

KEYWORDS: waiver of indebtedness

DIGEST: In the absence of clear and convincing contrary evidence from the employee, we accept the agency's statement of the facts.

CASENO: 09080411

DATE: 8/13/2009

DATE: August 13, 2009

_____)	
In Re:)	
[REDACTED])	Claims Case No. 09080411
)	
Claimant)	
_____)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

In the absence of clear and convincing contrary evidence from the employee, we accept the agency's statement of the facts.

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. 09010213. 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 July 23, 2007, the employee was reassigned from the General Schedule (GS), as a GS-11, step 6, 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 pay period ending August 4, 2007, through February 2, 2008, causing an overpayment in the amount of \$10,190.12. In addition, during the pay periods ending September 1, 2007, September 29, 2007, and March 29, 2008, the employee received retroactive payments for the total amount of \$3,846.24, which represented overtime pay at the rate of one and one-half times his basic salary for the pay periods ending August 4, 2007, August 18, 2007, September 15, 2007, January 19, 2008, and February 2, 2008. As a result, the employee was overpaid a total of \$14,036.36.

The record shows that on or about December 19, 2007, the employee was notified by his agency via e-mail that he was erroneously placed in NSPS and that he received payment for overtime at a higher rate than he would have as a GS employee. In DOHA Claim No. 09010213, the adjudicator waived \$8,463.00, the portion of the erroneous salary payments the employee received before notification of the error, but denied waiver of \$5,573.36, the erroneous salary payments he received after notification.

In his request for reconsideration, the employee contends that he never received the December 2007 e-mail notification advising him that he was being overpaid. He states that no other deployed employees working for his agency received the e-mail. He does not think it is fair for him to pay back money that he was told he was entitled to receive. He followed the instructions he received during his deployment and checked his pay to make sure he was being paid as he was told.

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 of the error on or about December 19, 2007, and the Union was notified on December 20, 2007. The record contains a list of names of the affected employees, and the employee's name is on this list. 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 the employee's reconsideration request he attaches a copy of a memorandum dated July 28, 2009, from an agency official questioning whether deployed employees received the December 2007 e-mail notification. However, the letter does not overcome the prior evidence of notification provided by the agency. Accordingly, we uphold the decision to deny waiver of \$5,573.36.

Conclusion

The employee's request for relief is denied, and we affirm the June 23, 2009, decision to deny waiver in the amount of \$5,573.36. 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