

KEYWORDS: waiver of indebtedness

DIGEST: A waiver of a debt under 5 U.S.C. § 5584 is generally not appropriate when a recipient of a significant increase in pay or allowances does not attempt to obtain a reasonable explanation from an appropriate official. The recipient has a duty to ascertain the reason for the payment and to set aside the funds in the event that repayment should be necessary.

CASENO: 09010501

DATE: 1/08/2009

DATE: January 8, 2009

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In Re:	)	
[REDACTED]	)	Claims Case No. 09010501
	)	
Claimant	)	
_____	)	

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

A waiver of a debt under 5 U.S.C. § 5584 is generally not appropriate when a recipient of a significant increase in pay or allowances does not attempt to obtain a reasonable explanation from an appropriate official. The recipient has a duty to ascertain the reason for the payment and to set aside the funds in the event that repayment should be necessary.

**DECISION**

An employee of the Army Corps of Engineers requests reconsideration of the December 10, 2008, decision by the Defense Office of Hearings and Appeals (DOHA) which sustained an

initial determination of the Defense Finance and Accounting Service (DFAS) to deny the employee's application to waive collection of a debt owed by the employee.

### **Background**

The record shows that effective January 23, 2005, the employee was temporarily promoted from GS-11, step 4, to GS-12, step 2, for a period not to exceed January 21, 2006. On January 20, 2006, the employer issued a Notification of Personnel Action (SF-50) that terminated the temporary promotion and returned the employee to his previous grade. However, the employee had become eligible for a within grade increase (WGI) during the period of his temporary promotion (August 7, 2005), and the SF-50 established his pay as GS-11, step 5, on January 22, 2006, the effective date of the termination of the temporary promotion. The employee was correctly paid at that grade and step through March 18, 2006.

The record further shows that on February 21, 2006, the employer erroneously issued a SF-50, which granted the employee a WGI from a GS-11, step 5, to a GS-11, step 6, effective January 22, 2006. As a result of this error, the employee erroneously received a retroactive payment in the amount of \$284.80 for the pay period ending April 1, 2006, which represented the difference in salary between a GS-11, step 5 and step 6, for the period between January 22, 2006, and March 18, 2006. The employee also continued to receive salary as a GS-11, step 6 through July 7, 2007. The employee was erroneously overpaid a total of \$2,716 from January 22, 2006, through July 7, 2007.

In upholding the DFAS determination, DOHA's adjudicator considered the information available to the employee through his leave and earnings statements. Those statements indicated that for the pay period ending March 18, 2006, the last pay period prior to the overpayments, the employee's gross salary was \$2,408.00, but jumped to \$2,764.00 the next pay period (\$284.80 retroactive payment plus a new gross salary of \$2,479.00 for the current pay period). The adjudicator concluded that the employee had no reasonable expectation that he would receive the retroactive payment or the WGI from GS-11, step 5 to step 6, only a short time after the effective date of the prior WGI increase from GS-11, step 4 to step 5, and therefore, he should have made a prompt inquiry to the appropriate official concerning his salary.

In his request for reconsideration, the employee asks us to fully review his June 23, 2008, correspondence, and to consider all of the circumstances surrounding the situation, not just those from which the adjudicator could conclude that he was in some way at fault. In his June 23<sup>rd</sup> statement, the employee acknowledges that he was advised that he would return to his old position about a month prior to the end of the temporary promotion. But he shows that his job performance as a GS-12 was rated above average, and explains that he was an important asset as a mentor with respect to his old duties after he returned to his GS-11 duties. The employee also states that when he returned to his GS-11 duties in January 2006, he trusted that his pay was properly set, and suggests that his successful performance was a circumstance that should be considered in his reasonable belief that his pay was properly set. However, he admits that the

overpayments were administrative errors and that he “was also at fault,” but believes that fault ought to be apportioned in some manner.

### **Discussion**

The employee seeks waiver of the debt under title 5 of the United States Code, Section 5584 (5 U.S.C. § 5584). This statute is implemented within the Department of Defense under Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006). Generally, persons who receive a payment erroneously from the Government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. *See* Instruction ¶ E4.1.1. Under 5 U.S.C. § 5584, we have the authority to grant waiver to an employee 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. *See* Instruction ¶ E4.1.2. A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant. *See* Instruction ¶ E4.1.1.

The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the Government is not a sufficient basis in and of itself for granting a waiver. A waiver usually 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* Instruction ¶ E4.1.4. *See also* DOHA Claims Case No. 03072812 (July 30, 2003), which also involved an erroneous step increase. A waiver generally is not appropriate in cases when a recipient of a significant unexplained increase in pay or allowances, or of any other unexplained payment of pay or allowances, does not attempt to obtain a reasonable explanation from an appropriate official. The recipient has a duty to ascertain the reason for the payment and to set aside the funds in the event that repayment should be necessary. *See* Instruction ¶ E4.1.5.

In this case, the employee had received a WGI from GS-11, step 4 to GS-11, step 5 effective August 2005, and absent some clear justification, had no reasonable expectation of receiving another one the following January. He should have questioned his pay no later than the pay period ending April 1, 2006, when he received a significant unexplained increase in pay. If he had reviewed his leave and earnings statement at that point in time, he would have seen that he was being paid erroneously as a GS-11, step 6 instead of a GS-11, step 5. The employee admitted he shared the fault in this situation, and DFAS and DOHA reasonably concluded that the employee was partially at fault. Considering the equitable nature of the remedy, there is no legal basis for granting a partial waiver based on some allocation of fault between the employee and the government. *See* DOHA Claims Case No. 98112018 (January 11, 1999) which also involved an erroneous step increase.

## **Conclusion**

The employee's request for relief is denied, and we affirm the December 10, 2008, decision to deny waiver in the amount of \$2,716.00. In accordance with ¶ E8.15 of the Instruction, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

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Michael D. Hipple  
Chairman, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin  
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board