

KEYWORDS: waiver of indebtedness

DIGEST: A waiver 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 duty to ascertain the reason for the payment and to set aside the funds in the event that repayment should be necessary.

CASENO: 09060901

DATE: 6/30/2009

DATE: June 30, 2009

In Re:)	
)	
[REDACTED])	Claims Case No.09060901
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A waiver 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 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 Department of Defense Education Activity (DoDEA) requests reconsideration of the May 6, 2009, appeal decision of the Defense Office of Hearings and

Appeals (DOHA) in DOHA Claim No. 08120101. In that decision, DOHA's adjudicator waived collection of \$4,657.01 of the employee's total indebtedness to the government of \$7,371.79, but denied waiver of the balance of the debt, \$2,714.78.

Background

The record shows that on January 18, 2005, the employee was issued an offer letter from DoDEA for a position as a Teacher, TP-1701-CD-02, with a salary of \$34,570.00 per school year. DoDEA later determined that although the offer letter correctly listed the employee's proposed salary as \$34,570.00, her pay grade was incorrectly listed as CD-02 (master's pay lane) instead of CB-02 (bachelor's pay lane). Due to an administrative error, the employee's salary was erroneously established as a TP-1701-CD-02, \$38,170.00 per school year, instead of TP-1701-CB-02, \$35,295 per school year. Due to this error, the employee's salary and post allowance entitlements were miscalculated from the pay period ending (PPE) March 5, 2005, through March 3, 2007, causing an overpayment of \$4,992.13. In addition, the employee erroneously received retroactive payments for basic salary and post allowance, causing an overpayment in the amount of \$2,799.62. The total claim against the employee was \$7,706.91. However, the employee was underpaid basic salary and post allowance in the amount of \$335.12 during the period March 4, 2007, through April 28, 2007, which was applied to the overpayment, reducing the debt to \$7,371.79.

In the DOHA's appeal decision, the adjudicator waived the portion of the employee's debt occurring during the PPE March 5, 2005, through March 3, 2007, in the amount of \$4,657.01.¹ However, the adjudicator denied waiver of the remaining portion of the debt resulting from the employee receiving retroactive payments during PPE May 14, 2005, through May 12, 2007, in the amount of \$2,714.78.

In her request for reconsideration, the employee states that she should not be held liable for the erroneous payments resulting from the retroactive payments she received. She does not understand how the erroneous salary payments were waived and not the retroactive payments she received. She argues that if she was deemed not to know about the erroneous salary payments, she would not have known that the retroactive payments were in error. She also states that irregularities in her salary were not easily identified due to pay fluctuations associated with various types of allowances she was receiving. She expresses frustration with the waiver process. She takes issue with the amount of time it has taken for her waiver request to be adjudicated. In addition, she states that she was just overpaid an additional \$4,900.00 in a retroactive payment in May 2009. She states that she now has to verify all funds deposited into her bank account and determine how they were applied to her salary. She finds this tedious and

¹The DOHA adjudicator upheld DoDEA's recommendation to waive the portion of the debt occurring during PPE March 5, 2005, through April 30, 2005, resulting from the employee's salary being established erroneously. However, the DOHA adjudicator disagreed with DoDEA's recommendation to deny waiver of the portion of the debt resulting from the employee's salary and post allowance being miscalculated from May 1, 2005, through March 3, 2007.

time-consuming. In addition, she states that the overpayment occurred through no fault of her own.

Discussion

Under 5 U.S.C. § 5584, we may waive collection of a claim for the 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, provided there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim. The waiver 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. A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant. *Id.*

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 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. 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 adjudicator properly waived the overpayment of salary and post allowance occurring during the PPE March 5, 2005, through March 3, 2007. It was reasonable for the adjudicator to find that the employee reasonably may not have known that the rate of pay she received was in excess of her entitlement, considering she was a new employee with an erroneously established salary upon assumption of her position.

We also agree with the adjudicator that the erroneous retroactive payments the employee received from PPE May 14, 2005, through May 12, 2007, should be denied. As noted in the appeal decision, the employee did not address this portion of the overpayment in her waiver request, specifically why she felt she was entitled to the retroactive payments. The employee now alleges that her salary fluctuated so much over the years that she would have been unable to identify any irregularities with her salary. However, the employee admits that she received leave and earning statements (LES) during the period of overpayment. Even though the employee

states that she finds reviewing her LES tedious, our decisions and those of the Comptroller General stress the importance of an employee's monitoring of her LES and other finance and personnel documents. *See* DOHA Claims Case No. 98120401 (March 4, 1999) and Comptroller General decision B-188822, June 1, 1977. We have consistently held that waiver is not appropriate when an employee has records which indicate an overpayment and fails to review such documents for accuracy or otherwise fails to take corrective action. *See* DOHA Claims Case No. 98120401, *supra*, and DOHA Claims Case No. 98112018 (January 11, 1999). In this case, the employee's LES for PPE May 12, 2007, reflects under the heading "Retroactive Earnings," that the employee received a large retroactive payment of regular pay in the amount of \$1,456.94, and a retroactive payment for post allowance in the amount of \$168.02. In addition, the employee's net salary jumped from \$1,130.98 in PPE April 28, 2007, to \$2,478.08 in PPE May 12, 2007. We believe that this large fluctuation in salary between pay periods and the employee's receipt of LES which reflected the retroactive payments, would have caused a reasonable person to at least question her entitlement to the payments. Since the employee had information at her disposal that indicated that she was receiving payments in excess of her entitlements, she should have set the excess amounts aside for possible repayment to the government. *See* DOHA Claims Case No. 02062401 (July 29, 2002).

Conclusion

The employee's request for relief is denied, and we affirm the May 6, 2009, appeal decision to deny waiver of \$2,714.78. In accordance with DoD Instruction ¶ 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

