

KEYWORDS: waiver of indebtedness

DIGEST: Waiver of an employee's debt is not appropriate where the employee knew or had reason to know that his pay was exceeding his proper entitlement even if he alerted pay officials about a potential problem and they failed to take appropriate action.

DATE: 10/25/2007

CASENO: 07102205

DATE: October 25, 2007

_____)
In Re:)
 [REDACTED]) Claims Case No. 07102205
)
Claimant)
_____)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Waiver of an employee's debt is not appropriate where the employee knew or had reason to know that his pay was exceeding his proper entitlement even if he alerted pay officials about a potential problem and they failed to take appropriate action.

DECISION

An employee of the United States Air Force requests reconsideration of the September 26, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07073003. In that decision, DOHA sustained the initial determination of the Defense Finance and Accounting Service (DFAS) to deny waiver of the \$4,211.72 indebtedness the employee incurred when he received erroneous overpayments of salary. On reconsideration, the employee seeks waiver of the debt.

Background

The record shows that the employee, a WG-11, step 5, was scheduled to work on the second shift. However, due to administrative error, the employee was erroneously paid based on the rate for the third shift. Since the rate for the third shift was higher than the rate for the second shift, he was overpaid \$4,211.72 from May 2, 2004, through January 20, 2007. The employee states that he reviewed his leave and earnings statement (LES) to ensure that he was receiving the proper pay, but he actually discovered the error in 2007 when he compared his pay with that of another employee. DOHA's adjudicator found that the employee's gross pay for the pay period ending (PPE) May 1, 2004, the pay period prior to the overpayment, was \$2,440, and his salary did not contain current third shift pay. On the following pay period (PPE May 15, 2004), when the error began, the employee's gross pay suddenly rose to \$2,496.80, and included third shift pay in the amount of \$227.20. The adjudicator concluded that at that time in 2004 the employee should have immediately questioned appropriate officials regarding such a significant unexplained increase in pay. In such circumstances, waiver is not appropriate.

On reconsideration, the employee clarifies his position. He points out that he was just promoted from a WG-10 to a WG-11 in March 2004, and that on his first few statements he "did not receive his increase directly." He stated that he noticed the increase in pay on his LES in May 2004 and went to his pay clerk to verify his pay. The pay clerk contacted civilian personnel and both responded to him advising him that the increase was due to his promotion and shift change and there was no mistake. The employee includes supporting statements from the pay clerk and supervisor indicating that the overpayment was due to clerical error. The employee also explains that holding him liable would cause financial hardship.

Discussion

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. We recognize that the erroneous payments in this case were due to administrative error, and that the employee had informed pay officials. This alone does not entitle the employee to a waiver. *See* DOHA Claims Case No. 01102310 (November 5, 2001). The implementing regulation, Department of Defense Instruction 1340.23 (Instruction), Enclosure 4 (February 14, 2006), contains the standards for waiver determinations. ¶ E4.1.5 of the Instruction states that waiver generally is not appropriate when a recipient of a significant unexplained increase in pay or allowances does not attempt to obtain a reasonable explanation from an appropriate official. Based on this longstanding principle and the record available to her, the adjudicator reasonably concluded that waiver was inappropriate because the employee should have suspected in 2004 that his pay exceeded his proper entitlement due to the magnitude of the pay increase.

The employee's clarification is not persuasive. Preliminarily, the employee should have offered his clarification of the events in 2004, as well as the supervisory and clerical statements to support his position, at the beginning of the adjudication process, and no later than his appeal

of the initial determination. *See* Instruction ¶ E8.3.8. The purpose of this requirement is to allow DFAS and DOHA adjudicators to fairly consider all the evidence. Accordingly, the Board will carefully consider what weight to place on this new evidence. The Board assumes, solely for purposes of this reconsideration request, that the clerk and supervisor were the appropriate officials for the employee to contact in 2004 when he suspected a potential pay problem.

The attempt at clarification actually undercuts the employee's position that he did not know until 2007 that he had a pay problem. He now indicates that he had some reason to approach pay officials in 2004 about pay problems, and after explaining that the pay increase was due to promotion and shift change, he stresses to us that the officials advised him that he had no pay problems. The inference that we draw from this is that in 2004 the employee at least suspected that he had pay problems. While a review of the statements confirms that the clerk made a data entry mistake, it does not corroborate that the clerk and her civilian personnel point of contact had advised the employee in 2004 that he had no pay problems. Further, the statements do not specify what the employee had told them, what pay records they reviewed, and what they advised him in 2004. Accordingly, for all of these reasons, we are reluctant to place much weight on the new evidence provided by the employee. *See* DOHA Claims Case No. 01010906 (March 8, 2001). Finally, the magnitude of the pay increase between the two pay periods in 2004 was so significant that an adjudicator reasonably could have found that waiver should be denied under ¶ E4.1.6 of the Instruction. That rule states that waiver may be inappropriate even in cases where the recipient questions a payment and is mistakenly advised by the appropriate official that payment is proper, if under the circumstances the recipient knew or reasonably should have known that the advice was erroneous. *See also* DOHA Claims Case No. 03072812 (July 30, 2003). The employee's waiver request never articulates why he reasonably expected the amount of increase in pay that he had received between the two specified pay periods in 2004.

Financial hardship is not a factor for consideration in determining whether waiver is appropriate. *See* Instruction ¶ E4.1.7. *See also* DOHA Claims Case No. 02112601 (December 6, 2002).

Conclusion

The employee's request for waiver relief is denied, and we affirm the September 26, 2007, appeal decision. In accordance with Instruction ¶ 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