

DATE: September 30, 1997

In Re:

[Redacted]

Claimant

Claims Case No. 97052111

CLAIMS APPEALS BOARD DECISION

DIGEST

The standard employed to determine whether a person was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person should have known or suspected that he was receiving more than his entitlement. Waiver of the debt of a finance officer who accepted an incentive award issued using improper procedures is not appropriate.

DECISION

This is in response to an appeal of GAO's Settlement Certificate, B-274428, dated November 7, 1996, which denied waiver under 5 U.S.C. § 5584 of a Department of Defense employee's debt to the United States resulting from erroneous payments of salary. Under Section 103(d) of Public Law No. 104-316, 110 Stat. 3826, 3828-3829, Oct. 19, 1996, Congress transferred to the Director of the Office of Management & Budget (OMB) the Comptroller General's authority under title 5, United States Code, Section 5584 (5 U.S.C. § 5584) to consider applications by Federal employees requesting that the government waive debts resulting from the erroneous overpayment of salary and allowances. The OMB Director delegated this authority to the Secretary of Defense for Department of Defense employees effective December 18, 1996. The Defense Office of Hearings and Appeals (DOHA) now exercises the authority transferred or delegated to the Secretary of Defense through this Board, which is part of DOHA.

Background

The record indicates that the employee was a financial analyst at [Redacted]. His debt was established as a result of a Criminal Investigation Division (CID) investigation conducted in 1995. The employee is indebted to the United States for \$3,000 for unauthorized incentive award payments in 1990, 1992, and 1993.⁽¹⁾ The CID report found that the awards were unauthorized because there was no sign of supporting documentation and that it was an abuse of fiduciary duty to process and collect one's own award without concurrence of the chain of command. The report acknowledges contradictory statements by the managers interviewed, but found managerial incompetence and poor internal controls. It suggests that the employee sought the award, completed the Form 1034s for his supervisors' signatures, and that senior managers were not aware of the awards until 1993. The U.S. Attorney did not prosecute as a result of the CID investigation because of the minimal dollar amount involved and the management negligence and mismanagement.

The Settlement Certificate denied the employee's request for waiver of the debt stating that there is no indication that the employee received official authorization to receive the award payments. GAO believed that collection of the overpayment would not be against equity and good conscience, nor would it be contrary to the best interests of the United States.

The employee appeals the denial of his waiver request contending that his signature does not appear on either the budgeting or disbursing documents for the awards, but that proper supervisory and budgeting officers' signatures are on the documents. In addition, he contends that there is no overpayment because the Army billed the "customer" for the awards. His reasoning is that there is no debt, so the Army is collecting the overpayment as repayment of a loan, in essence garnishing his check without providing him a day in court. The employee also is concerned about the tax

consequences if he repays the overpayment.

Decision

We are concerned here only with the employee's request for waiver of the entire debt, but acknowledge his additional contentions. Concerning his argument of not having been provided due process and the nature of the debt as a loan repayment, the Office of Personnel Management is the appropriate forum for these issues because these issues involve a Federal civilian employee's legal claim for compensation.⁽²⁾ Regarding the employee's contention that there is no debt because his office charged its "customer" for the awards, we note that the member's debt was established by the agency. The source of the funds is not relevant to the waiver process. In addition, the employee should contact the Internal Revenue Service regarding his questions of the tax consequences of his repaying the debt. It is well-established that the application of the tax laws to an individual's income is a matter for consideration by the revenue authorities and generally is not within our jurisdiction. See DOHA Claims Case No. 97050502 (July 23, 1997); and Richard C. Clough, 68 Comp. Gen. 326 (1989).

Title 5 of the United States Code, Section 5584 provides for waiver of a claim of the United States against a person which arises out of the erroneous payment to an employee of pay and allowances, including travel, transportation and relocation expenses and allowances. Waiver is permitted only when the collection of the claim would be against equity and good conscience, and would not be in the best interest of the United States. Under 5 U.S.C. § 5584(b), waiver is not permitted if there exists in connection with the claim an indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee or one having an interest in the claim. Under the terms of the statute and implementing regulations, 4 C.F.R. Parts 91-93 (1996), the appropriateness of waiver turns on the knowledge and conduct of the employees who have received erroneous payments, rather than the actions of the agency in making such payments. See Export-Import Bank Employees, B-272467, Dec. 13, 1996. The principal test is whether an employee knew or reasonably should have known that an erroneous payment occurred and failed to bring the matter to the attention of the responsible officials. See also Standards for Waiver, 4 C.F.R. §91.5(b). The standard employed to determine whether a person was at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person should have known or suspected that he was receiving more than his entitlement. See Petty Officer Ricky Johnson, USN, B-256417, July 22, 1994; Captain Douglas K. Basiger, USAF, B-256600, July 14, 1994; Bryan E. Lippman, B-201816, July 8, 1981.

A financial officer is expected to be familiar with the regulations dealing with the expenditure of funds. He is expected to know that processing an incentive award using Form 1034 is improper. The employee calls attention to the fact that most payments in his office were made using the Public Voucher, Form 1034. It is our belief that the use of public vouchers to "run the office", as stated by the employee, is a different issue than the use of such a payment method for personnel actions. Regardless of whether the appropriate supervisory officials requested the awards, documented the reasons for the awards, or when and why they signed the Form 1034s, a finance officer should have questioned the method of payment. The supervisor's use of improper procedures for giving incentive awards does not excuse an employee who is a finance officer under these circumstances. The employee knew or should have known that the procedure was incorrect and should have made inquiry or brought the matter to the attention of the appropriate officials. Waiver under the circumstances is not appropriate. The facts taken as a whole in this case suggest that it would not be against equity and good conscience to collect the debt.

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. The awards were processed using Public Vouchers, Standard Form 1034, rather than the required Incentive Award Nomination and Approval Form, Department of the Army Form 1256.

2. See 31 U.S.C. § 3702(a)(2). We note that under the Debt Collection Act, 5 U.S.C. § 5514 and implementing regulations found in 5 C.F.R. Part K, the employee was extended due process in that a copy of the written decision of a hearing dated November 1995 is contained in the record as is agency information responding to his Freedom of Information Act request. The agency had discretion under the Debt Collection Act to provide a written hearing, rather than the oral hearing requested by the employee. The Petition for Hearing signed by the employee explains the agency discretion in this matter. See also 64 Comp. Gen. 142 (1984) for a general discussion of the procedures to be followed when collecting debts by administrative offset.