

KEYWORDS: waiver of indebtedness

DIGEST: An employee who erroneously received shift differential pay at the rate for the third shift when he was working the second shift is deemed partially at fault under the waiver statute when his leave and earnings statements reflected he was being paid for the third shift.

CASENO: 07100101

DATE: 10/11/2007

DATE: October 11, 2007

In Re:)
) [REDACTED]) Claims Case No.07100101
))
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

An employee who erroneously received shift differential pay at the rate for the third shift when he was working the second shift is deemed partially at fault under the waiver statute when his leave and earnings statements reflected he was being paid for the third shift.

DECISION

An employee of the Air Force Reserve requests reconsideration of the September 7, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07072402. In that decision, DOHA sustained the Defense Finance and Accounting Service's (DFAS) denial of the employee's application for waiver of a debt of \$1,543.20.

Background

The record shows that although the employee was working the second shift, he was erroneously paid shift differential pay at the rate for the third shift. Since the shift differential pay rate for the third shift was higher than the rate for the second shift, he was overpaid \$1,543.20 from January 8, 2006, through December 23, 2006.

Our Office sustained DFAS's denial of the employee's waiver request, stating that the employee should have examined his leave and earnings statements (LES) in January 2006 and reported the overpayment at that time, thereby preventing the perpetuation of the error. Since the employee did not carefully examine the LES furnished him, he is partially at fault in the matter, precluding waiver under 5 U.S.C. § 5584.

In his request for reconsideration, the employee states that there were three reasons why he did not question the increase in his salary in January 2006. First, he was expecting a retroactive payment for his 2006 cost of living increase. Second, his hourly rate went from the day shift rate to the swing shift rate. And third, the hourly rate for the swing shift rate had just increased because of the raise in his cost of living.

Discussion

Under 5 U.S.C. § 5584, this Office may waive claims of the United States against DoD employees arising out of erroneous payments of pay and allowances when collection would be against equity and good conscience and not in the best interest of the United States, provided there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. Waiver is not appropriate if an employee knew or should have known that he was receiving payments in excess of his entitlements. 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. Once he receives the information which reasonably suggests that the validity of the payments may be in issue, he should set aside the funds for eventual repayment to the Government. *See* DOHA Claims Case No. 03072812 (July 30, 2003); DOHA Claims Case No. 02050613 (May 23, 2002); and DOHA Claims Case No. 97122313 (February 24, 1998).

The employee states that he was expecting an increase in his salary in January 2006 as a result of a cost of living increase. Although the employee's January 21, 2006, LES reflects an increase due to the cost of living raise, it also clearly reflects that he was paid at the rate for the third shift. In the employee's original waiver application, he stated that he began working second shift in January 2006. Therefore, he should have questioned the fact that his LES clearly reflected that he was being paid for working the third shift when he was working the second shift and set aside the funds for repayment. The DOHA adjudicator reasonably concluded that the employee was at least partially at fault in accepting the overpayment.

Conclusion

The employee's request for relief is denied, and we affirm the September 7, 2007, appeal 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: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board