

DATE: July 18, 1997

In Re:

[Redacted]

Claimant

Claims Case No. 97031009

CLAIMS APPEALS BOARD DECISION

DIGEST

An employee was aware that his salary was to be reduced by the amount of the disability annuity he was receiving from the Office of Personnel Management. Although the employee notified the proper authorities that the reductions were not being made, the resulting debt cannot be waived. When an employee is aware that he is being overpaid, he cannot reasonably expect to retain the overpayments, but must set them aside for eventual repayment.

DECISION

This is in response to an appeal of DOHA's Settlement Certificate, DOHA Claim No. 97016172, February 18, 1997, which denied the request of a reemployed annuitant for waiver of a debt which arose when his pay was not reduced by the amount of his disability annuity.

Background

The record indicates that the employee was retired from his position as a National Guard Technician in 1994 and began to receive a disability annuity. On January 23, 1995, he was appointed to a temporary position with the Defense Commissary Agency (Agency). His salary should have been reduced to reflect the disability annuity he was receiving. Through administrative error, his salary was not reduced from January 23 through October 13, 1995. This resulted in an overpayment of \$9,052.80. From October 14 through 28, 1995, his salary was reduced, but the amount of the reduction was \$38.40 too little. This increased the total debt to \$9,091.20.⁽¹⁾ In the Settlement Certificate, we waived \$582.40 which he received between January

23 and February 18, 1995, plus the \$38.40 caused by miscalculation of the reduction for two weeks. We denied waiver of the balance of the debt, \$8,470.40.

Through his attorney, the employee points out that in early March 1995 he began receiving Leave and Earnings Statements (LES) and realized that his salary was not being reduced by the amount of his disability annuity payments. He brought this error to the attention of his supervisor. In mid-March Agency personnel informed him that his salary would be reduced by \$450 every two weeks. In March he also received a letter telling him that his annuity was being terminated, but was later informed that the letter was sent in error. Subsequent LESs contained corrections, but the reductions due to his annuity did not begin until October. His position, which was originally to last two years, was terminated in February 1996, after one year. The employee points out that his LESs with their frequent corrections and fluctuations were difficult to understand and that he questioned them and attempted to have the deductions made.

Discussion

Under 5 U.S.C. 5584, we may grant waiver of erroneous payments of salary to a civilian employee or former employee of the Department of Defense if collection would be against equity and good conscience and not in the best interest of the United States if there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. See Standards for Waiver, 4 C.F.R. 91.5(b). Prior waiver decisions indicate that when an employee is aware of an overpayment, he cannot expect to retain the money. Rather, he has a duty to set aside the money for repayment. In

such a situation, collection is not against equity and good conscience and is in the best interest of the United States. Charles R. Ryon, Sr., B-234731, June 19, 1989.

In the present situation, the employee knew in March 1995 that his salary was to be reduced by the amount of his disability annuity. He correctly brought the government's failure to make the reduction to the attention of the proper authorities. While we agree that numerous errors were made in his pay and that he acted properly in notifying the authorities, waiver is precluded because he was aware that he was being overpaid by the amount of his annuity. Therefore, he had a duty to set the overpayments aside for repayment. See Charles R. Ryon, Sr., B-234731, *supra*.

Conclusion

We affirm the Settlement Certificate.

/s/ _____

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Christine M. Kopocis

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member, Claims Appeals Board

1. Through his attorney, the employee questions this amount, since he was initially informed that the amount of his debt was \$6,322.94. The record indicates that \$6,322.94 was the net amount of the overpayment after deductions for income taxes, social security, etc. The proper amount of the debt is the gross overpayment, since the amounts deducted were disbursed on the employee's behalf. The Agency should attempt to recover the disbursements. If the Agency is unsuccessful, the employee must repay the amount of the disbursements and seek to recover those amounts from the Internal Revenue Service, state income tax authorities, etc. Dr. Joella Campbell, B-259660, June 8, 1995.