

KEYWORDS: waiver of indebtedness; back pay; lump sum leave

DIGEST: 1. The deduction of lump sum leave from the back pay award of a restored employee of the Navy is required under the Back Pay Act. Under the Act, deduction of lump sum leave is required since the employee was reinstated under the Back Pay Act as if the removal never occurred, and thus there is no basis for payment of lump sum leave. 2. When an employee was restored to duty following an erroneous separation, the lump sum leave payment was deducted from his back pay, and his annual leave was restored. Although the erroneous lump sum leave payment is subject to waiver under 5 U.S.C. § 5584, waiver is not appropriate since there was no net indebtedness after required statutory deductions.

CASENO: 09060201

DATE: 6/19/2009

DATE: June 19, 2009

In Re:	)	
	)	
[REDACTED]	)	Claims Case No. 09060201
	)	
Claimant	)	

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

1. The deduction of lump sum leave from the back pay award of a restored employee of the Navy is required under the Back Pay Act. Under the Act, deduction of lump sum leave is required since the employee was reinstated under the Back Pay Act as if the removal never occurred, and thus there is no basis for payment of lump sum leave.

2. When an employee was restored to duty following an erroneous separation, the lump sum leave payment was deducted from his back pay, and his annual leave was restored.

Although the erroneous lump sum leave payment is subject to waiver under 5 U.S.C. § 5584, waiver is not appropriate since there was no net indebtedness after required statutory deductions.

## **DECISION**

An employee of the Navy requests reconsideration of the April 30, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08091602.

### **Background**

The record shows that the employee was removed from his position with the Navy on March 2, 2007. As a result, he received payment for 272 hours lump sum leave (LSL) in the gross amount of \$8,782.73 (net payment of \$6,020.56) during the pay period March 4, 2007, through March 17, 2007. The employee appealed his removal to the Merit Systems Protection Board (MSPB). The record reflects that the employee was represented by an attorney in his appeal to the MSPB. On August 15, 2007, a settlement agreement was reached between the employee and the Navy. Under the terms of the settlement agreement, the removal action of March 2, 2007, was cancelled and replaced by a 30-calendar-day suspension from March 4, 2007, through April 2, 2007. The Navy agreed to pay the employee back pay from April 3, 2007, until his return to duty on August 20, 2007. As a result, the employee became indebted to the government in the amount of \$8,782.73. The employee returned to duty effective April 3, 2007. The employee became entitled to back pay in the gross amount of \$40,615.76. Since the employee was indebted \$8,782.73 for the gross amount of the LSL payment, this amount should have been applied to the \$40,615.76 back pay award. However, the Defense Finance and Accounting Service (DFAS) was able to recover the LSL taxes paid on the employee's behalf. As a result, \$6,020.56 was applied to the back pay award. The record shows that the employee received a net payment of \$21,946.14 (\$2,625.83 regular salary and entitlements + \$19,320.31 back pay award) in the pay period ending October 13, 2007. In addition, the employee's annual leave was restored.

In the appeal decision, the DOHA adjudicator considered for waiver \$6,020.56, the net amount of the LSL, because that was the amount applied to the employee's back pay award. The adjudicator sustained DFAS's initial determination denying waiver of the debt. The adjudicator noted that under the MSPB settlement agreement, the employee was required to submit any documentation required to process his back pay, and the employee subsequently submitted documentation that he received a lump sum payment for 272 hours of annual leave. The adjudicator also noted that the employee was notified, prior to receiving his back pay award, by letter from DFAS dated September 15, 2007, that he was indebted \$8,782.73 to the government. In addition, the employee's annual leave was restored. Under these circumstances, the adjudicator found that collection of the overpayment would not be against equity and good conscience, nor would it be contrary to the best interests of the United States. In addition, the

adjudicator stated there was no basis for the employee to be permitted to retain both the LSL payment and his restored leave.

In his request for reconsideration, the employee states that he was told during mediation discussions that he would receive back pay for the time he was separated, but he would not be paid for the period he was on administrative leave. He states that he lost \$13,331 in overtime and shift differential during the time he was separated. He states that he was also told he could not receive any of the \$13,331, but that his annual leave would be restored. He states that with the amount he received in LSL and the restoration of his annual leave, he thought he was getting a fair deal. However, he states that it was not until after he was back at work that he found out he had to repay \$8,782.73. He disagrees with the adjudicator's statement that he submitted documentation reflecting he received the LSL payment. He states that he signed a document stating that he received the LSL payment and that he was willing and able to report to work. The employee contends that if he is not entitled to receive waiver for the amount of money he had to use to buy back his leave, then he should be entitled to pay for the his overtime and shift differential pay in the amount of \$13,331.

### **Discussion**

Under the provisions of 5 U.S.C. § 5551(a), an employee who is separated is entitled to lump sum payment for annual leave. The Back Pay Act of 1966, as amended, 5 U.S.C. § 5596, entitles an employee to back pay when he undergoes an unjustified or unwarranted personnel action which results in the withdrawal or reduction of all or part of his pay. Implementing regulations contained in 5 C.F.R. § 550.805(a) provide that when an appropriate authority corrects an unjustified or unwarranted personnel action, the agency must compute the employee's pay and allowances as if the personnel action has not occurred. Under 5 C.F.R. § 550.805(e)(2), the agency is required to deduct from back pay, "[a]ny erroneous payments received from the Government as a result of the unjustified or unwarranted personnel action..." Such erroneous payments include retirement annuities, refunds of retirement contributions, severance pay and lump sum payments for annual leave. Where the separation is determined to be erroneous under the Back Pay Act, the separation is treated as if it never occurred and the employee is not entitled to retain the lump sum payment received under section 5551(a). *See* Comptroller General decisions 64 Comp. Gen. 86 (1984) and 59 Comp. Gen. 395 (1980). This is because 5 U.S.C. § 5551(a) expressly conditions payment of the lump sum on an employee's separation from government service. *See* 59 Comp. Gen. 395, *supra*.

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. In decisions involving employees who are improperly separated and who receive a lump sum leave payment, the Comptroller General has consistently held that upon restoration and the award of back pay, the lump sum leave payment may be considered for waiver under 5 U.S.C. § 5584, but only to the extent that there remains a net indebtedness after deductions are made from the back pay award. *See* 71 Comp. Gen. 114

(1991); 59 Comp. Gen. 395, *supra*, and B-238243, July 20, 1990.

In this case, as a result of his removal, the employee received a payment for 272 hours LSL in the gross amount of \$8,782.73. Under the August 15, 2007, settlement agreement the Navy agreed to pay the employee back pay from April 3, 2007, until the employee's return to duty on August 20, 2007, in accordance with the provisions contained under the Back Pay Act. By letter dated September 15, 2007, DFAS notified the employee that an overpayment in the gross amount of \$8,782.73, was generated on his pay account.<sup>1</sup> The employee's leave was restored in pay period ending October 13, 2007. Also, in the pay period ending October 13, 2007, the employee received his back pay award in the amount of \$19,320.31, after deductions including a deduction of \$6,020.56 for his net LSL payment. The employee argues that the settlement agreement never specified that he had to repay the LSL payment. However, as stated above, lump sum leave payments must be offset from back pay awards. *See* 59 Comp. Gen. 395, *supra*. In addition, the deduction of LSL from the employee's back pay did not result in net indebtedness to the government. Therefore, waiver of collection of the LSL would not be appropriate and was properly denied under 5 U.S.C. § 5584.

Our authority here is limited to determining whether collection of the employee's \$8,782.73 indebtedness can be waived under 5 U.S.C. § 5584. For the reasons stated above, it is not appropriate to grant waiver. The employee should address any concerns regarding the interpretation of his settlement agreement or his right to overtime and shift differential to the Navy and DFAS. We have no authority to consider the employee's claims for pay and allowances, the settlement agreement, or the Back Pay Act.

### **Conclusion**

The employee's request for relief is denied, and we affirm the April 30, 2009, appeal decision. In accordance with DoD Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense concerning waiver under 5 U.S.C. § 5584.

Signed: Michael D. Hipple

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Michael D. Hipple  
Chairman, Claims Appeals Board

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<sup>1</sup>DFAS advised the employee that he could request a hearing concerning the amount, validity of the debt, or the repayment schedule. DFAS also advised the employee that he could request waiver of repayment of the debt if he acknowledged the validity of the debt, but believes he should not be required to repay it.

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