

DATE: February 24, 1998

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In Re:

[Redacted]

Claimant

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Claims Case No. 97122313

## CLAIMS APPEALS BOARD DECISION

### DIGEST

The legal precedent is well-established that it is not against equity and good conscience to recover an indebtedness where the recipient of the erroneous payment knew or should have known that the payment was erroneous, and the knowledge of such an overpayment carries with it the obligation to return that amount. An employee who erroneously received retention allowance and supervisory differential pay for five pay periods is deemed partially at fault under the waiver statute and may not have the debt waived. The employee should have questioned the addition of codes for these allowances and his right to the allowances when they first appeared on his leave and earnings statement.

### DECISION

This is in response to an appeal of our November 3, 1997, Settlement Certificate, DOHA Claim No. 97010678, which denied a DoD employee's request for waiver of a debt to the government. The debt arose when the employee received erroneous payments of basic salary for the 5 pay periods ending November 11, 1995, through January 6, 1996.

#### Background

The record shows that the employee returned from an overseas tour with return rights to a GS-14 salary. From April 1995 through early October 1995, the employee was paid at the GS-14, step 5-level (gross amount of \$2,713.60 per pay period) pending determination by the civilian pay office of the correct step to which the employee was entitled. For the pay period ending October 14, 1995, the employee's Leave and Earnings Statement (LES) reflected that his salary was adjusted to the GS-14, step 6-level. He received the gross amount of \$5,823.20 for the pay period. The following pay period, his LES again reflected a GS-14, step 5-level and he received \$2,713.60 with the explanation that the previous adjustment was incorrect. Anticipating both a step adjustment and a performance award for the pay period ending November 11, 1995, the employee did not question when his gross pay was \$7,039.00, including \$655.00 for "PA", \$222.40 for "SD", and \$2,730.40 for "RA".<sup>(1)</sup> From this pay period forward his LES reflected the GS-14, step 8 level. For the next 4 pay periods, his gross pay was \$5,905.60, including the amounts described above for "SD" and "RA".

When the employee returned from a vacation on January 8, 1996, he reviewed his LESs and reported to the civilian pay office that he believed he was being overpaid, but was not able to determine where the error occurred to cause the overpayment. On January 29, 1996, the civilian pay office notified the employee of an indebtedness to the government in the amount of \$6,969.40.<sup>(2)</sup> The employee requested waiver stating that he had expected a pay adjustment and therefore, he had no reason to question the pay increase received. He also pointed out that he had discovered the error, he had not received an explanation on how the debt was calculated, and the civilian pay office should be responsible for quality control. The employee contended that he notified the civilian pay office in a reasonable time given the facts that in November he was expecting a salary increase and a performance award, he was preparing for use-or-lose leave, and he was entertaining guests from overseas.

The Agency's administrative report contends that the employee, with 29 years of federal service, reasonably should have been aware of the payments for the retention allowance and supervisory differential pay which were listed as separate line items on his LESs. He should have questioned what these payments were for and if he should continue to receive

them. The agency concluded that his failure to question these payments makes him partially at fault, which statutorily precluded favorable waiver consideration.

Our Settlement Certificate upheld the agency's denial of the waiver request stating that the employee should have examined his LESs for the pay periods prior to his vacation. Had he done so he could have discovered and reported the overpayment at that time thereby preventing the perpetuation of the error. We concluded that since the employee did not carefully examine the LESs furnished him, he is partially at fault in this matter, precluding waiver under 5 U.S.C.

§ 5584.

On appeal, the employee again questions the amount of his indebtedness, and reiterates that he was expecting a step adjustment and therefore had no reference point of what a "normal" paycheck should be. He again points out that he discovered and reported the error as soon as he was aware of it and the civilian pay office should be accountable for any errors which occur in that office. He states that he was unfamiliar with retention allowances and supervisory differential pay and could not possibly have been able to recognize an error regarding them.

### **Discussion**

Our waiver authority, 5 U.S.C. § 5584, applies to a claim against an individual arising out of the erroneous payment of pay or allowances to an employee, the collection of which would be against equity and good conscience and not in the best interest of the United States. The statute further provides that waiver cannot be granted if there is any indication of fraud, fault, misrepresentation, or lack of good faith on the part of the person having an interest in obtaining the waiver. See 5 U.S.C. § 5584(b)(1) and the 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; Bryan E. Lippman, B-201816, July 8, 1981; and George S. Winfield, 66 Comp. Gen. 124 (1986). .

There is no indication of fraud, misrepresentation or lack of good faith by the employee with respect to the debt, but DFAS and our adjudicators reasonably concluded that the employee was at least partially at fault. The employee knew there was a problem with his pay account since his return from overseas. In our view, the employee should have questioned the codes when they first appeared on his LES. It was reasonable for him to presume that the "PA" code was for his performance appraisal, however, by his own admission, he was unaware what the other 2 codes meant. This fact coupled with the knowledge that past step increases were reflected as base pay, not separate line items should have caused him, a federal employee with so many years of service, to question the payment. Additionally, even though he was unaware of what his correct salary should be, it was not reasonable for him to presume that a gross salary of either \$7,039.00 or \$5,905.60, which he received in November, was correct. This is not a reasonable expectation for a GS-14 salary. There is no evidence that the employee reasonably could explain a salary of over \$5,000 each pay period.

In any event, a service member or employee derives no entitlement to an erroneous payment of pay or allowances just because the government, however incompetently, makes a mistake. In the present case, the employee correctly brought the government's error to the attention of the proper authorities. The legal precedent is well-established that it is not against equity and good conscience to recover such indebtedness where the recipient of the erroneous payment knew or should have known that the payment was erroneous, and the knowledge of such an overpayment carries with it the obligation to return that amount, or set aside an equivalent amount for refund to the government when the error is corrected. See, for example, DOHA Claims Case No. 97052732 (July 8, 1997); and Phyllis J. Wright, B-272194, Aug. 27, 1996. Accordingly, waiver is inappropriate.

### **Conclusion**

We affirm the Settlement Certificate.

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Michael D. Hipple

Chairman, Claims Appeals Board

\_\_\_\_\_/s/\_\_\_\_\_  
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Christine M. Kopocis

Member, Claims Appeals Board

\_\_\_\_\_/s/\_\_\_\_\_  
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Jean E. Smallin

Member, Claims Appeals Board

1. These codes are not defined on the LES. The employee states that he first learned that "SD" is supervisory differential and "RA" is retention allowance when he read our Settlement Certificate.
2. This amount reflects the net overpayment received by the employee, the gross amount being \$11,811.20. We note that an employee is indebted for the gross amount of an overpayment of salary. See DOHA Claims Case No. 97050502 (July 23, 1997). This initial indebtedness mistakenly was for 4 pay periods. When our adjudicators requested a verification of the indebtedness, the Defense Finance and Accounting Service verified that the debt is \$14,764.00, \$222.40 plus \$2,730.40 for 5 pay periods. The employee correctly points out that he should have received a proper accounting of his indebtedness. By examining his LESs for the 5 pay periods, he can verify this amount.