows or reasonably should know that he is receiving money to which he 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 employee. It merely indicates that he is not entirely without some responsibility for any resulting overpayment and that therefore the equitable remedy of waiver is not available to him.

The employee knew or should have known that he was receiving money to which he was not entitled. Moreover, the employee did not present any compelling new evidence. The statement of the employee’s physician is that he treated the employee for the injury and prescribed medication. It does not indicate that that the employee’s medical condition precluded him from monitoring his pay or managing his financial affairs. Therefore, it would not be against equity and good conscience to deny waiver of the erroneous overpayment in the amount of \$8,828.76. *See* DOHA Claims Case No. 09080701 (August 12, 2009).

### **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.

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Jean E. Smallin  
Chairman, Claims Appeals Board

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Catherine M. Engstrom  
Member, Claims Appeals Board

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Natalie Lewis Bley  
Member, Claims Appeals Board

