

KEYWORDS: Waiver of Indebtedness

DIGEST: When an employee knows, or reasonably should know, that he is receiving payments to which he is not entitled, he has a duty to retain such amounts for subsequent refund to the government, and to make prompt inquiry to the appropriate officials concerning his pay.

CASENO: 2012-WV-031301.2

DATE: 10/04/2012

DATE: October 4, 2012

In Re:)
 [REDACTED]) Claims Case No. 2012-WV-031301.2
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When an employee knows, or reasonably should know, that he is receiving payments to which he is not entitled, he has a duty to retain such amounts for subsequent refund to the government, and to make prompt inquiry to the appropriate officials concerning his pay.

DECISION

An employee of the Navy has appealed the July 12, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claims Case No. 2012-WV-031301. In that case, this Office granted waiver in the amount of \$21,139.16, and denied waiver in the amount of \$20,438.20.

Background

Effective December 11, 2005, the employee was temporarily promoted from a Physical Scientist, GS-14, step 3 (\$90,798.00 per annum) to a Physical Scientist, GS-15, step 1 (\$100,129.00 per annum). The Notification of Personnel Action (SF-50) stated the promotion

was for a period not to exceed (NTE) December 10, 2007, which was later changed to September 30, 2007. During the period December 11, 2005, through January 20, 2007, the employee was paid correctly. However, in January 2007, the employee received a general pay adjustment, changed to a lower grade, and was converted to the National Security Personnel System (NSPS). As a result of these initial changes and subsequent personnel actions, his salary and lump sum performance payment (LSPP) were miscalculated from January 21, 2007, through September 29, 2007; and because the temporary position failed to be terminated, he erroneously continued to receive salary and pay changes based on the temporary promotion rate through May 10, 2008, causing an overpayment of \$16,360.60.

In May 2008, the employee was returned to a lower grade from the temporary promotion, and his salary reduced. Although his salary was reduced from \$124,026.00 per annum (\$59.43 per hour) to \$112,095.00 per annum (\$54.28 per hour), the Defense Finance and Accounting Service (DFAS) determined that his salary should have changed to \$104,825.00 (\$50.23 per hour). Due to this administrative error, the employee's salary continued to be miscalculated from May 11, 2008, through January 3, 2009, resulting in an overpayment of \$4,778.56. This increased his debt to \$21,139.16 (\$16,360.60 + \$4,778.56).

On January 4, 2009, the employee was entitled to receive a general pay adjustment and a regular performance increase. However, due to an administrative error his salary was increased using the erroneous salary of \$124,026.00 per annum, as opposed to the correct salary rate of \$104,825.00 per annum. Consequently, his salary was erroneously increased to \$130,479.00 per annum (\$62.52 per hour), instead of \$110,279.00 per annum (\$52.84 per hour). This caused his salary to be miscalculated from January 4, 2009, through November 21, 2009, resulting in an overpayment of \$17,811.20. This further increased his debt to \$38,950.36 (\$21,139.16 + \$17,811.20).

Additionally, the employee received a LSPP during the pay period January 4, 2009, through January 17, 2009, in the amount of \$3,105.00. However, DFAS has advised this Office that the employee should have only received \$2,625.00, causing an overpayment of \$480.00. Also, during the pay period November 22, 2009, through December 5, 2009, the employee was erroneously issued a retroactive LSPP which duplicated the prior award for the period January 4, 2009, through January 17, 2009. Thus, the total debt is \$41,577.36 (\$38,950.36 + \$480.00 + \$2,147.00).

In their administrative report DFAS recommended that \$4,758.40 of the debt be waived. This represents the portion of his salary that was miscalculated from January 21, 2007, through September 29, 2007. They recommended the remainder be denied. DFAS stated that during the period January 21, 2007, through September 29, 2007, the employee was detailed to North Carolina, away from his permanent duty station in Virginia. DFAS believed that this may have made it difficult for the employee to verify the accuracy of his pay. DFAS, however, believed that when the employee returned to his permanent duty station in October 2007, because he had over fifteen years of federal experience, that he should have expected that his return would be documented in the form of a SF-50. Unless he received documentation of a promotion, he should not have relied on general assurances that his pay was correct. In the appeal decision, the adjudicator determined that the employee acted in good faith in accepting \$21,139.16 of the

overpayment for the period January 21, 2007, through January 3, 2009. The adjudicator pointed to the evidence in the record that each time the employee's pay fluctuated, he questioned the changes and was assured his pay was correct.¹ There was also information from his human resources office that it was highly probable that the employee did not receive the SF-50s in question. First, requests for personnel action involving temporary employees failed to be submitted to the human resources office; and second, the fact that he was away from his duty station probably contributed to the errors. The adjudicator did agree with DFAS that the \$17,811.20 salary overpayment, \$480.00 LSPP overpayment, and the \$2,147.00 retroactive LSPP payment should be denied. The employee based his belief in his previous higher salary on his temporary promotion, which had been miscalculated. The employee stated that he was not aware of the erroneous payments until April 2009. However, in May 2008 there was a decrease in his salary due to the temporary promotion ending. As noted, his pay decreased from \$59.43 per hour to \$53.71 per hour. During this period, the adjudicator believed the employee may not have been aware his pay was still being miscalculated as he was expecting his salary to decrease. However, during the pay period ending (PPE) January 17, 2009, the employee's salary increased to \$62.52 per hour. The adjudicator believed that the employee should have at least questioned an increase of approximately \$9.00 an hour. The adjudicator noted that while the employee may have attributed the increase to the "flexibility available with NSPS performance recognition," he did not submit any documentation as to why he would be entitled to such an amount. He also failed to address the LSPP overpayment and the LSPP retroactive payment.

The employee requests reconsideration because while he understands the argument that \$9.00 is a significant difference, he says it should really be compared against what he was making before the reduction, \$59.43, which is only approximately a \$3.00 difference. He states that he was told that his pay was reduced because his temporary promotion expired. He requested that it be reinstated because he was still working at the GS-15 level. He was told that his command needed to do the paperwork. He contends that nothing moved very quickly in his command, and they were also restructuring the workforce, so six months to fix the problem did not seem unreasonable. When he received the pay raise to \$62.52, he assumed that his GS-15 had been reinstated, and his pay was within the boundaries of NSPS. He points out that our Office has already concluded that he did not receive SF-50s regarding pay changes during this period. He contends that he was not aware that he had a pay problem until April 2009, and did not know the scope of the problem until October 2009. Therefore, he requests the remainder of the overpayment be waived.

Discussion

Title 5, U.S.C., § 5584 provides authority for waiving claims for erroneous payments of pay and certain allowances made to specified federal employees, if collection of the claim would be against equity and good conscience and not in the best interests of the United States. Generally, these criteria are met by a finding that the claim arose from an administrative error

¹ Although his position had converted to NSPS, the employee believed he was performing work, and was being compensated during his temporary promotion, at the GS-15 level. The employee stated that he was advised by the Budget and Personnel Manager from his permanent duty assignment that if he continued to do the work at the GS-15 level, the detail would continue until May 2008 and his pay would reflect that of a GS-15. The record reflects that the employee's pay decreased from \$59.43 per hour to \$53.71 per hour in May 2008.

with no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee or any other person having an interest in obtaining the waiver.

The employee may have believed that the pay increase in January 2009 was attributed to the “flexibility available with the NSPS recognition,” but he has still not submitted any documentation substantiating a pay increase of approximately \$9.00 per hour. He has also still not addressed the LSPP overpayment or the retroactive LSPP payment or why he would be entitled to those payments. This Office has consistently held that when an employee knows, or reasonably should be expected to know, that he is receiving payments to which he is not entitled, he has a duty to retain such amounts for subsequent refund to the government, and to make prompt inquiry to the appropriate officials concerning his pay. Since the employee failed to do so, and has failed to provide any new evidence in his request for reconsideration to persuade us otherwise, this Office believes collection of the overpayment in the amount of \$20,438.20 for the period January 4, 2009, through December 5, 2009, would not be against equity and good conscience, nor would it be contrary to the best interests of the United States. *See* DOHA Claims Case No. 2011-WV-032105.2 (September 29, 2011), DOHA Claims Case No. 2011-WV-020101.2 (September 4, 2011), and DOHA Claims Case No. 2010-WV-010801.3 (May 24, 2010).

Conclusion

The claimant’s request for reconsideration is denied, and we affirm the July 12, 2012, appeal decision. In accordance with Department of Defense Instruction 1340.23, ¶ E7, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

///Original Signed///

Catherine M. Engstrom
Member, Claims Appeals Board

///Original Signed///

Natalie Lewis Bley
Member, Claims Appeals Board

