

KEYWORDS: waiver of indebtedness; notification

DIGEST: Waiver is not appropriate when an employee is aware or should be aware that she is receiving a payment in excess of her entitlement.

CASENO: 08061603

DATE: 6/24/2008

DATE: June 24, 2008

In Re:)
) [REDACTED])
)) Claims Case No.08061603
))
))
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Waiver is not appropriate when an employee is aware or should be aware that she is receiving a payment in excess of her entitlement.

DECISION

An employee of the Department of Defense requests reconsideration of the May 20, 2008, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08051401. In that decision, DOHA waived \$1,541.64 of the government's claim and denied waiver of \$5,190.04.

Background

On June 10, 2007, the employee was reassigned for a period not to exceed December 9, 2007. Due to an administrative error, she was erroneously granted a promotion on June 10, 2007, resulting in her salary being incorrectly established as \$76,335.00, instead of \$64,121.00. As a result, the employee was overpaid \$6,731.68 during the period June 10, 2007, through December 8, 2007.

The employee first became aware she was being overpaid on August 7, 2007, and notified her supervisor, branch chief and civilian pay representatives of the error. In her decision, the DOHA adjudicator waived \$1,541.64 of the employee's debt, and denied waiver of \$5,190.04, the portion of the debt that occurred after the employee was informed she was being overpaid.

In her request for reconsideration, the employee states that she unofficially was made aware of the error by a resource manager on August 7, 2007. However, the resource manager indicated that the error would be corrected and that she should not worry about it. The employee attaches a revised DD Form 2789, *Waiver/Remission of Indebtedness Application*, with a revised date of January 9, 2008, the date that she asserts she was officially informed by an authorized representative of her civilian personnel office that she was being overpaid. She also states that repayment of the debt would cause her financial hardship. She states that she should not be penalized for a mistake made by staffing personnel who processed her reassignment incorrectly and she recommends that fault be apportioned. Finally, she asserts that she was actually performing at the level she was being paid and states that it is only fair she receive the salary for the work she was performing.

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive erroneous payments of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States. The fact that an erroneous payment is solely the result of an administrative error or mistake on the part of the government is not sufficient basis in and of itself for granting a waiver. *See* Department of Defense Instruction 1340.23 (Instruction), ¶ E4.1.3. Waiver is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient 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* ¶ E4.1.4 of the Instruction. Financial hardship is not a factor for consideration in determining whether a waiver is appropriate. *See* ¶ E4.1.7 of the Instruction.

The DOHA adjudicator properly waived collection in the amount of \$1,541.64, which the employee received before she was notified that she was being overpaid. The employee now states that she was officially notified by an authorized representative of her civilian personnel office that she was being overpaid on January 9, 2008. However, this does not change the fact that she was informed on August 7, 2007, that she was being overpaid. When an employee is aware that she is being overpaid, waiver is not appropriate. She does not acquire title to the

excess payments and has a duty to return the excess amounts to the government. *See* DOHA Claims Case No. 05090603 (September 14, 2005) and DOHA Claims Case No. 00030709 (April 28, 2000). In addition, there is no basis for apportioning fault under the waiver statute. An employee derives no entitlement to an erroneous payment because the government makes a mistake. *See* DOHA Claims Case No. 00081602 (November 22, 2000).

Finally, our jurisdiction in this matter is limited to consideration under the waiver statute, 5 U.S.C. § 5584. Therefore, we do not have jurisdiction over any issues concerning the underlying debt, including any entitlement to a higher salary. The employee may address her concerns about that issue to DFAS and the Office of Personnel Management (OPM).

Conclusion

The employee's request for additional waiver relief is denied, and we affirm the May 20, 2008, 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