

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: 09080702

DATE: 8/12/2009

DATE: August 12, 2009

In Re:)
) [REDACTED]) Claims Case No. 09080702
))
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. 09010209. 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 7, 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 \$8,894.44. In addition, during the pay period ending September 29, 2007, the employee received a retroactive payment in the amount of \$181.92, which represented overtime pay at the rate of one and one-half times his basic salary for the pay period ending September 15, 2007. As a result, the employee was overpaid a total of \$9,076.36.

The record shows that on 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. 09010209, the adjudicator waived \$6,185.28, the portion of the erroneous salary payments the employee received before notification of the error, but denied waiver of \$2,891.08, 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 he was notified by his agency's home office on December 19, 2007, that there was a problem with his deployment under the NSPS system. He attaches the e-mail he received from his home office. He states that he was told that a waiver request had been submitted and he would not have to pay back any monies owed. He states that he was told that his agency was going to take corrective action with DFAS to stop any further overpayment. He states that his agency submitted a *Notification of Personnel Action* (SF-50) to correct the issue in a timely manner. However, DFAS did not process the action in a timely manner, and as a result, the overpayments continued. He states that everything was done correctly to stop the overpayments. He knew about the error and his supervisor knew about the error. However, he states it took 88 days for DFAS to correct the problem. He requests that the remainder of the debt be waived because he was not at fault in the matter, and the problem was brought to the attention of the appropriate officials in a timely manner.

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.

In his reconsideration request, the employee admits he was notified by his agency on December 19, 2007, that he was erroneously placed in NSPS. He attaches a copy of the notification which was sent to him by e-mail. We note that the notification does advise the employee that as a result of being reassigned to the NSPS “YA” pay schedule, the employee was receiving payment for overtime at a higher rate than he was entitled to receive. 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, Apr. 4, 1995; B-256934, Sept. 20 1994; and B-259124, Feb. 23, 1995. Although the e-mail notification stated that the agency requested waiver through DFAS so that the employee would not have to repay the erroneous payments of overtime, the employee 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); 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. Accordingly, we uphold the appeal decision to deny waiver of the portion of the overpayment occurring after the employee was notified of the error.

Conclusion

The employee's request for relief is denied, and we affirm the June 23, 2009, decision to deny waiver in the amount of \$2,891.08. 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