

This decision was modified by the Deputy General Counsel (Fiscal), Department of Defense, on February 9, 2001.

DATE: February 18, 1999

In Re:

[Redacted]

Claimant

Claims Case No. 98113023

CLAIMS APPEALS BOARD DECISION

DIGEST

An employee received a partial salary payment during an extended leave-without-pay period and another full payment 2 months after retirement. The employee should not have anticipated a salary payment during his LWOP, nor a full pay period salary payment after his retirement date. The employee is considered partially at fault under the waiver statute for his failure to make inquiries to verify the nature and amount of these payments; and, therefore, waiver is precluded.

DECISION

This is in response to an appeal of our November 10, 1998, Settlement Certificate, DOHA Claim No. 98062215, which sustained the Defense Finance and Accounting Office's (DFAS) denial of a DoD employee's application for waiver of a debt of \$2,111.97.⁽¹⁾ The debt arose when the employee received erroneous salary and benefits payments.

Background

The record indicates that the employee was in a leave-without-pay (LWOP) status from January 31, 1993, through June 5, 1993. He then resigned on June 14, 1993. The employee erroneously received \$213.57 basic salary for the pay period ending May 22, 1993, and \$1,898.40 basic salary for the pay period ending July 31, 1993. Additionally, he was overpaid \$284.76 lump-sum leave during the pay period ending September 25, 1993. Our Settlement Certificate agreed with the DFAS's recommendation that the debt for the lump-sum leave be waived.

The employee states he was not aware of the debt prior to receiving a September 1994 letter of indebtedness. At that

time he requested an explanation of the debt and began exchanging letters with DFAS. In each letter, DFAS confirmed the debt, but made changes in the amount of the debt and the reason for the debt. The record indicates the employee's frustration with the lack of specific response to his questions and with the debt process in general.

On appeal, the employee argues that there are compelling reasons that provide bases for waiver of the salary overpayments beyond the fact that erroneous payments were made in May and August. Particularly, he states that he assumed when he received each of these checks that they represented the routine and proper closing of accounts. He points out that his experience with the government pay system up to this time had been that it was careful, consistent and accurate. Additionally, he states that he did not receive a Leave and Earnings Statement or other document which would have suggested to him that either payment was in any way improper. He contends that the fact that at least part of the payments received were correct (a portion of the lump-sum leave payment received in September) reinforced his good faith presumption that the government had acted correctly in issuing the checks. The employee apparently deposited all three checks simultaneously in December 1993. He also contends that the repeated changes in position by DFAS concerning the nature and amount of the debt⁽²⁾, the extended delays resulting in a five year debt process, and the significant costs he has incurred as a direct result of the process are compelling reasons for waiver.

Discussion

Under 5 U.S.C. § 5584, this Office may waive claims of the United States against DoD employees arising out of erroneous payments of pay and allowances only when collection would be against equity and good conscience and not in the best interest of the United States and only when there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee or any other persons having an interest in obtaining a waiver. *See Standards for Waiver*, 4 C.F.R. § 91.5 (1996). 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 DOHA Claims Case No. 98072904* (September 1, 1998); *George S. Winfield*, 66 Comp. Gen. 124 (1986). An individual who should have known or did in fact know that a payment was erroneous has a duty to make inquiries or bring the matter to the attention of the appropriate officials. The employee is at fault if he does otherwise. *See DOHA Claims Case No. 97013104* (March 20, 1997). In such circumstances, collection action of the erroneous payment is neither against equity and good conscience nor contrary to the interest of the United States. *See DOHA Claims Case No. 97062629* (July 17, 1997); *Dennis R. Nix--Reconsideration*, B-249371.2, April 30, 1993.

Regarding the May payment of base salary for 9 hours, we note that this was in the middle of the employee's period of LWOP. He provides no justification for his statement that he reasonably assumed that a salary payment at this time was correct. A reasonable person who had been on extended LWOP for approximately five months would not have reason to anticipate a payment of salary from the government during the fifth month. Having received such a payment, we believe a reasonable person would contact his finance office to verify the validity of the payment. *See DOHA Claims Case No. 97012135* (June 13, 1997) and cases cited therein. The employee apparently did not do so in this case. As a result, we find that the employee is at least partially at fault, and collection of the erroneous payment is appropriate.

The employee argues that he presumed the August payment was the proper closing of his account. He received two payments after his retirement: the August salary payment for a full pay period and the September lump-sum leave payment. His July 23, 1997, fax to the Director, DFAS, suggests that the August payment may have been the final check for the final period he worked, presumably between June 5 and June 14. We note that DFAS indicates that he previously had been paid for his final period he worked. Even if he had not received such payment, he provides no evidence to support his contention that he reasonably expected to receive after his retirement a salary payment for a full pay period.

This Board finds that a reasonable person would verify the purpose and amount of a payment received almost two months after his retirement. Not having verified the payment, we find that the employee is at least partially at fault, and collection of the erroneous payment is appropriate.

Waiver is an equitable remedy and therefore depends on the facts of the case at hand. Equity is not available to a party who is in any way at fault. Since in this case the employee is partly at fault, waiver is precluded. It is unfortunate that these overpayments were made due to administrative error; however, under the waiver statute, an erroneous payment by the government alone does not provide an opportunity for an employee to accept a windfall at the government's expense. *See* DOHA Claims Case No. 98040117 (July 8, 1998). An employee is not entitled to waiver as a matter of right whenever he receives an overpayment as a result of an administrative error. When an employee receives payments which he knows or ought to know are in excess of his entitlement, he does not acquire title to the excess amounts and has a duty to return them when asked to do so.

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. Our Settlement Certificate agreed with DFAS' recommendation to waive \$284.76 of the total debt of \$2,396.73.
2. One change purportedly was a decrease in the amount of the debt as a result of a check to the employee dated June 25, 1993, which was not cashed. Another dispute centered around health benefits payments which the employee made in October 1995.