

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: 02062401

DATE: 07/29/2002

July 29, 2002

In Re:

Redacted

Claimant

Claims Case No. 02062401

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

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 02040430, in which we waived \$2,733.75 of the government's claim, and disallowed waiver of the remaining \$1,826.39. The employee seeks waiver of the entire amount.

Background

The record shows that an employee was placed on retained grade, effective January 8, 1997. Due to an administrative error, the employee received a cost of living pay increase effective June 22, 1997, which he was not entitled to since he was in a retained grade status. On November 9, 1998, his entitlement to retained grade lapsed and he became entitled to retained pay. However, the adjustment to change the employee from retained grade to retained pay was never performed. As a result, the cost of living overpayment continued to be applied from its inception on June 22, 1997, through January 26, 2000. This resulted in an overpayment of \$25,997.19. The amount of the overpayment was reduced to \$4,560.14 because the employee was underpaid \$21,437.05 during the period November 9, 1998, through January 26, 2000, as a result of his entitlement to retained pay. The error was discovered in August 2001, and the employee was advised of the debt by a letter dated August 29, 2001. However, due to further administrative error, the overpayments continued through January 26, 2002.

In the Settlement Certificate, we waived \$2,733.35 of the employee's debt. This amount represented the portion of the overpayment that the employee received prior to being notified that he was being overpaid by the letter of August 29, 2001. We denied waiver of \$1,826.39 of the overpayment that the employee received from September 8, 2001, through January 26, 2002, because the employee was placed on notice that he had been receiving overpayments and should have monitored his leave and earning statements (LES) carefully, to be sure that the error had been corrected.

The employee now appeals the denial of the waiver of \$1,826.39 of his debt. On appeal, the employee asserts that the payments should be waived because the overpayment was a result of an administrative error and that he was not aware of the overpayments at the time they were deposited into his account.

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). It is clear that in the instant 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. *See DOHA Claims Case No. 02032201 (April 2, 2002).*

The standard we employ is whether a reasonable person should have suspected that he was receiving payments in excess of her entitlement. *See 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. *See DOHA Claims Case No. 02030503 (March 14, 2002); and DOHA Claims Case No. 01092001 (October 29, 2001).* An employee who should have known or did in fact know that a payment was erroneous has a duty to make inquiries or bring the matter to the attention of the appropriate officials. In such circumstances, collection action of the erroneous payment is neither against equity and good conscience nor contrary to the interest of the United States. *See DOHA Claims Case No. 97062629, supra.*

In this case, the employee claims that due to the number of changes to his pay status, he was not aware that he continued to be overpaid after receipt of the August 29, 2001, letter notifying him of the initial overpayment. The employee notes

that the letter notifying him of the debt was unclear as to the time period of the overpayment. The letter indicated that he had been overpaid for the pay periods ending October 7, 2000, through December 16, 2000, and April 21, 2001. While we agree that the letter notifying the employee of the debt did not clearly state the period of the overpayment, we note that the DFAS letter also advised him that his correct hourly rate was \$23.57. Therefore, we believe that a reasonable person would have noticed that his leave and earnings statement (LES) continued to show that he was being paid at a higher rate. For instance, his July 14, 2001 LES indicated that he was receiving \$26.99 per hour. He had a duty to review his LES to verify that he was being paid at the proper rate. Since the employee had information at his disposal that indicated that he was being overpaid and thus could have ended the overpayments by notifying his payroll office, he is at least partially at fault for the continuation of the overpayments. *See* DOHA Claims Case No. 01102309 (November 14, 2001) .⁽¹⁾ Therefore, he had a duty to hold the excess amounts aside for possible repayment to the government no matter how incompetently the government continued to pay him at the erroneously higher rate. *See* DOHA Claims Case No. 00053006 (August 18, 2000); DOHA Claims Case No. 98040110(July 8, 1998), *aff'd* Deputy General Counsel (Fiscal) February 14, 2001; and DOHA Claims Case No. 97062629, *supra*. Waiver is not appropriate in such a situation.

Conclusion

We affirm the Settlement Certificate.

/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. While this decision involves a waiver request from a military member under 10 U.S.C. § 2774, the same waiver standards (4 C.F.R. § 91.5(b) (1996)) also apply to civilian employees seeking waiver under 5 U.S.C. § 5584 .