

KEYWORDS: waiver of indebtedness; gross amount of debt; insurance premiums

DIGEST: 1. Waiver is not appropriate when an employee is aware or should be aware that he is receiving a payment in excess of his entitlement. 2. In collection of erroneous payments to an employee, the amount of the employee's debt to the government is the gross amount of the erroneous 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. If the Defense Finance and Accounting Service (DFAS) cannot recoup the deducted amounts from those authorities, the employee must repay those amounts to DFAS unless the entire debt is waived.

CASENO: 08091801

DATE: 9/23/2008

DATE: September 23, 2008

In Re:)	
[REDACTED])	Claims Case No.08091801
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

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

2. In collection of erroneous payments to an employee, the amount of the employee's debt to the government is the gross amount of the erroneous 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. If the

Defense Finance and Accounting Service (DFAS) cannot recoup the deducted amounts from those authorities, the employee must repay those amounts to DFAS unless the entire debt is waived.

DECISION

An employee of the Army requests reconsideration of the August 21, 2008, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08072802. In that decision, DOHA followed the recommendation of the Defense Finance and Accounting Service (DFAS) and waived \$3,263.20 of the government's claim against the employee which totaled \$48,256.24; DOHA denied waiver of the balance of the employee's debt to the government in the amount of \$44,993.04.

Background

The record shows that the employee was ordered to active duty in the United States Army on September 1, 2005. As a result, the Department of the Army issued a Notification of Personnel Action (SF-50) on January 13, 2006, placing the employee, a GS-14, in a leave without pay (LWOP) status in his civilian position retroactive to September 1, 2005. Accordingly, the employee was not entitled to receive salary payments from that date. However, due to administrative error, the employee erroneously continued to receive intermittent salary payments through March 2007, causing an overpayment in the total amount of \$48,256.24.

Under the waiver statute, 5 U.S.C. § 5584, DOHA waived collection of the erroneous salary payment that the employee received during the pay period ending September 17, 2005, and that portion of the debt is not in issue here. The employee denied that he was aware of any overpayments until October 2006, but DOHA's adjudicator noted that the employee acknowledged that he had received the leave and earnings statements during the period of the overpayments and that the erroneous payments were directly deposited to the bank account the employee had used for salary payments prior to September 2005.¹ The adjudicator explained the duty of an employee is to review his leave and earnings statements and to monitor his bank account, verify bank statements and question discrepancies. Since the employee had failed to do so, collection of the balance of the overpayments was not against equity and good conscience, nor contrary to the best interests of the United States for purposes of the waiver statute.

On reconsideration, the employee claims that approximately one year after he left his civilian position he began receiving his salary again. He contends that the leave and earnings

¹In addition to the erroneous payment of \$3,263.20 for the pay period ending (PPE) September 17, 2005, it is undisputed that the employee also received erroneous salary payments in the amount of \$3,059.25 for PPE October 1, 2005; \$3,263.20 for PPE October 15, 2005; \$3,263.20 for PPE November 26, 2005; and \$3,263.20 for PPE December 10, 2005. The employee received several erroneous payments in the amount of \$3,467.20 each, on an intermittent basis, starting in August 2006. Three other smaller payments were made to the employee.

statements were so “messed up” that he could not understand them even after calling DFAS twice. His greatest concern appears to be that it is unfair to collect the gross amount of the remaining debt (\$44,993.04) from him because it will be “near to impossible” for him to re-coup the erroneous tax payments and health insurance premiums credited to him. Finally, he contends that he was denied compensation by TRICARE due to the presence of other health insurance.

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.

The employee knew that he was not entitled to receive civilian employee salary payments during periods when he was on active military duty and not in Federal civilian service. Furthermore, the record shows that the employee received erroneous salary payments just after he entered active duty and well before October 2006. While there is no indication of fraud, misrepresentation, or lack of good faith, the employee would have been aware of the erroneous payments just after entering active duty if he had paid attention to his bank statements and leave and earnings statements. He is partially at fault in this matter, and waiver is precluded.

As DOHA’s adjudicator explained, amounts withheld, such as Federal Employee Health Benefit Plan premiums and federal and state income tax withholding, are withheld and forwarded to the appropriate agencies for the benefit of the employee. Further, application of the tax laws to an employee’s income is a matter solely within the jurisdiction of the taxing authority, and an employee’s tax liability on an overpayment does not permit partial waiver of an amount not otherwise appropriate for waiver. Thus, the amount of the employee’s debt to the government is the gross amount of the payment, rather than the net amount deposited to his bank account. If DFAS cannot recoup the deducted amounts from those authorities, the employee must repay those amounts to DFAS unless the entire amount is waived. *See* DOHA Claims Case No. 00073101 (August 21, 2000), *aff’d* Deputy General Counsel (Fiscal), December 21, 2001, citing the Comptroller General’s decisions in B-261628, June 13, 1996, and B-261699, Oct. 25, 1996.

Conclusion

The employee’s request for additional waiver relief is denied, and we affirm the August 21, 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