

DATE: January 25, 2007

In Re:

[REDACTED]

Claimant

)

Claims Case No. 07011606

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

When an employee is aware or should be aware that he is receiving payment in excess of his entitlement, he does not acquire title to the excess amount and has a duty to hold it for eventual repayment.

DECISION

An employee requests reconsideration of the December 29, 2006, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 06122604. In that decision DOHA denied waiver of \$136.98 of the government's claim against the employee.

Background

The employee resigned from the federal government on March 12, 2006. At that time he was entitled to receive salary for 33.56 hours in the amount of \$801.50. However, due to an administrative error, the employee was paid salary for 36 hours in the amount of \$938.48. Therefore, he was overpaid \$136.98.

In the appeal decision, our Office denied waiver of the \$136.98 because the employee was notified on March 27, 2006, prior to receiving the overpayment, that a mistake may have been made in the calculation of his final salary payment. Thus, our Office determined that since the member was alerted to the fact a mistake might have been made prior to his receipt of the overpayment, waiver was not appropriate. In his request for reconsideration, the employee cites an article from the *European and Pacific Stars and Stripes* concerning overpayments made to U.S. Air Force members. The article describes a situation in which thousands of airmen stationed in Europe were erroneously paid a housing allowance; the Air Force decided not to collect the overpayments from the members which totaled \$4.14 million. The employee states that since his overpayment is considerably less compared to the aggregate relief of debt granted these airmen, his debt should be waived. He also refers us to a memorandum from the individual who informed him that he might receive an overpayment. He states that this individual had no authority to declare that a civilian employee received an overpayment, since this authority rests with the Defense Finance and Accounting Service (DFAS).

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive collection of erroneous overpayments of pay and allowances if collection would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee. See DoD Instruction 1340.23 (Instruction) ¶ E.4.1.2. The standard we employ to determine fault is whether a reasonably prudent person knew or should have known that he was receiving payments in excess of his entitlements. Our decisions indicate that waiver is not appropriate when an employee is aware that he is being overpaid, or had no reasonable expectation of

payment in the amount received. *See* DOHA Claims Case No. 02032201 (April 2, 2002) citing DOHA Claims Case No. 97062629 (July 17, 1997). An employee is considered to be aware of an erroneous payment when he possesses information which reasonably suggests that the validity of the payment may be in question. Once he has received information which reasonably suggests that the validity of a payment may be in issue, he should be prepared to return to the government any amounts received from that time forward. *Id.* Waiver under 5 U.S.C. § 5584 does not apply automatically to relieve the debts of all employees who, through no fault of their own, receive erroneous payments from the government. An employee is not entitled to waiver as a matter of right merely because he was overpaid due to administrative error. *See* DOHA Claims Case No. 02050613 (May 23, 2002).

The record shows that the employee questioned the accrual of his leave for his last pay period and was misinformed that he would accrue 3 hours of leave for that pay period. However, on March 27, 2006, the employee was subsequently informed via e-mail by the Chief of Civilian Personnel that he was not entitled to accrued leave for the last pay period since he was not in "pay status" for the full pay period. She specifically stated, "End result is that you were in effect overpaid three hours."⁽¹⁾ Therefore, on March 30, 2006, when the employee received his salary payment, he was aware that the validity of the payment was in question. Although the employee states that the Chief of Civilian Personnel did not have the authority to hold him liable for the overpayment, he was given information prior to receiving his final salary payment that called its validity into question. Under these circumstances, he had the burden of obtaining clear and thorough advice in writing from an appropriate official. In the meantime, he did not acquire title to the questionable overpayment merely because the government made an administrative error, and should have held the excess amount until the government determined the amount of the overpayment and asked for repayment. Waiver is not appropriate in such a situation. *See* DOHA Claims Case No. 02062401 (July 29, 2002).

Finally, the article provided by the member does not provide him with a basis for waiver. As stated in Instruction ¶ E4.1.8, we base our waiver determinations on the facts in each case.

Conclusion

The employee's request for relief is denied, and we affirm the December 29, 2006, decision to deny waiver of \$136.98. In accordance with Department of Defense Instruction 1340.23, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin

Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom

Member, Claims Appeals Board

1. The Chief of Civilian Personnel also states in the e-mail: "DFAS will send you a letter. I do not know if they recover the overpayment at this time, or 'flag' your record in the event you return to Federal service. It is also possible they will 'flag' any monies owed to you through the Treasury, i.e., tax returns, if the payment is not made. This will all be explained to you from DFAS. Be aware that this will be coming. It may be soon or could be after several weeks."