

KEYWORDS: Waiver of Indebtedness

DIGEST: When an employee is aware or should be 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-110208.2

DATE: 12/13/2012

DATE: December 13, 2012

In Re:)	
[REDACTED])	
Claimant)	Claims Case No. 2012-WV-110208.2
)	
)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When an employee is aware or should be 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

A retired employee of the Department of Defense Education Activity (DoDEA) requests reconsideration of the November 9, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-110208.

Background

The employee was employed by DoDEA overseas. For the school year (SY) 2005/2006, the employee was paid over 26 pay periods. For the SY 2005/2006, his pay year started August 1, 2005, and ended July 31, 2006. In preparation for his retirement on July 31, 2006, the employee submitted a *Foreign Allowances Application, Grant and Report*, Standard Form (SF)

1190, on May 19, 2006, requesting that his living quarters allowances (LQA) be terminated effective June 15, 2006. However, due to an administrative error, the employee erroneously received LQA in the amount of \$1,848.16. The LQA payments should have terminated June 15, 2006, but continued through July 8, 2006.

Effective July 31, 2006, the employee retired. Since the employee retired at the end of his pay year, but in the middle of the pay period ending (PPE) August 5, 2006, he was only entitled to receive regular salary for the period July 23, 2006, through July 31, 2006, in the amount of \$1,037.70. However, due to an administrative error, in addition to the \$1,037.70, the employee erroneously received regular pay after his retirement in the amount of \$711.20¹ for the period August 1, 2006, through August 5, 2006, in the PPE August 5, 2006.² As a result, he was overpaid \$2,559.36 (\$1,848.16 + \$711.20).³

In the employee's original waiver request, he states that he was assured by his local servicing agency and DoDEA Headquarters prior to leaving his duty station that his pay was correctly adjusted. He had previously elected that his pay be spread over a 12-month pay schedule, instead of a 10-month pay schedule. Although he acknowledges receiving LES during his normal course of employment mailed to him by military postal service, he states that he did not receive any account statements after his retirement. He states that he changed his permanent address after purchasing a new residence. In his reconsideration request of the DOHA appeal decision, he requests copies of the documentation the attorney examiner reviewed to make her determination. He states that it took five years for the Defense Finance and Accounting Service (DFAS) to notify him that he was indebted. He states that after he filed his waiver request, it took another year for any action to be taken. He points out that the overpayments in all the decisions cited in the appeal decision were discovered within one or two years of the occurrence. He further states that the overpayments occurred over several pay periods in 2006 and were not large enough for him to have noticed while he traveled from overseas to the United States in July 2006.

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive collection 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 interests of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. The fact that the debt arose due to administrative error does not entitle an

¹We note that the gross amount of the employee's debt for overpayment of regular pay is \$711.20. DFAS has advised the employee that \$199.53 has been offset from this amount, reducing it to the net amount of \$511.67. However, we will consider the gross amount of the debt for waiver.

²We note that the record reflects that the employee received regular pay in the gross amount of \$1,748.90 (\$1,037.70 + \$711.20) in the PPE August 5, 2006. However, a debt was established against the employee's account for an overpayment of post allowance in the amount of \$153.66, erroneously paid to the employee during the PPE June 24, 2006. This amount was collected during the PPE August 5, 2006, reducing the employee's regular pay to \$1,595.24 (\$1,748.90 - \$153.66), as reflected on his leave and earnings statements (LES).

³The DoDEA administrative report and DOHA appeal decision incorrectly reflect the debt as \$2,559.46. DoDEA has verified the amount of the debt to be \$2,559.36.

employee to waiver or relieve him of the responsibility to verify the correctness of the payments he receives. See Department of Defense Instruction 1340.23 (Instruction) ¶ E4.1.3. Waiver 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 the funds for eventual repayment, even if the government fails to act after such notification. See Instruction ¶ E4.1.4. Under circumstances in which an employee should have been aware of an error, we have held that when an employee has records which, if reviewed, would indicate an overpayment, and the employee fails to review such documentation for accuracy or otherwise fails to take corrective action, he is not without fault and waiver will be denied. See DOHA Claims Case No. 2011-WV-021401.2 (July 21, 2011); DOHA Claims Case No. 02030503 (March 14, 2002); and DOHA Claims Case No. 01110112 (November 29, 2001). In addition, an employee has a duty to monitor his bank accounts, verify bank statements, and question discrepancies. See DOHA Claims Case No. 07103109 (November 15, 2007); and DOHA Claims Case No. 99111916 (December 8, 1999), *aff'd* by the Deputy General Counsel (Fiscal) on December 12, 2000. The fact that an employee has pay sent directly to his bank account does not relieve him of the responsibility of verifying his statements and questioning any discrepancies.

In this case, the record contains a copy of the SF 1190 submitted by the employee to terminate his LQA. We note that the employee acknowledges receipt of LES while he was an employee of DoDEA. Although we do not have copies of the employee's LES, we were provided with the Master Pay Histories for the period May 13, 2006, through August 19, 2006, which contain the same information that would have appeared on the employee's LES. In the two pay periods prior to the termination of his LQA entitlement, his LES reflect he was receiving over \$1,000.00 a pay period in LQA. Specifically, in the PPE May 27, 2006, the employee received \$1,105.58 in LQA. In the PPE June 10, 2006, he received \$1,095.78 in LQA. Since his LQA terminated on June 15, 2006, he should have expected a significant decrease in the amount of LQA he received in the PPE June 24, 2006. However, in the PPE June 24, 2006, the employee received \$1,082.48 in LQA. In the PPE July 8, 2006, when the employee should have expected no payment for LQA, he received \$1,075.06 in LQA. The employee had information at his disposal that indicated he was being overpaid. He had a duty to bring the matter to the attention of the proper officials. Although he states that he was assured by pay officials prior to leaving his duty station that he was being paid correctly, he should have specifically raised the matter with pay officials after reviewing his LES for the PPE June 24, 2006.

As for the portion of the debt resulting from the overpayment of regular pay during the PPE August 5, 2006, we find that under the circumstances, the employee should have known he was overpaid. As previously mentioned, the employee was paid over 26 pay periods, with his pay year starting on August 1, 2005, and ending on July 31, 2006. Although the employee states that he did not receive LES after he retired on July 31, 2006, we note that in the PPE July 22, 2006, the employee received pay in the gross amount of \$1,578.04, and the net amount of \$789.71. Therefore, when he retired on July 31, 2006, at the end of the pay year and in the middle of a pay period, he should have expected a decrease in pay for the PPE August 5, 2006. However, we note that in the PPE August 5, 2006, he received pay in the gross amount of \$1,595.24, and the net amount of \$800.81. Although he may not have received his final LES, he had a duty to monitor his bank account, verify his statements and question discrepancies. Upon receipt of questionable deposits, the employee had a duty to question his entitlement to them and

set them aside in the event repayment was necessary. *See* DOHA Claims Case No. 99111916, *supra*.

The employee suggests that waiver should be granted because it took DFAS five years to notify him of the overpayment. However, there is no basis for granting waiver of the overpayment under 5 U.S.C. § 5584, because of the length of time it takes for DFAS to notify an employee.⁴ We do note that an employee must request waiver within three years after the overpayment is discovered by the government. *See* 5 U.S.C. § 5584(B)(3). Although DFAS and DoDEA were unable to ascertain the exact date of discovery, the record before us indicates that the employee was notified by DFAS on March 26, 2010, of the overpayment of LQA.⁵ Presumably, the debt was discovered by the government prior to the date of the notification of indebtedness. However, since we are unsure of the date of discovery, we find the employee's request for waiver to be timely.

Additionally, while the employee may have relied on the information given to him by his local servicing agency and DoDEA Headquarters, he has not submitted any corroborating, written evidence of his version of events. As set forth under DoD Instruction 1340.23, DoDEA is the component concerned in this case and submitted the written record to us. Therefore, the employee should make his request for documentation to DoDEA.

Conclusion

The employee's request for relief is denied, and we affirm the November 9, 2012, appeal decision to deny waiver in the amount of \$2,559.36. In accordance with DoD Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom

⁴Prior to June 18, 2008, an agency was prohibited from initiating salary offset to collect a debt more than 10 years after the government's right to collect the debt first accrued. *See* Pub. L. No. 110-234, Title XIV, § 14219(a), 122 Stat. 1483 (2008), and Pub. L. No. 110-246, Title XIV, § 14219(a), 122 Stat. 1664 (2008), amending 31 U.S.C. § 3716(e), which formerly read that this section does not apply to a claim that has been outstanding for more than 10 years.

⁵Although the employee contends that he was not notified of the overpayment until March 12, 2011, both debt notification letters were sent to the same address. We further note that this address is the same as the employee's current address. In addition, the *Notification of Personnel Action* (SF-50) issued on August 9, 2006, that granted the employee's retirement effective July 31, 2006, lists the employee's current address.

Member, Claims Appeals Board

Signed: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board