

KEYWORDS: waiver of indebtedness

DIGEST: When an employee is aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

CASENO: 09080401

DATE: 8/11/2009

DATE: August 11, 2009

In Re:)	
)	
[REDACTED])	Claims Case No.09080401
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When an employee is aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment.

DECISION

An employee of the Air Force requests reconsideration of the June 23, 2009, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09010211. In that decision, DOHA waived in part the collection of a debt owed by the employee. The employee

seeks waiver of the remainder of the debt.

Background

Effective September 13, 2007, the employee was reassigned from the General Schedule (GS), as a GS-11, step 10, to a pay band under the National Security Personnel System (NSPS), as a YA-02. The reassignment entitled the employee to receive overtime pay at the rate of one and one-half times his basic salary, instead of his overtime being capped at the GS-10, step 1 rate. The Defense Finance and Accounting Service (DFAS) later determined that the employee's reassignment to a YA-02 was erroneous. Due to this administrative error, the employee's overtime pay was miscalculated from September 16, 2007, through January 19, 2008, causing an overpayment in the amount of \$11,869.20. In addition, during the pay period ending September 29, 2007, the employee received a retroactive payment in the amount of \$244.80, which represented overtime pay at the rate of one and one-half times his basic pay for the pay period ending September 15, 2007. As a result, the employee was overpaid a total of \$12,114.00.

The record shows that on December 19, 2007, the employee was notified by his agency via e-mail that he had been erroneously placed in NSPS and that he had received payment for overtime at a higher rate than he would have as a GS employee. In DOHA Claim No. 09010211, the adjudicator waived \$8,323.20, the portion of the erroneous salary payments the employee received before notification of the error, but denied waiver of \$3,790.80, the erroneous salary payments he received after notification during the period December 9, 2007, through January 19, 2008.

In his request for reconsideration, the employee states that while deployed to Afghanistan, he received an e-mail notification from his supervisor on December 25, 2007, advising him that the DFAS had disapproved his temporary conversion from the GS-11 pay grade to a YA-02. The employee states that before December 25, 2007, he was unaware that there was an issue. He states that he does not have any recollection of an "official" notification while he was deployed. He states that communication to the United States was sporadic and at times he had to use his personal e-mail to submit his time cards and to communicate. He states that he does remember receiving information from credible sources such as his home station and other employees in the field that the Air Force had approved his reassignment from a GS-11, step 10, to YA-02. He was informed this was an incorrect reassignment and that a waiver request had been submitted to DFAS. He states that he believed he would not have to pay back any money. He states that the only issue was that the change might be implemented before he returned from his deployment and he should not be surprised if he saw a significant drop in his paycheck.

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. In such circumstances, 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.

We base our decisions on the written record submitted by the agency concerned as well as evidence submitted by the employee. In this case, the record reflects that the agency notified the employee by e-mail on or about December 19, 2007, that he was erroneously placed in NSPS and was receiving payment for overtime at a higher rate than he was entitled to receive. There is a statement in the record from the USAF Director of Manpower and Personnel that all affected employees were notified on or about December 19, 2007, and the Union was notified on December 20, 2007. We have no reason to question the date of notification as stated by the agency. Our decisions indicate that in the absence of clear and convincing contrary evidence from the employee, we accept the agency's statement of the facts. *See, e.g.*, DOHA Claims Case No. 02030501 (April 18, 2002); and DOHA Claims Case No. 02030503 (March 14, 2002).

In this case, we find that the adjudicator reasonably concluded that it would not be against equity and good conscience to deny the erroneous salary payments he received during the period December 9, 2007, through January 19, 2008. Even if we accept that the employee did not receive notification of the error until December 25, 2007, it would not change our decision in this case. Once an employee is on notice that he is receiving erroneous payments he must expect that refund will be required upon correction of the error. *See* DOHA Claims Case No. 98062401 (October 13, 1998); and Comptroller General decisions B-259477, April 4, 1995; B-256934, Sept. 20, 1994; and B-259124, Feb. 23, 1995. According to the record, the pay period began on December 9, 2007, and ended on December 22, 2007. If the employee did not receive notification until December 25, 2007, he still would have been on notice of the error prior to receiving his salary payment on December 29, 2007. At that point, knowing he was being paid at the incorrect overtime rate, he should have verified the amount he received for the overtime work he performed during the pay period and set aside the excess amount for repayment. *See* B-259124, *supra*. As for the employee's assertion that he was assured by credible sources that the matter was being resolved and that he would not have to payback anything, he was on notice

of the error and he should have set aside the questionable payments until the matter could be officially resolved, even if the government continued to erroneously pay him at the higher rate for overtime. *See* DOHA Claims Case No. 02062401 (July 29, 2002). The employee did not acquire title to the overpayments and could not reasonably expect to retain them, especially since he was told not to be surprised if he saw a significant drop in his salary. Accordingly, we uphold the appeal decision to deny waiver of the portion of the overpayment occurring after the employee was notified.

Conclusion

The employee's request for relief is denied, and we affirm the June 23, 2009, decision to deny waiver in the amount of \$3,790.80. 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

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