

KEYWORDS: waiver of indebtedness

DIGEST: An employee who was deployed from October 2007 through February 2008 was reassigned from the General Schedule (GS) to the National Security Personnel System (NSPS) in February 2008, effective in October 2007. As a result, he was entitled to receive overtime pay at the rate of one and one-half times his base salary retroactive to October 2007. It was later determined that this reassignment was erroneous and, consequently, he was overpaid for overtime. Waiver was granted to the employee for an overpayment he received during the pay period ending (PPE) February 16, 2008, but denied for the retroactive payment he received in PPE March 1, 2008, in the amount of \$4,995.20, which represented overtime pay at the rate of one and one-half times his basic salary for the period September 30, 2007, through February 2, 2008. Denial was based on a December 2007 notification to the employee that the NSPS reassignment and overtime rate were erroneous. On further review, the Board identified evidence which supports the employee's contention that he was not notified about the erroneous reassignment, and it considered new evidence that the employee questioned the retroactive payment of \$4,972.16 on his leave and earnings statement, which resulted in written assurance from his pay representative that the payment was correct. Accordingly, collection of \$4,972.16 would be against equity and good conscience, and we waive this additional amount of debt.

CASENO: 09082002

DATE: 8/27/2009

DATE: August 27, 2009

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In Re:)	
REDACTED)	Claims Case No.09082002
)	
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

An employee who was deployed from October 2007 through February 2008 was reassigned from the General Schedule (GS) to the National Security Personnel System (NSPS) in February 2008, effective in October 2007. As a result, he was entitled to receive overtime pay at

the rate of one and one-half times his base salary retroactive to October 2007. It was later determined that this reassignment was erroneous and, consequently, he was overpaid for overtime. Waiver was granted to the employee for an overpayment he received during the pay period ending (PPE) February 16, 2008, but denied for the retroactive payment he received in PPE March 1, 2008, in the amount of \$4,995.20, which represented overtime pay at the rate of one and one-half times his basic salary for the period September 30, 2007, through February 2, 2008. Denial was based on a December 2007 notification to the employee that the NSPS reassignment and overtime rate were erroneous. On further review, the Board identified evidence which supports the employee's contention that he was not notified about the erroneous reassignment, and it considered new evidence that the employee questioned the retroactive payment of \$4,972.16 on his leave and earnings statement, which resulted in written assurance from his pay representative that the payment was correct. Accordingly, collection of \$4,972.16 would be against equity and good conscience, and we waive this additional amount of debt.

DECISION

An employee of the Air Force requests reconsideration of the June 26, 2009, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 09010212. 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

The record shows that a Notification of Personnel Action (SF 50) issued on February 20, 2008, reassigned the employee from the General Schedule (GS), as a GS-11, step 5, to a pay band under the National Security Personnel System (NSPS), as a YA-02, effective October 7, 2007. The reassignment entitled the employee to receive overtime pay at the rate 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 administrative error, the employee's overtime pay was miscalculated during the pay period ending (PPE) February 16, 2008, causing an overpayment of \$2.16. Additionally, during the PPE March 1, 2008, the employee erroneously received a retroactive payment in the amount of \$4,995.20 (as initially reported to DOHA), which represented overtime pay at the rate of one and one-half times his basic pay for the period September 30, 2007, through February 2, 2008. Thus, the total claim against the employee is \$4,997.36 (\$2.16 + \$4,995.20)

In DOHA Claim No. 09010212, the adjudicator waived \$2.16, attributed to miscalculating overtime during the PPE February 16, 2008, and that portion of the waiver is not in issue in this request for reconsideration. The adjudicator denied waiver of the balance of the reported debt (\$4,995.20) because the record contained evidence that the employee was provided notice in December 2007, before he received the retroactive payment, that payments to him of

overtime based on the rate of one and one-half times his salary, were improper, and that the employee should have questioned such payments after receiving this notice.

In his request for reconsideration, the employee denies he received such notice and states that he received a retroactive payment of \$4,972.16 in addition to his regular pay and that he immediately questioned this payment. A copy of the employee's leave and earnings statement (LES) for the PPE March 1, 2008,¹ attached to the reconsideration request as Attachment E, shows that the employee did receive a retroactive payment in the amount of \$4,972.16 (not \$4,995.20), along with other credits and debits to both current earnings and retroactive earnings. In response to the questioning of this retroactive payment, the employee and his supervisor received an e-mail from his civilian pay representative (Attachment F) which specifically addressed each aspect of the retroactive payment of overtime and other credits and debits on the LES. The email reasonably assured the employee that all was correct. Therefore, he thought he was entitled to the retroactive payment.

Discussion

Under 5 U.S.C. § 5584, we have authority to waive erroneous payments of pay and allowances if collection would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, fault, misrepresentation or lack of good faith on the part of the employee. A waiver usually is not appropriate when an employee knows, or reasonably should know, that a payment is erroneous. The employee 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* DoD Instruction 1340.23 (Instruction) ¶ E4.1.4 (February 14, 2006).

We base our decisions on the written record submitted by the agency concerned as well as evidence submitted by the employee, and 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 several related cases, the record reflected 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

¹This LES and additional evidence submitted by the employee on reconsideration were not available to the adjudicator in the initial determination. This matter arose as one of approximately 40 in a "group" waiver submitted by the Air Force through DFAS, which requested waivers on behalf of all employees in the group without obtaining comment from the members of the group. There are some factual differences between this employee's record and the records of others in this group that must be addressed without regard to the "group" designation. The waiver statute (5 U.S.C. § 5584) generally "contemplates consideration of individual cases where the identity of the individual, the amount of the debt, and the circumstances of each case may be examined." *See* Comptroller General decision B-222776, June 16, 1986. While a group investigation is appropriate in some circumstances (*see, e.g.*, B-179186, Oct. 24, 1973), "group" procedures should be eschewed if they deprive the waiver applicant of a copy of the administrative report with an opportunity to comment because, as here, the adjudicator tends not to receive evidence of differences among members of the group in terms of their individual circumstances.

payment for overtime at a higher rate than he was entitled to receive. There is a statement in the record from the USAF, Air Combat Command, 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 in those other cases, each employee's name is on this list. Here, however, the employee's name is absent from the key list of affected employees.²

More significantly, in this case, there is written evidence that the employee, through his supervisor, questioned the retroactive payment shown on the LES for the PPE March 1, 2008, with his pay representative. It appears that the employee questioned what was, in effect, a significant, unexplained payment, in an attempt to obtain a reasonable explanation from an appropriate official of his right to the payment. *Cf.* Instruction at ¶ E4.1.5. On March 11, 2008, the supervisor and employee received a detailed written response from the pay representative which justified the retroactive pay and the other debits and credits on the subject LES. The pay representative, who presumably was in a better position than the employee to be aware of the improper reassignments to NSPS by that time, did not indicate, in any manner, that there was any problem with the employee's reassignment to NSPS or of the employee's right to overtime at the rate of one and one-half times salary. These facts all support the employee's position that he obtained a reasonable explanation. When an agency has affirmed an employee's pay with a reasonable explanation after inquiry and the employee has no reason to doubt the agency's response, the employee is without fault and waiver should be granted. *See* the Comptroller General's decision in B-255550, Feb. 25, 1994; and B-240393, Jan. 31, 1991. Accordingly, we waive an additional \$4,972.16.

Conclusion

The employee's request for relief is granted. The debt is waived in the additional amount of \$4,972.16. We remand this matter to the DFAS to address the validity of the remaining portion of the reported debt that has not been waived (\$23.04). 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

²One possible explanation for the employee's absence from the list is the unusual delay between the effective date of the erroneous reassignment to NSPS and the date of the SF 50 notifying the employee and others of this reassignment. The general notices of erroneous reassignments issued by ACC's Manpower and Personnel director were prior in time to this employee's SF 50. The delay in this case appears to be much longer than in other employees' cases.

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Member, Claims Appeals Board