

KEYWORDS: Waiver of Indebtedness

DIGEST: Due to an administrative error, an employee’s salary was miscalculated, causing him to be overpaid. He was unaware he was being overpaid until he was notified in October 2011. Under 5 U.S.C. § 5584, the amounts he was overpaid before notification may be waived. However, the amounts he received after notification may not be waived because he did not acquire title to the excess amounts and has a duty to return them to the government.

CASENO: 2012-WV-060506.2

DATE: 11/27/2012

DATE: November 27, 2012

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In Re:	)	
[REDACTED]	)	Claims Case No. 2012-WV-060506.2
	)	
Claimant	)	

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Due to an administrative error, an employee’s salary was miscalculated, causing him to be overpaid. He was unaware he was being overpaid until he was notified in October 2011. Under 5 U.S.C. § 5584, the amounts he was overpaid before notification may be waived. However, the amounts he received after notification may not be waived because he did not acquire title to the excess amounts and has a duty to return them to the government.

**DECISION**

An employee requests reconsideration of the October 26, 2012, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-060506. In that decision, DOHA followed a recommendation of the Defense Finance and Accounting Service (DFAS), and waived \$10,536.37 of the \$18,264.79 that the employee owed the government due to the overpayment of salary, but denied waiver of the \$7,728.42 balance of the indebtedness.

## Background

Effective May 22, 2011, the employee, an AD-07, step 13, with a salary of \$96,416.00 per annum, was reassigned to a GS-07, step 10, with a salary of \$54,875.00 per annum. Also effective May 22, 2011, the employee was erroneously granted retention pay, and his salary was changed to \$82,313.00 per annum. Since the employee was not entitled to pay retention, his salary should have remained at \$54,875.00. Due to this administrative error, the employee's salary and night differential pay (ND) were miscalculated during the period May 22, 2011, through January 14, 2012, causing an overpayment of \$17,940.31.

On November 21, 2011, a *Notification of Personnel Action*, SF-50, was issued cancelling the employee's reassignment, effective May 22, 2011. As a result, due to an administrative error, the employee was erroneously issued a retroactive payment in the amount of \$324.48, during the pay period ending (PPE) December 3, 2011, which represented basic salary for the PPE June 4, 2011. Therefore, the employee was overpaid \$18,264.79 (\$17,940.31 + \$324.48).

The DOHA adjudicator concluded that the employee acted in good faith in accepting the portion of the overpayment which occurred during the period May 22, 2011, through October 8, 2011, and that all conditions necessary for waiver of this portion of the claim have been met. She further concluded that since the employee became aware of the overpayment on October 20, 2011,<sup>1</sup> it was not against equity and good conscience to deny waiver of the portion of the overpayment she received during the period October 9, 2011, through January 14, 2012.

In his request for reconsideration, the employee questions the validity of the debt. He asserts that he is entitled to the salary of \$96,416.00. He states that the DOHA adjudicator was not aware of certain salient facts. He states that after suffering from a medical condition, Human Resources contacted him and informed him that he should apply for another position but still retain the same salary of \$96,416.00 per annum. He states that after he accepted the position, he was told there was an error in his salary, and his salary should have been set at \$81,267.00 per annum. He received this salary from May 2011 through October 2011. He states that he and others similarly situated were then called into a meeting to discuss "pay setting errors." In the meeting, he was told by pay officials that an error had been made, and he was not authorized to receive his agreed upon salary. He states that he was then reduced to a GS 7, step 10, equivalent to \$54,875.00 per annum. He states that he was told he would have to pay back any money overpaid to him and that the agency would assist him in applying for waiver of the indebtedness. He cites a Merit Systems Protection Board (MSPB) case in support of his claim that he was entitled to the retained salary of \$96,416.00, because he applied for and accepted the position at the agreed salary and the agency cannot then reduce his salary by claiming that he voluntarily applied for the position. In such a case, he states that the employee's decision is deemed involuntary. The employee raises other concerns that are beyond our authority in this matter regarding his agency's treatment of him. The employee also argues that the remaining balance of \$7,728.42 should be waived because he had a reasonable belief to be suspicious of anything

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<sup>1</sup> On October 20, 2011, the employee's Human Resources Directorate issued him a memorandum which notified him that his pay was set improperly and that he was overpaid. On his *Waiver/Remission of Indebtedness Application*, DD Form 2789, the employee notes October 20, 2011, as the date he first became aware of the erroneous payment.

Human Resources or DFAS says, especially since they had already admitted to pay setting errors and did not correct his salary in an expeditious manner. In fact, he states that he was told he was being overpaid in July 2011 but continued to be overpaid until February 2012.

### **Discussion**

Under 5 U.S.C. § 5584, we have the authority to waive collection of erroneous payments of salary an employee received if collection would be against equity and good conscience and not in the best interests of the United States. This statute is implemented within the Department of Defense under Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006). The Standards for Waiver Determinations are found at Enclosure 4 of this Instruction. In relevant part, generally, persons who erroneously receive a payment from the government acquire no right to it and are bound in equity and good conscience to make restitution, no matter how careless the act of the government may have been. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. Waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant.

A waiver is usually not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. In such instances, the recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government. *See* Instruction E4.1.4.

In the present case, the employee acknowledges that he was notified of the overpayment on October 20, 2011, by memorandum from Human Resources.<sup>2</sup> Waiver is inappropriate if the employee is aware he is being overpaid when he receives the payment. *See* DOHA Claims Case No. 2012-WV-070306.2 (September 17, 2012) and DOHA Claims Case No. 2011-WV-030802.2 (August 24, 2011). Once the employee was notified on October 20, 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-030802.2, *supra*.

Our decision under 5 U.S.C. § 5584 does not preclude the employee from addressing matters he raised in his reconsideration request to the proper authorities. This Office has no authority to determine if the personnel actions involved with the employee's pay setting were appropriate or unjust. The MSPB case cited by the employee has no precedential value on our decision under the waiver statute. If the employee wishes to contest the validity of the debt by disputing it and proving his entitlement, he should contact his agency and DFAS. Generally, an appeal of a decision by his agency or DFAS on his entitlement would be directed to the Office of Personnel Management (OPM) under 31 U.S.C. § 3702(a)(2).

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<sup>2</sup> Although in his reconsideration request, the employee states that he was told he was being overpaid in July 2011, as a general rule, we will not disturb any amount already waived by a DOHA adjudicator.

### **Conclusion**

The employee's request for relief is denied, and we affirm the October 26, 2012, decision to deny waiver in the amount of \$7,728.42. In accordance with ¶ E8.15 of the Instruction, 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

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Jean E. Smallin  
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

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Natalie Lewis Bley  
Member, Claims Appeals Board