

KEYWORDS: waiver of indebtedness

DIGEST: Waiver is not appropriate when an employee knows or should know that he is receiving payments in excess of his authorization.

CASENO: 2012-WV-052402.2

DATE: 8/23/2012

DATE: August 23, 2012

_____)
In Re:)
 [REDACTED]) Claims Case No. 2012-WV-052402.2
)
Claimant _____)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Waiver is not appropriate when an employee knows or should know that he is receiving payments in excess of his authorization.

DECISION

An employee of the U.S. Army requests reconsideration of the Defense Office of Hearings and Appeals (DOHA) decision in DOHA Claim No. 2012-WV-052402, dated July 19, 2012, which granted waiver in the amount of \$2,438.26, and denied waiver in the amount of \$1,731.74.

Background

On March 24, 2010, the employee was issued Temporary Change of Station (TCS) travel orders with a report date of August 2, 2010. The orders authorized him five days of fixed Temporary Quarters Subsistence Expense (TQSE) in the amount of \$695.00, which he received on July 23, 2010. The employee's orders indicated that an extension of TQSE could be granted,

but not to exceed 30 days. On August 6, 2010, the employee's orders were amended granting him an additional 25 days of fixed TQSE in the amount of \$3,475.00. Due to an administrative error, on August 25, 2010, the employee received a payment of \$4,170.00, which represented 30 days of TQSE. As a result, the employee received 35 days of TQSE compensation totaling \$4,865.00 (\$695.00 + \$4,170.00). However, it was later determined that the amended orders dated August 6, 2010, which granted the employee an extension of fixed TQSE were erroneous.¹ Therefore, it was determined that the employee was only entitled to receive fixed TQSE for five days in the amount of \$695.00. As a result, the employee was overpaid \$4,170.00 (\$4,865.00 - \$695.00).

In the decision, the DOHA adjudicator waived \$2,438.26 of the erroneous TQSE payments because the employee provided documentation that he used this amount for its intended purpose. However, the adjudicator denied that remaining \$1,731.74 because there was no indication in the record that he used this amount for its intended purpose.

In his reconsideration request, the employee questions why he is liable for \$1,731.74. He states that his travel voucher clearly reflects that the money he received was for an authorized fixed housing hunting trip. However, he states that he only received \$468.08 of the \$695.00, because \$226.92 was deducted for taxes. He further states that although he was to receive \$4,170.00 on August 25, 2010, for fixed TQSE for 30 days, he only received \$2,808.49, because \$1,361.51 was deducted for taxes. He also argues that he was entitled to receive 30 days of fixed TQSE because he states that a fixed house hunting trip and fixed TQSE are two separate entitlements. In addition, he states that the adjudicator erred in the appeal decision when she treated his fixed claim as an actual TQSE expense. He states that his orders reflect that the intent of the fixed TQSE was so that no receipts were needed. He encloses his personal bank account statement reflecting he used an additional \$928.18 of the TQSE payments for their intended purpose. He further states that he spent an additional \$200.00 in cash, but he cannot substantiate it with documentation.

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive the government's claims 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 interest of the United States, provided there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. Waiver is usually not appropriate if the employee knew or should have known that he was receiving payments in excess of those authorized. The employee does not acquire title to the excess payments merely because the

¹After coordination with the Per Diem, Travel and Transportation Allowance Committee (PDTATAC) (a joint DoD committee responsible for writing the travel regulations), the Defense Finance and Accounting Service (DFAS) determined that under paragraph C5384-A of the Joint Travel Regulations (JTR), once orders are executed, the number of days of fixed TQSE cannot be changed.

government made an administrative error, and has the duty to return the excess amount when asked to do so. *See* DOHA Claims Case No. 98102706 (November 25, 1998).

When DFAS and the DOHA adjudicator considered the employee's waiver request, they focused on the fact that the employee was issued amended orders erroneously authorizing him an additional 25 days of TQSE. Under such circumstances, waiver may be appropriate for the amount the employee expends in reliance on those improper orders.² That was DFAS's basis for their recommendation for partial waiver which our adjudicator accepted. However, it is our view that the employee could not have reasonably relied on the improper orders. As a general rule, we will not disturb any amount already waived by a DOHA adjudicator, but we see no reason to waive anything further in this case. We note that the employee's original orders reflected that he was not to be granted more than 30 days of fixed TQSE. On the amended orders issued on August 6, 2010, in the remarks section, it is specifically noted: "An additional 25 days of TQSE is granted. No Receipts required. This brings total TQSE to 30 days. No additional extensions can be granted. Increase of \$3,475." Therefore, when the employee received payment on August 25, 2010 for 30 days of fixed TQSE in the gross amount of \$4,170.00, he should have at least questioned his entitlement. He knew he was only authorized 25 more days of TQSE in the amount of \$3,475.00. The employee therefore had information as to the limitation of receipt of any further TQSE. The employee did not acquire title to the money he received and is obligated to return it. Where a reasonable person should be aware that there was an overpayment, waiver is not appropriate. *See* DOHA Claims Case No. 07080701 (August 21, 2007), DOHA Claims Case No. 01081402 (September 18, 2001) and DOHA Claims Case No. 98102706, *supra*.

As for the employee's concern that he did not receive the total amount he is being held liable for because of deductions, we have consistently held that the amount of the employee's debt equals the gross amount of the payment. *See* DOHA Claims Case No. 97050502 (July 23, 1997). We note that both of the employee's travel vouchers clearly listed his entitlements (which included the gross payments of his TQSE, per diem payments and other reimbursable expenses) and the deductions (which included amounts deducted for a partial payment, a travel advance and a government charge card payment.) If the employee has further questions about the amounts he received for TQSE, he should contact DFAS.

Finally, the establishment of a debt amount is a matter primarily for administrative determination, and our Office will ordinarily not question a determination in the absence of clear error.³ DOHA's authority in this matter pertains only to the availability of the equitable remedy

²In this case, the DOHA adjudicator looked at whether the erroneously paid TQSE was used for its intended purpose, *i.e.*, whether it was used to offset the expenses of lodging, food, and other necessities incurred while an employee and/or dependent occupied temporary lodging incident to a change of station.

³In addition, we note that in this case, DFAS consulted with the PDTATAC to reach its determination that the additional TQSE was not authorized under the JTR. The PDTATAC is the agency

of waiver. Waiver consideration at the appellate level in this Office generally does not include an adjudication of the validity of the debt. Moreover, our Office has no authority to adjudicate claims involving civilian employees' travel, transportation and relocation allowances. *See* 31 U.S.C. § 3702(a)(3). Those claims must be submitted through DFAS to the Civilian Board of Contract Appeals (CBCA). *See* <http://www.cbca.gsa.gov>.

Conclusion

The employee's request for relief is denied, and we affirm the July 19, 2012, decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense concerning the employee's request for waiver under 5 U.S.C. § 5584.

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

with the responsibility to administer the JTR. In this situation, great deference must be given to the regulation's interpretation by the agency which administers it, unless plainly erroneous or inconsistent with the words of the regulation. *See* DOHA Claims Case No. 99051701 (July 28, 1999).