

KEYWORDS: Waiver of Indebtedness

DIGEST: The U.S. Air Force (AF) erroneously calculated a Post-1956 military service deposit (MSD) of an employee in 2003 and erroneously informed him that his deposit had been paid in full. The error was not discovered until 2011. The member's resulting debt may not be considered for waiver under 5 U.S.C. § 5584 because the amount he owes for his MSD did not arise from an erroneous payment of pay or allowances.

CASENO: 2012-WV-091802.2

DATE: 10/18/2012

DATE: October 18, 2012

)	
In Re:)	
[REDACTED])	
)	Claims Case No.2012-WV-091802.2
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

The U.S. Air Force (AF) erroneously calculated a Post-1956 military service deposit (MSD) of an employee in 2003 and erroneously informed him that his deposit had been paid in full. The error was not discovered until 2011. The member's resulting debt may not be considered for waiver under 5 U.S.C. § 5584 because the amount he owes for his MSD did not arise from an erroneous payment of pay or allowances.

DECISION

An employee of the AF requests reconsideration of the September 24, 2012, appeal

decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-091802. In that decision, DOHA determined that the government's \$13,974.82 claim against him could not be considered for waiver.

Background

From September 27, 1974, through August 8, 1982, the employee was an active duty (AD) member of the AF. On October 1, 1982, the employee was appointed as a civilian AF employee. In 1986 the employee elected to change his retirement plan from the Civil Service Retirement System (CSRS) to the Federal Employees Retirement System (FERS). In 2003 the employee applied to the AF for a MSD to his retirement account for his period of AD in order to receive credit for his AD service toward his civilian retirement annuity. The AF calculated the employee's MSD amount to be \$4,117.26, based on his military wages for his period of AD service at the 3 percent contribution rate for employees covered by FERS.¹ The AF notified the employee of the deposit required, and he paid it through payroll deductions. He completed the payments on March 18, 2006.² In 2011 the employee requested an annuity computation from the AF. At that time, the AF discovered that the employee had actually been covered by CSRS rather than the FERS for the military service period involved. Therefore, the AF realized that it had erroneously calculated the employee's deposit in 2003. The AF recalculated the employee's MSD at the higher 7 percent contribution rate applicable to employees covered under the CSRS plus interest. On January 17, 2012, the DFAS notified the employee that an additional MSD of \$13,974.82 was required in order to receive credit for the period of AD requested.³

In the appeal decision, the DOHA adjudicator explained that under the waiver statute, there was no authority to consider the additional amount due on his MSD in order to buy back his AD military service for creditable service for his civilian retirement. Although the AF committed error in its original calculation of the MSD amount, the adjudicator explained that

¹Specifically, the employee was advised that the amount of his MSD, if paid prior to his interest accrual date, was \$3,918.56.

²The record reflects that the employee made a payment of \$2,000.00 on March 5, 2005; a payment of \$1,000.00 on June 11, 2005; and a payment of \$1,117.26 on March 18, 2006.

³DFAS explained to the employee that his estimated military earnings from September 27, 1974, to August 8, 1982, were \$55,134.00. However, because CSRS MSDs are multiplied by 7 percent rather than 3 percent, the deposit amount was \$3,859.00. The total interest on this amount was \$14,233.12. Since the employee had already paid \$4,117.26, DFAS calculated the total remaining amount owed as approximately \$13,974.82.

under 5 U.S.C. § 5584, we have the authority to waive claims of the United States only if they arise from erroneous payments of pay and allowances. In this case, there is no indication that the employee received an erroneous payment of pay and allowances.

In his request for reconsideration, the employee takes issue with the following statement used by the DOHA adjudicator: “We have consistently held that the United States is not liable for the erroneous actions of its officers, agents, or employees even though committed in the performance of their official duties.” He states that this statement means that anyone who works for the United States (military or civilian) can make a mistake and nothing will be done to rectify it. He states that it is unfair for the government to overlook an error caused by an incompetent employee and not take any action against that employee. He states that the appeal decision protects the employee who made the error, and not him. He argues he had no control over what occurred. As an alternative, he suggests that the government share responsibility and pay 50 percent of the amount he owes. He would pay the other 50 percent.

Discussion

The Post-1956 MSD is a voluntary contribution made by an employee to the Office of Personnel Management (OPM), through the employee’s agency, in order to receive retirement credit for the periods of military service. The deposit must be made before the employee retires. Otherwise, OPM will not grant credit for the military service towards the employee’s civilian retirement annuity.⁴ Under 5 C.F.R. § 831.2106, “if interest is applicable, it shall be computed in accordance with instructions published by OPM.” Section 23A3.1-5K of Chapter 23 of the CSRS and FERS Handbook provides:

K. Agency Payment of Interest

1. Interest Charges Must Be Paid

There is **no** provision in law or regulation for the waiver of interest charged on military deposit accounts. It is OPM policy that if a remittance is not timely, interest must be charged on the deposit (see CFR 831.105). Agencies should advise employees of this policy so they can take the necessary steps to make timely payments if they want to avoid the additional interest charges.

2. Agency Payment for the Employee

⁴The statutes involved are 5 U.S.C. §§ 8332, 8334, 8411 and 8422. The implementing regulations of the OPM are found in 5 C.F.R. §§ 831.2101 to 831.2107 (for those positions covered by the CSRS). Further OPM instructions can be found under Chapter 23 of the CSRS and FERS Handbook (April 1998).

If the agency determines that its errors caused the employee to be liable for additional interest, and the agency has authorization to spend monies for this purpose, it may pay, on behalf of the employee, the interest charges caused by its errors.

Our authority in this case is limited to a consideration of whether the employee's debt may be waived under 5 U.S.C. § 5584.⁵ Under 5 U.S.C. § 5584, we have the authority to waive claims of the United States only if they arise from erroneous payments of pay and allowances, and only if collection would be against equity and good conscience and not in the best interest of the United States.

In this case, the AF erroneously calculated the employee's deposit in 2003, and recalculated the employee's MSD at the higher 7 percent contribution rate when the error was discovered in 2011. The AF notified the employee by email on June 7, 2011, about the error in calculation of his MSD. He was advised that he could request another MSD package be processed for the additional amount owed, or if he did not want to make the additional MSD, then once he retired, it would be considered an incomplete deposit and would be refunded to him by OPM. The record reflects that the employee requested another MSD package to be processed, thereby obligating him to pay the additional MSD applicable to employees covered under the CSRS. As explained in the appeal decision, the employee's obligation to pay the additional money to buy back his military service is not the result of the erroneous receipt of pay and allowances, and therefore, we have no authority to consider it for waiver under 5 U.S.C. § 5584. In addition, we note that the Comptroller General decision cited by the adjudicator held that since the principal and interest of MSD accounts are voluntary contributions, they may not be considered as "erroneous payments," subject to waiver under 5 U.S.C. § 5584. *See* B-270151.3, n.6, Jan. 16, 1996.

Although our review is limited to our authority under 5 U.S.C. § 5584, we do note that on March 10, 2012, the AF denied the employee's request to waive the additional interest payments that resulted from the agency's error made while processing the employee's MSD package. In denying the employee's request for waiver, the AF cited the authority under Chapter 23 of the CSRS and FERS Handbook. We further note that the Comptroller General has held that there is no statutory authority that would allow an agency to expend its appropriated funds on behalf of the employee by paying the interest due on his retirement deposit. *See* B-232231, Feb. 23, 1989. In B-232231, the Comptroller General noted that there is no agency obligation under 5 U.S.C. § 8334(j) regarding post-1956 military service and that, once the employee decides to participate, the employee must make the required deposit plus any applicable interest in order to

⁵We note that after the employee was notified by the AF of the error in calculation of his MSD, he requested another MSD package to be processed, thereby obligating him to pay the additional MSD.

receive credit for the military service. *See also* B-230854, Sept. 1, 1988.

Finally, even if we were able to consider the debt under 5 U.S.C. § 5584, there is no basis for apportioning fault under the waiver statute. An employee derives no entitlement from an administrative error made by the government. *See* DOHA Claims Case No. 2011-WV-050304.2 (November 29, 2011) and DOHA Claims Case No. 09010501 (January 8, 2009).

Conclusion

The employee's request for relief is denied, and we affirm the September 24, 2012, appeal decision. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense under the waiver statute, 5 U.S.C. § 5584.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signd: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board

