

KEYWORDS: waiver on indebtedness

DIGEST: When an employee knows he is being overpaid, he has a duty to set aside the erroneous payments, even if the government fails to act after notification.

CASENO: 08082201

DATE: 8/28/2008

DATE: August 28, 2008

In Re:)
) [REDACTED])
)) Claims Case No.08082201
))
))
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When an employee knows he is being overpaid, he has a duty to set aside the erroneous payments, even if the government fails to act after notification.

DECISION

An employee requests reconsideration of the August 8, 2008, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08080401. In that decision, DOHA sustained the decision of the Defense Finance and Accounting Service (DFAS) to deny the employee's request that the government waive collection of his debt in the amount of \$20,355.20.

Background

The employee performed temporary duty in Iraq during the pay period ending April 28, 2007, through September 15, 2007. As a result, he was entitled to receive post differential pay and danger pay in the amount of \$24,692.80. However, due to an administrative error, he erroneously continued to receive post differential pay and danger pay through January 19, 2008, causing an overpayment of \$20,355.20. In the member's request for waiver, he stated that he knew of the overpayment. In his appeal of DFAS's determination to deny waiver, he stated that he started contacting DFAS and agency representatives as soon as he returned from Iraq, but was assured that the matter had been corrected.

In the appeal decision, our Office denied waiver of the debt because the employee knew the payments were erroneous. In his reconsideration request the employee states that he is a civilian employee, and the cases cited by the adjudicator in the appeal decision to support denying waiver are old cases involving active duty members. He argues that he earned "every single cent of that post differential and danger pay." He states that he was not given the opportunity to defend himself. He states that the appeal decision was issued without the adjudicator taking time to talk to him or ask him about the situation. He states he did his best to correct the error but was told on three separate occasions that the matter had been resolved. Finally, he requests that he not be held liable for the gross amount of the debt.

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive collection of erroneous overpayments of pay and allowances an employee received if collection 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. Waiver is not appropriate when the employee was aware of the overpayment. *See* DOHA Claims Case No. 00081602 (November 22, 2000) and DOHA Claims Case No. 00073101 (August 21, 2000), *aff'd by* Deputy General Counsel (Fiscal) on December 21, 2001. The employee has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the Government, even if the Government fails to act after such notification. *See* DoD Instruction 1340.23, ¶ E4.1.4 (February 14, 2006).

In this case, the DOHA adjudicator examined the written record and researched prior published DOHA decisions to find analogous case law. It would have been inappropriate for the adjudicator to talk to the employee and ask him for his side of the story. Our Office does not have the authority to perform investigations. Appeal decisions and requests for reconsideration are based only on the written record. Oral hearings are not available. Furthermore, all four decisions cited by the adjudicator involved waiver requests from civilian employees under

5 U.S.C. § 5584.¹ However, the same waiver standards also apply to military members seeking waiver under 10 U.S.C. § 2774.

_____ Waiver was properly denied in this case because the employee admits that he knew of the overpayment. We appreciate the fact that the employee brought the error to the attention of his pay officials. However, it is well-established that an employee has a duty to monitor his pay and take appropriate action to resolve errors. *See* DOHA Claims Case No. 07072501, *supra*.. When an employee knows that he is being overpaid, he also has a duty to set aside the erroneously paid funds for eventual repayment, even if the government fails to act after notification.

_____ Finally, the amount of the employee's debt equals the gross amount of the payment, including amounts such as insurance premiums, retirement contributions, and federal and state income tax withholding which are withheld and submitted to the proper authorities on the employee's behalf. *See* DOHA Claims Case No. 97050502, *supra*; and Comptroller General decision B-234731, June 19, 1989. If DFAS cannot recoup the deducted amounts from those authorities, the employee must repay those amounts to DFAS.

Conclusion

The employee's request for relief is denied, and we affirm the August 8, 2008, decision to deny waiver in the amount of \$20,355.20. In accordance with Department of Defense 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

¹The adjudicator cited and provided the employee copies of DOHA Claims Case Nos. 07072501 (July 31, 2007), 08051406 (May 21, 2008), 97050502 (July 23, 1997) and 98020429 (May 14, 1998), as applicable precedent. The adjudicator also advised the employee that these decisions are posted on-line at <http://www.dod.mil/dodgc/doha/claims/>.

Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board