

KEYWORDS: waiver of indebtedness-knowledge

DIGEST: Waiver is not appropriate under 5 U.S.C. § 5584 when an employee knows or should be aware that he is receiving pay to which he is not entitled.

CASENO: 07100905

DATE: 10/16/2007

DATE: October 16, 2007

In Re:)	
[REDACTED])	Claims Case No.07100905
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Waiver is not appropriate under 5 U.S.C. § 5584 when an employee knows or should be aware that he is receiving pay to which he is not entitled.

DECISION

An employee of the United States Navy requests reconsideration of the September 20, 2007, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07091006. In that decision DOHA considered the employee's request that the government waive his indebtedness for the overpayment of salary in the amount of \$2,779.44, but agreed with a recommendation of the Defense Finance and Accounting Service (DFAS) to waive only \$2,497.84 of the indebtedness and deny waiver of the remaining \$281.60.

Background

On October 1, 2006, the employee was promoted from a Program Manager YA-03, to a Director, Integrated Naval Architectures, GS-15, step 5. DFAS later determined that the employee's salary should have been established as a GS-15, step 3. As a result, the employee was overpaid \$2,779.44 from October 1, 2006, through February 17, 2007. DOHA's adjudicator found that the employee acted in good faith in accepting the overpayments which had occurred during the pay periods between October 1, 2006, and February 3, 2007. The waiver of the debt that accrued during that period (\$2,497.84) is not in issue in this reconsideration request. The adjudicator concluded that notification of the error on February 22, 2007, provided sufficient knowledge to alert the employee to question his salary entitlement when he received his pay for the pay period ending (PPE) February 17, 2007, on February 23, 2007.

The employee contends that DOHA's adjudicator erred by not waiving the overpayment during the final pay period (February 4, 2007, through February 17, 2007). He argues that it is against equity and good conscience not to waive the indebtedness in the final pay period because he was not notified of the error in the calculation of his pay until after he had already expended 10 days labor in the expectation that he would be paid the same as he received in the previous pay periods.

Discussion

Even though the employee approaches the issue here somewhat differently, the issue in this reconsideration request is similar to the main issue raised by two other Navy employees in decisions recently issued by this Board. *See* DOHA Claims Case No. 07100102 (October 11, 2007) and DOHA Claims Case No. 07100201 (October 10, 2007). As we understand the employee's position in this case, essentially he argues that the government cannot deny him a waiver for the PPE February 17, 2007, for one of two reasons: either (a) the government is contractually required to pay him at the same salary step he received in the prior pay periods because he rendered his services in reasonable reliance that he would receive the same salary; or (b) equitable estoppel precludes the government from paying him anything less than the salary step paid to him in the prior periods because he labored under the reasonable expectation that he would be paid at such a salary rate. However, our Office has no authority to determine a claim under the theory suggested in the first rationale because we have no jurisdiction to consider employee pay claims. *See* DOHA Claims Case No. 07100102, *supra*. The theory in the second rationale is not persuasive because equitable estoppel cannot be applied against the government due to the inaction or inattentiveness of its representatives. *See OPM v. Richmond*, 496 U.S. 414, 420-428 (1990), *reh'g denied*, 497 U.S. 1046 (1990). We will consider employee's application for waiver in accordance with well-established principles that apply to the granting of waivers.

The DOHA adjudicator reasonably concluded that the employee had sufficient knowledge to alert him to question the amount of salary he received on February 23, 2007. In such circumstances, waiver is not appropriate for the portion of the overpayment that accrued during

the PPE February 17, 2007. DoD Instruction 1340.23, ¶ E4.1.4 (February 14, 2006).

Under 5 U.S.C. § 5584, we have 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. The Board recognizes that the government administratively erred in this case when it initially set the employee's salary at the rate of a GS-15, step 5, instead of a GS-15, step 3. However, it is not against equity and good conscience to deny waiver for overpayments in pay periods when the employee is advised in sufficient time to alert him to potential problems. In this case, the employee should have questioned the amount of salary payments he received on or after February 22, 2007. Waiver is inappropriate when an employee is aware that he is being overpaid. DoD Instruction 1340.23, ¶ E4.1.4; DOHA Claims Case No. 03041512 (June 26, 2003). An employee is considered to be aware of an erroneous overpayment when he possesses information which reasonably suggests that the validity of the payment may be in question. DOHA Claims Case No. 03041512, *supra*. 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 excess amounts received from that time forward. *See* DOHA Claims Case No. 07011606 (January 25, 2007).

Conclusion

The employee's request for additional waiver relief is denied, and we affirm the September 20, 2007, decision. In accordance with DoD Instruction 1340.23, ¶ E8.15, 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: William S. Fields

William S. Fields
Member, Claims Appeals Board