

March 12, 2002

In Re:

Redacted

Claimant

Claims Case No. 01122601

CLAIMS APPEALS BOARD DECISION

DIGEST

1. An arbitrator issuing an opinion in a collective bargaining agreement does not have the authority to waive a debt or make factual findings to try to influence a DOHA waiver decision under 5 U.S.C. § 5584.
2. When an employee is aware or should be aware that he is receiving payments in excess of her entitlements, she does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

DECISION

An employee of the Department of Defense Schools (DODDS) requests waiver of a \$67,675.87 overpayment for Living Quarters Allowance (LQA). Because of the legal issues involved in this case, we are directly settling this matter for administrative convenience.

Background

The record shows that a civilian employee of the DODDS in Kaiserslautern, Germany, purchased Privately Owned Quarters (POQ) in Queidersbach, Germany on October 4, 1982. As of that date, the employee became entitled to receive living quarters allowance (LQA) for a period not to exceed 10 years at any one duty station.

In October, 1988, the employee elected to purchase another POQ in Queidersbach, Germany, at the same post.⁽¹⁾ At the time the employee purchased the second POQ, she was erroneously informed that she would be eligible receive 10 years of LQA based upon the date of the purchase of the new residence.

The record further shows that in May of 1993, the employee was contacted by a representative from the Civilian Pay Office (CPO) who informed her that her LQA should have terminated in October 1992, since that was ten years from the original POQ purchase. Unfortunately, there was an administrative delay and the employee's LQA payments were not terminated until the pay period ending July 19, 1997. As a result, the employee is indebted to the U.S. Government for \$67,675.87 in LQA overpayments.

On May 7, 1998, the employee received an indebtedness letter from the 266th Finance Office, stating that she had been overpaid for LQA. On May 13, 1998, the employee requested documentation and a hearing under the Debt Collection Act. She did not receive a response to her May 13, 1998, letter and on June 11, 1998 she filed a grievance under the collective bargaining agreement between DODDS and the Federal Education Association. In her grievance, she requested that the overpayment be waived. The agency responded to her grievance with a denial.

The employee then appealed the agency's denial through third party arbitration. The arbitrator issued his Award on June 26, 2001. In his decision, he found that there was no indication of fault on the part of the employee. The findings further state that there was no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee in seeking waiver of the overpayments. The arbitrator directed that the claim be presented to us for waiver consideration under 5 U.S.C. § 5584 (1996). The Department of Defense Education Activity (DODEA) has forwarded us the application for waiver and requests we reach a determination on our jurisdiction to adjudicate this waiver, before considering the waiver application itself.

Discussion

The Comptroller General's authority under title 5, United States Code, Section § 5584 (5 U.S.C. § 5584) to consider applications by Federal employees requesting that the government waive debts resulting from the erroneous overpayments of salary and allowances was transferred to the Director of OMB under Section 103(d) of Public Law 104-316, 110 Stat. 3826, 3828-3829, Oct. 19, 1996. The OMB Director delegated this authority to the Secretary of Defense effective Dec. 17, 1996. The Defense Office of Hearings and Appeals (DOHA) now exercises the authority transferred or delegated to the Secretary of Defense through this Board, which is part of DOHA. Under 5 U.S.C. § § 5584, this Office may waive collection of overpayments of pay and allowances to an employee, when collection would be against equity and good conscience and not in the best interest of the United States. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996). However, a waiver cannot be granted if there is any indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee, or any other person having an interest in obtaining the waiver. When an employee is aware that he or she received an erroneous overpayment, the employee should be prepared to return the excess amount to the government. *See B-234731*, June 19, 1989. An employee cannot reasonably expect to retain such an overpayment, absent official notice that the payment was correct. Verbal notification is sufficient to constitute official notice. *See 68 Comp. Gen 326* (1989).

Before we address the issue of waiver, we must examine our authority in this case in light of the employee's filing of a

grievance and use of an arbitrator in this matter. In 71 Comp. Gen. 374 (1992), the Comptroller General ruled that the grievance procedure under a collective bargaining agreement was the exclusive means of resolving grievances falling within an agreement's coverage. However, in B-250978.1-O.M., April 19, 1993, the General Counsel at the General Accounting Office opined that waiver requirements do not fall within the class of claims covered by 71 Comp. Gen. 347, *supra*. The Federal Labor Relations Authority (FLRA) has recognized the Comptroller General's authority (and subsequently DOHA's authority) to promulgate waiver standards and grant waivers under 5 U.S.C. § 5584, and it has held that proposed negotiated agreements that are contrary to the statute and waiver standards are outside the duty to bargain. *See* B-250978.1 (O.M.), April 19, 1993. [\(2\)](#) While the employee did not follow the proper procedure for applying for a waiver, in this instance, we are the only body that may properly assert jurisdiction over this application for waiver under 5 U.S.C. § 5584. Therefore, we need not assume the arbitrator's findings of fact, but shall review the record *de novo*.

In the instant case, the employee states that she was unaware that the entitlement to LQA was to have stopped in October 1992. Because she was not aware that her entitlement to LQA had terminated, she accepted the overpayments from October 1992 through May 1993 in good faith. Therefore, we believe waiver of the overpayment during this time is appropriate.

However, the employee was notified in May 1993 that she was no longer entitled to receive LQA because she had exceeded her 10-year entitlement. While we recognize that the erroneous payments were due to an administrative error, the employee had no reason to believe that she was entitled to the extra LQA payments she continued to receive after May 1993. She should have set aside the excess payments for eventual repayment. *See* B-188595, June 3, 1977. [\(3\)](#) Therefore, she did not acquire title to the excess amount. *See* DOHA Claims Case No. 99071602 (September 10, 1999). Since she was aware of the overpayment, waiver of the payments made to the employee from May 1993 through the pay period ending July 19, 1997, is not proper. *Id.*

Conclusion

Accordingly, under the provisions of 5 U.S.C. § 5584, we hereby waive the government's claim for the debt incurred from October 1992 through May 1993 in the amount of \$8,435.14, and deny waiver of the amounts received from June 1993, through the pay period ending July 19, 1997 in the amount of \$59,240.73 .

/s/ _____

Michael D. Hipple

Chairman, Claims Appeals Board

/s/ _____

Jean E. Smallin

Member, Claims Appeals Board

/s/ _____

Jennifer I. Campbell

Member, Claims Appeals Board

1. The employee retained the first parcel as a rental property.
2. Although the Department of Defense is not bound by this opinion, we believe that the General Counsel's study and analysis of this issue merits consideration.
3. The waiver standards for military members under 10 U.S.C. § 2774 are the same as those for civilian employees under 5 U.S.C. § 5584.