

September 20, 2004

In Re:

[Redacted]

Claimant

Claims Case No. 04082704

CLAIMS APPEALS BOARD DECISION

DIGEST

Waiver under 5 U.S.C. § 5584 is precluded when an employee is aware or should be aware that he is receiving payments in excess of his entitlement. The employee is considered to be aware of overpayments when he has information which reasonably suggests that the payments may be questionable. In that situation, he does not acquire title to the overpayments and has a duty to hold them until his entitlement to them is established or until he is asked to repay them.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate 04051005, dated June 24, 2004, which denied in part the waiver request of a civilian employee. The employee's debt arose when he was erroneously paid locality pay.

Background

Effective August 29, 1999, the employee transferred from Zweibruecken, Germany, to Hill Air Force Base, Utah. At that time he was on pay retention and therefore was not entitled to locality pay. His pay was properly set at the time of his transfer. However, effective January 2, 2000, when his annual cost of living increase was calculated, locality pay was erroneously added to his pay. At that time, the employee received an SF-50 which erroneously stated that he was entitled to locality pay. When the error was discovered, the employee received a corrected SF-50 with an approval date of May 11, 2001. Between January 2, 2000, and May 5, 2001, the employee received erroneous payments totaling \$6,096.19. At the recommendation of the Defense Finance and Accounting Service, we waived that amount.

When the employee's annual cost of living increase was calculated in January 2002, locality pay was again erroneously included. Between January 13, 2002, and May 17, 2003, the employee received \$8,587.01 in erroneous payments. We denied waiver of that amount on the grounds that since his locality pay had been stopped as erroneous a few months earlier, he should have questioned its restoration in January 2002.

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive repayment of erroneous pay to civilian employees of the Department of Defense if repayment would be against equity and good conscience and 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 Standards for Waiver*, 4 C.F.R. § 91.5 (1996). Waiver is not appropriate if an employee knew or should have known that he was receiving payments in excess of his entitlements. *See* DOHA Claims Case No. 02032601 (May 13, 2002). An employee is considered to be aware of erroneous payments when he possesses information which reasonably suggests that the validity of the payments may be in question. *See* DOHA Claims Case No. 03072812 (July 30, 2003). When the employee has knowledge of questionable payments, he does not acquire title to the excess amounts and has a duty to hold them until their validity is established or until he is asked to repay them. *See* DOHA Claims Case No. 03072812, *supra*; and DOHA Claims Case No. 02032601, *supra*. Administrative error does not provide a basis for waiver. *Id.* *See also* DOHA Claims Case No. 02040402 (May 9, 2002).

In the case before us, with regard to locality pay, the employee's pay was correct immediately after his return from Germany. The erroneous addition of locality pay occurred at the beginning of pay year 2000, when the employee's cost-of-living increase was computed. The error was corrected on an SF-50 with an approval date of May 11, 2001. The employee's pay was again correct until the beginning of the pay year 2002, when his cost-of-living increase was computed. The employee's debt for the first period (January 2, 2000, through May 5, 2001) was properly waived because he may not have realized that he was not entitled to locality pay. However, when the locality pay was reinstated under the same circumstances, *i.e.*, at the beginning of the pay year, he should have realized that the payment of locality pay was at least questionable and should have demanded a definitive explanation of his entitlement to it. He should have held the questionable amounts until his entitlement to them was established. Under those circumstances, he did not acquire title to the excess amounts and should have held them for eventual repayment. *See* DOHA Claims Case No. 03072812, *supra*; and DOHA Claims Case No. 02032601, *supra*.

The employee states that he was confused by the starting and stopping of the locality pay and that he received incorrect advice concerning his entitlement to it. He indicates that when he questioned the absence of locality pay upon his return from Germany in August 1999, the pay was started; likewise, he states that when the pay was stopped in May 2001 and he questioned its absence, it began again. According to the record, the pay was reinstated each time at the beginning of a pay year rather than in response to the employee's questions. In particular, the timing of the reinstatement, at the beginning of the pay year, should have put the employee on notice that he might be receiving pay to which he was not entitled. As of January 2002, he should have begun putting the locality pay aside and should have been prepared to return it if asked to do so. The employee calls our attention to an e-mail dated February 28, 2003, from the Chief of Affirmative Employment in the Human Resources Office for Hill Air Force Base, stating that she had assigned someone to work on his "pay issue." While the e-mail shows that the employee was in contact with personnel authorities about his pay, it also shows that the issue had not been resolved more than 13 months after the locality pay had been reinstated. This is a further indication that the employee should have been putting aside the locality pay he had been receiving until his entitlement to it was determined.

Conclusion

We affirm the Settlement Certificate.

/s/

Michael D. Hipple
Chairman, Claims Appeals Board

/s/

William S. Fields
Member, Claims Appeals Board

/s/

Jean E. Smallin
Member, Claims Appeals Board