

August 16, 1999

In Re:

[Redacted]

Claimant

)

Claims Case No. 99070513

CLAIMS APPEALS BOARD DECISION

DIGEST

Under 5 U.S.C. § 5584, waiver is precluded when an employee is aware that he is being overpaid. In such a situation the employee does not acquire title to the overpayment and has a duty to hold the excess amounts for eventual repayment.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate, DOHA Claim No. 99040511, dated April 7, 1999, which denied the request of a retired employee for waiver of a debt which arose when his salary was not reduced after he was rehired in a temporary position.

Background

The employee accepted the temporary position on February 23, 1994. He was notified in April 1994 that his annuity was subject to offset due to his employment, but his salary was not reduced until after May 28, 1994, resulting in a debt of \$1,915.20. The employee states that he believed his salary was not subject to offset because the job was temporary and without benefits. The Defense Finance and Accounting Service (DFAS) states that he was not advised of the offset until April, and therefore DFAS recommended that DOHA waive the overpayment of \$1,094.40 which the employee received between February 23 and April 16. They recommended denial of waiver of the remaining \$820.80, since the employee was aware of the salary overpayment by April 17. In his appeal the employee states that repayment will cause him hardship.

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive collection of erroneous payments of pay or allowances from DoD employees if collection would be against equity and good conscience and not in the best interest of the United States, provided that 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) (1996). Waiver is precluded when the employee was aware that he was being overpaid. *See* DOHA Claims Case No. 98040116 (July 8, 1998); and *Richard W. DeWeil*, B-223597, Dec. 24, 1986. *See also Philip W. McNany*, B-198770, Nov. 13, 1980.

In the case before us, the member states that he was unaware when he accepted a temporary government job that his salary was subject to reduction due to his Civil Service annuity, and DFAS concurs. Therefore, waiver was properly granted for payments made before the employee was aware of the required reduction. Waiver cannot be granted for overpayments which occurred after he was informed of the requirement. *See* DOHA Claims Case No. 98040116, *supra*. After he was made aware that he was being overpaid, he did not acquire title to the overpayments and should have held the money for eventual repayment. *Id.*

While we understand and appreciate the employee's financial situation, hardship does not provide a basis for waiver. *See* DOHA Claims Case No. 98012301 (February 3, 1998); and *Susan J. Carroll*, B-252672, Sept. 20, 1993. If the employee

explains his situation to DFAS, DFAS may take it into account in setting up his repayment plan. However, that determination is within DFAS's authority, not ours.

Conclusion

We affirm the Settlement Certificate.

/s/

Michael D. Hipple

Chairman, Claims Appeals Board

/s/

Michael H. Leonard

Member, Claims Appeals Board

/s/

Jean E. Smallin

Member, Claims Appeals Board