

KEYWORD: General; 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 hold them for eventual repayment.

CASENO: 02030501

DATE: 04/18/2002

DATE: April 18, 2002

In Re:

[Redacted]

Claimant

Claims Case No. 02030501

CLAIMS APPEALS BOARD 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 hold them for eventual repayment.

DECISION

An employee appeals the November 29, 2001, Settlement Certificate of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 01111302, that had accepted the recommendation of the Department of Defense Education Activity (DoDEA) to waive \$6,530 of erroneous overpayments of pay and allowances paid to the employee, but deny waiver of \$3,437.58 in erroneous overpayments. The employee requests waiver of the entire amount of the erroneous overpayment, \$9,967.58.

Background

The administrative report of DoDEA states that on August 19, 1998, the employee, a retired service member, was appointed by Department of Defense Dependent Schools (DoDDS) to the position of Junior Reserve Officers' Training Corps (JROTC) instructor, TP-1701-BA-00, at an installation in Europe. As an instructor, the employee was entitled to receive a salary from DoDDS equivalent to the total military pay (according to his rank and length of military service) and allowances he would receive if on active duty, minus his gross retired pay. The employee also was entitled to receive the DoDDS supplement for JROTC instructors, which was not part of salary.

In accordance with DoDDS pay policy, the servicing finance office began paying JROTC instructors based on an initial estimate of military pay and entitlements. During the summer of every school year (SY) salaries of JROTC instructors were calculated based on the average allowance and foreign currency exchange rates for the period. This information was used to estimate instructor's pay for the next SY. At intervals through the SY, the estimate was reconciled with actual military entitlements and expenses, to prevent excessive overpayments to instructors. Also, each January, JROTC instructors' salaries were reviewed, and pay was adjusted, to implement the annual active-duty military cost-of-living increase. As entitlements changed during the SY, a *Notification of Personnel Action*, Standard Form 50 (SF 50), was processed and a copy was distributed to the instructor.

The SF 50 effecting the employee's appointment estimated his total compensation to be \$37,647; and beginning in the pay period ending (PPE) August 29, 1998, the employee received biweekly payments based on this amount. On March 30, 1999, a SF 50 retroactively corrected the employee's compensation to \$27,259 for the SY. Based on its review, DoDEA believes that this correction was intended to account for the employee's move into government quarters on August 22, 1998, and the consequent reduction in total annual compensation. Due to an administrative error, the employee's pay rate was not adjusted until PPE June 19, 1999. An audit of the employee's pay account indicates erroneous payment in the gross amount of \$9,967.58 between the PPEs August 29, 1998, and June 5, 1999.

In accordance with the DoDEA recommendation, DOHA's Settlement Certificate waived the portion of the indebtedness accruing prior to February 28, 1999, because the employee was a newly assigned JROTC instructor; he did not possess specialized knowledge of the pay system; and his leave and earnings statements (LES) did not itemize his entitlements. However, in accordance with the same recommendation, it denied waiver of the portion of the indebtedness accruing on and after the pay period beginning February 28, 1999, because the employee was notified on March 5, 1999, that his pay was subject to adjustment to reflect his assignment to government housing. In support of its recommendation to deny waiver of the portion beginning February 28, 1999, DoDEA provides a copy of an e-mail exchange between a named finance or personnel representative and the employee.

The exchange began on February 4, 1999, with a message from the representative to all instructors, including the employee, which requested that each instructor forward a copy of his 1999 (military) retirement statement in order to calculate 1998-1999 SY salaries. On February 5, 1999, the employee responded stating that he had already forwarded the statement and asked if he needed to provide more information. As a postscript, the employee asked about the status of another allowance (a miscellaneous allowance for \$700) he had claimed. Later that day, the representative responded confirming that she received the statement and noted that she was working on the allowance and a "TLA" (temporary lodging allowance) claim. On February 17, 1999, the representative sent an e-mail message to the employee asking him to confirm whether he had obtained permanent housing because the TLA claim covered only August 15-21, 1998. She requested a copy of his lease or a letter regarding his base housing, plus a copy of the JROTC Instructor Information Sheet. On March 4, 1999, the employee sent a follow-up inquiry asking whether the representative needed any additional documentation to process his allowance because, during the previous week, he had "forwarded a copy of the letter that put me into government housing" along with the Instructor Sheet. On March 5, 1999, the representative

responded: "I did receive the letter regarding base housing and the Instructor Sheet. When the pay adjustments are processed for this school year, your salary will be adjusted to reflect base housing." The representative also advised him that he would receive \$812 as the miscellaneous allowance, more than the \$700 he claimed, and that the TLA payment would be \$872.97.

The employee contends that he was unaware of any pay problem until the official notification of May 1, 2000, and he does not remember receiving the arch 5, 1999, e-mail.⁽¹⁾ On appeal, the employee reminds us that when he accepted government housing, the base housing office so notified DoDDS. Moreover, when he received his first pay, he had no reason to believe that LQA (living quarters allowance) was not stopped because he had nothing to compare in this confusing pay system. He also notes that on March 5, 1999, he was not advised of an overpayment, and in his January 30, 2002, letter to DoDEA, he denies any further documentation on this issue from the representative after her February 17th correspondence (which he states was on February 14th). He says that if the representative had advised him that his salary would be adjusted, she may have been mistaken because such an adjustment never happened. He contends that the overpayment occurred entirely because of administrative error, and there was no significant, unexplained increase in his pay that would have alerted him to make an inquiry.

Discussion

Under 5 U.S.C. § 5584, we may waive collection of a claim for the erroneous overpayment of pay and allowances against an employee if collection would be against equity and good conscience and is 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. *See also Standards for Waiver*, 4 C.F.R. § 91.5 (1996). In the present case the erroneous salary overpayments were made as a result of administrative errors and there is no indication of fraud, misrepresentation, or lack of good faith on the employee's part. However, an employee is at least partially at fault and waiver is precluded when, in light of all of the circumstances, it is determined that he should have known that an error existed and taken steps to have it corrected. The standard we employ is whether a reasonable person should have suspected that he was receiving payments in excess of his entitlement. *See* DOHA Claims Case No. 02032201 (April 2, 2002) citing DOHA Claims Case No. 97062629 (July 17, 1997). An employee is not entitled to waiver as a matter of right merely because he was erroneously overpaid due to administrative error. *Id.*, citing DOHA Claims Case No. 02030503 (March 14, 2002); and DOHA Claims Case No. 01092001 (October 29, 2001). Moreover, when the employee suspects error, he has a duty to hold the excess payments aside for possible repayment to the government. *Id.*

In this case, DoDEA's recommendation to waive erroneous overpayments through PPE February 27, 1999, is reasonable. The employee was newly hired as a JROTC Instructor, and the compensation system was complex and somewhat unusual, with a lack of specificity in the employee's biweekly LESs.

On the other hand, DoDEA's recommendation not to waive the indebtedness accruing on or after February 28, 1999, also is reasonable. On disputed questions of fact between the claimant and the administrative office, we accept the statement provided by the administrative office in the absence of clear and convincing contrary evidence. *See* the Comptroller General's decision in 57 Comp. Gen. 415, 419 (1978). DoDEA provided us copies of messages in an e-mail exchange between the employee and the agency's representative. Our review of this exchange and the surrounding circumstances clearly support the factual conclusion reached in DoDEA's administrative report, namely, that the employee did receive the last message in the series which was the one sent by the DoDEA representative on March 5, 1999. DoDEA's version is supported by written documentation in the same form and from the same representative as

previous correspondence acknowledged by the employee. All of this correspondence appears to have been made in the regular course of business. The employee's version is based on unsupported denial. Also, as indicated above, the employee suggests that he did not receive any communication from the representative after February 1999, but DoDEA's version is more consistent with the tendency of this employee to verify that his agency did receive copies of key documents requested by it.

The direct response to the employee's March 4, 1999, e-mail request came from the same representative the next day with a message not only confirming receipt of these documents, but also delivering some bad news - "your salary will be adjusted to reflect base housing." The employee may have been focused on the money that was owed to him, but as DoDEA indicates, the reasonable inference concerning the salary adjustment was that he owed the government for the value of the housing he was living in. We agree that the representative did not advise him that he owed the government close to \$10,000 in debt, but a reasonable person in the employee's position would have requested a much fuller explanation of the representative's remark about a salary adjustment, especially if he had been under the impression that any LQA had been terminated in August 1998. At this point, he should have obtained an estimate of how much he was being overpaid for eventual return to the government.

Conclusion

We affirm the Settlement Certificate.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Christine M. Kopocis

Christine M. Kopocis

Member, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

1. The employee contends that he has asked for, but has not received, a copy of the March 5, 1999, e-mail message. We are enclosing a copy of the e-mail sequence for his information.