

June 26, 2003

In Re:

[Redacted]

Claimant

Claims Case No. 03041512

CLAIMS APPEALS BOARD DECISION

DIGEST

1. An arbitrator issuing an award pursuant to a collective bargaining agreement does not have the authority to order the waiver of a debt or make factual findings which are binding on a DOHA waiver decision under 5 U.S.C. § 5584.
2. When an employee is aware or should be aware that she 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

Based on facts and circumstances unique to this case, the Acting Deputy General Counsel (Fiscal) remanded a request for reconsideration of DOHA Claims Case No. 01122601, dated March 12, 2002, to this Board.

Background

The record shows that a civilian employee of the Department of Defense Dependents Schools (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 to receive 10 years of LQA based upon the date of the purchase of the new residence.

The record further shows that in May 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 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 employee's 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 for erroneous LQA payments. 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)⁽²⁾ forwarded us the application for waiver and requested we reach a determination on our jurisdiction to adjudicate this waiver, before considering the waiver application itself.

In DOHA Claims Case No. 01122601, dated March 12, 2002, having determined that we had jurisdiction over this application for waiver, our Office granted waiver with respect to \$8,435.14 of the debt and denied waiver with respect to the remaining \$59,240.73 of the debt. On November 29, 2002, an Administrative Law Judge of the Federal Labor Relations Authority (FLRA) issued a decision on the employee's grievance in Case No. WA-CA-02-0174, ordering DoDEA to withdraw their written argument to our Office opposing waiver of the employee's debt. The decision also requested that we reconsider the employee's waiver application without that argument.

By letter dated April 10, 2003, DoDEA withdrew arguments previously presented to DOHA in opposition to a waiver of the employee's indebtedness and requested reconsideration of the application for waiver on the remaining record. By memorandum dated June 16, 2003, the request for reconsideration was remanded to our Office by the Acting Deputy General Counsel (Fiscal) for appropriate action.

Discussion

The first issue we examine is that of our jurisdiction over this case. The Comptroller General has previously recognized that the grievance procedure under a collective bargaining agreement is the exclusive means of resolving grievances falling within an agreement's coverage. *See* 71 Comp. Gen. 374 (1992). But waiver requirements do not come within the class of claims covered by his decision in that regard. *See* B-250978.1 O.M, April 19, 1993. The Comptroller General's authority to establish waiver standards and grant waivers under 5 U.S.C. § 5584 has been recognized by the Federal Labor Relations Authority (FLRA). That agency considers proposed negotiated agreements that are contrary to the statute and waiver standards to be outside the duty to bargain. *Id.*

The waiver of an indebtedness owing the United States is discretionary in nature.⁽³⁾ Prior to 1996, the authority under 5 U.S.C. § 5584 to waive debts resulting from the erroneous overpayment of salary and allowances to Federal employees rested with the Comptroller General. In 1996, that authority was transferred to the Director of the Office of Management and Budget (OMB) under Section 103(d) of Public Law 104-316, 110 Stat. 3826, 3828-3829, Oct. 19, 1996.⁽⁴⁾ The Secretary of Defense was in turn delegated the authority by the OMB Director effective December 17, 1996. That waiver authority now rests with this Board by virtue of delegations to DOHA by the Deputy Secretary of Defense and the Department's General Counsel.⁽⁵⁾

We are the appropriate body to assert jurisdiction over this application for waiver under 5 U.S.C. § 5584. We have reviewed the record *de novo*. This decision, like all our decisions, is based upon the underlying factual circumstances and the applicable precedents. Although we have considered this application for waiver without a recommendation from DoDEA, we note that our decisions are made independently of the arguments or recommendations of the administrative agency that has transmitted the case for adjudication.⁽⁶⁾ Additionally, we note that our Office is not bound by the arbitrator's findings of fact in the June 2001 Award or the Administrative Law Judge's findings of fact in the November 2002 Decision insofar as they relate to the issue of waiver.

Pursuant to 5 U.S.C. § 5584, we have the authority to waive the collection of erroneous payments of pay and allowances to an employee if collection would be against equity and good conscience and not in the best interest of the United States. Waiver is not appropriate if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. *See Standards for Waiver*, 4 C.F.R. § 91.5(b) (1996). The standard we employ to determine fault is whether a reasonably prudent person knew or should have known that he or she was receiving payments in excess of his or her entitlements. Our decisions indicate that waiver is not appropriate when an employee is aware that he or she is being overpaid, or had no reasonable expectation of payment in the amount received. *See* DOHA Claims Case No. 00031401 (May 10, 2000) citing DOHA Claims Case No. 99121406 (January 19, 2000). An employee is considered to be aware of an erroneous overpayment when he or she possesses information which reasonably suggests that the validity of the payment may be in question. Prior precedents have established that formal written notification is not necessary to constitute official notice--verbal notification is sufficient. *See* 68 Comp. Gen 326 (1989).⁽⁷⁾ Once an employee has received information which reasonably suggests that the validity of a payment may be in issue, he or she should be prepared to return to the government any amounts received from that time forward. *See* B-234731, June 19, 1989.

In this case, the employee stated 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, we conclude that she accepted the overpayments from October 1992 through May 1993 in good faith. Therefore, we believe waiver of the overpayment occurring during that time period is appropriate.

However, the employee was verbally advised by the CPO in May 1993 that she was no longer entitled to receive LQA because she had exceeded her 10-year entitlement.⁽⁸⁾ That advice was different from advice she had previously received from the CPO regarding her eligibility for LQA.⁽⁹⁾ We have repeatedly held that, under such circumstances, the employee has the burden of obtaining clear and thorough advice in writing from an appropriate official or continuing to press for an explanation of the discrepancy in the advice she was receiving. In the meantime, she did not acquire title to the questionable overpayments merely because the government made an administrative error, and should have held them until final determination was made that they were hers or until the government asked for repayment. *See* DOHA Claims Case No. 02122602 (January 13, 2003) citing DOHA Claims Case No. 99033117 (April 15, 1999).⁽¹⁰⁾ 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. Our reconsideration is without prejudice to the employee's ability to seek review of this decision by the Deputy General Counsel (Fiscal).

_____/s/_____
Christine M. Kopocis
Acting Chairman, Claims Appeals Board

_____/s/_____
Jean E. Smallin
Member, Claims Appeals Board

/s/

William S. Fields

Member, Claims Appeals Board

1. The employee retained the first parcel as a rental property.
2. DoDDS is a component of DoDEA.
3. Waiver is not a substantive right enforceable against the United States for money damages. *See Price v. United States* 621 F.2d 418 (Ct. Cl.1980) (Granting the government's motion to dismiss a service member's action seeking reversal of a Comptroller General's decision denying waiver of his debt for basic allowance for quarters).
4. This authority applies to the waiver of debts in excess of \$1,500.
5. *See Delegations of Decision Authorities - Waiver of Indebtedness, Advance Decision, and Claims Settlement*, dated March 5, 1999, by the Deputy Secretary of Defense and *Delegations of Decision Authorities - Waiver of Indebtedness, Advance Decision, and Claims Settlement*, dated March 17, 1999, by the General Counsel of the Department of Defense.
6. *See, e.g.*, DOHA Claims Case No. 03040701, dated April 15, 2003 (Agency recommended complete denial of waiver of a debt for an erroneous travel advance; we granted waiver in the amount of \$3,886.60); DOHA Claims Case No. 03061247, dated June 17, 2003 (Agency recommended waiver of \$900 of a debt for overpayment of basic allowance for housing; we granted waiver in the amount of \$6,902.48).
7. *See also* B-260849, Sept. 19, 1995 (A request for waiver of erroneous payments occurring prior to formal notification of error by the agency was denied where the employee had verbally heard that the rate had changed).
8. *See* Testimony of the employee before the Arbitrator, April 3, 2001, at page 117. ("And so then I went over and talked to him and that's when he said, 'You're not supposed to be getting housing for this long. Your housing was supposed to be cut off.'").
9. *Id.* ("... and the other CPO lady said we could and he said we couldn't. Who's -- you know, who's right?").
10. *See also* DOHA Claims Case No. 99012022 (March 11, 1999); DOHA Claims Case No. 03050907 (May 15, 2003); DOHA Claims Case No. 02111801 (December 2, 2002); DOHA Claims Case No. 99071602 (September 10, 1999); B-188595, June 3, 1977; B-260849, *supra*. 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.