

KEYWORDS: waiver of indebtedness; notification of error

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: 09080701

DATE: 8/12/2009

DATE: August 12, 2009

In Re:)
) [REDACTED]) Claims Case No. 09080701
))
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. 09010214. 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 11, 2007, the employee was reassigned from the General Schedule (GS), as a GS-11, step 4, 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 \$5,224.16. In addition, during the pay period ending January 5, 2008, the employee received a retroactive payment in the amount of \$334.72, which represented overtime pay at the rate of one and one-half times his basic pay for the pay period ending December 8, 2007. As a result, the employee was overpaid a total of \$5,558.88.

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. 09010214, the adjudicator waived \$3,477.44, the portion of the erroneous salary payments the employee received before notification of the error, but denied waiver of \$2,081.44, 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 he was deployed to Iraq, he was notified by his supervisor that he had erroneously been assigned to YA-02. He states that he was told that a waiver request had been submitted on his behalf and that he probably would not have to pay any money back. He states that based on his previous experience with overpayments, he began saving the excess money in case of possible repayment. He states that it took nearly five months after he was informed of the error to correct it. He states that had DFAS acted in a more timely manner, the overpayments would have stopped much sooner than they did. In addition, he states that on April 28, 2008, he received an e-mail from his human resources department stating that "DFAS will suppress the debt letters and automatic withholdings." He states that at this point he no longer had any reason to believe that the money would be collected and acted in good faith in doing what he wished with the funds. Finally, he argues that it is unfair for someone who is deployed in the GS system to receive a capped overtime rate while a person of equivalent grade in the NSPS system can do the exact same job and get paid more to do it.

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. A waiver may be inappropriate in cases where a recipient questions a payment (which ultimately is determined to be erroneous) and is mistakenly advised by an appropriate official that the payment is proper, if under the circumstances the recipient knew or reasonably should have known that the advice was erroneous. *See* Instruction ¶ E4.1.6.

In his reconsideration request, the employee admits he was notified on or about December 19, 2007, that he was erroneously placed in NSPS, but probably would not have to pay the money back. However, he states that based on the information he received in the April 28, 2008, e-mail, he no longer thought he would have to repay the debt. He attaches a copy of this e-mail to his reconsideration request. We note the exact language contained in the e-mail is the following: “The good news is that DFAS will suppress the debt letters and automatic withholdings.” We appreciate the fact that the employee held the money for eventual repayment once he was notified of the error, but we do not think the information in the e-mail would lead a reasonable person to assume that he no longer was indebted for the overpayment he received. Although the e-mail was sent by an official in the employee’s agency, there was no mention of DFAS’s final decision on the employee’s request for waiver. In fact, the agency official states that he is providing an update on the status of the waiver request as promised in the December 19, 2007, memorandum. Under these circumstances, the employee should have asked for clarification concerning the e-mail he received before spending the money and continued to set aside the questionable payments until the matter could be officially resolved, no matter how inefficient the government was in correcting the error. *See* DOHA Claims Case No. 02062401 (July 29, 2002); and DOHA Claims Case No. 02032201 (April 2, 2002). The employee did not acquire title to overpayments and could not reasonably expect to retain them. *See* DOHA Claims Case No. 08051406 (May 21, 2008). Accordingly, we uphold the appeal decision to deny waiver of the portion of the overpayment occurring after the employee was notified of the error.

Our authority in this matter covers the employee's request for waiver of repayment of the overpayments he received. The differing overtime rates for GS employees and NSPS employees involve policy decisions that are beyond our purview.

Conclusion

The employee's request for relief is denied, and we affirm the June 23, 2009, decision to deny waiver in the amount of \$2,081.44. 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