

DATE: June 17, 2019

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2018-WV-082309.2
)
)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Waiver is not appropriate when an employee is aware or should be aware that he is receiving payments in excess of his entitlement.

DECISION

An employee of the U.S. Navy requests reconsideration of the decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-WV-082309.2, dated March 8, 2019. In that decision, DOHA denied waiver of the employee's debt in the amount of \$2,327.96, which resulted from the overpayment of basic salary, overtime and shift differential pay.

Background

On July 6, 2010, the employee was appointed as a Boilermaker, WG-10, step 1, with the Navy. Effective March 14, 2012, the employee received a temporary promotion to a Boilermaker Leader, WL-10, step 1. Effective September 8, 2013, the employee's promotion became permanent. In 2015 the employee received a temporary promotion to Boilermaker Supervisor, WS-10, step 1, not to exceed 120 days. On December 18, 2015, while the employee was still serving in his temporary promotion as a Boilermaker Supervisor, he resigned from his position. On July 22, 2016, the employee was tentatively selected to be reinstated for the position of Boilermaker Supervisor, WS-10, step 1. A *Notification of Personnel Action*, SF-50, issued on August 26, 2016, and effective August 22, 2016, reinstated the employee to the career position of a Boilermaker Supervisor, WS-10, step 1, with a salary of \$28.28 per hour. The remarks section of the SF-50 stated "Completed service requirement for career tenure."

However, it was later determined that since the employee had previously only held a temporary supervisory position, he was not entitled to reinstatement in a permanent supervisory position. An SF-50 issued and effective October 23, 2016, corrected the employee's position from a Boilermaker Supervisor, WS-10, step 1, to a Boilermaker Leader, WL-10, step 3, with a salary of \$25.93 per hour. However, the employee continued to be erroneously paid \$28.28 per hour as a Boilermaker Supervisor, WS-10, step 1. As a result of the employee's erroneous hiring, the employee was overpaid \$2,327.96 during the period August 22, 2016, through February 4, 2017.

The employee requested waiver of the debt on August 25, 2017. On his DD Form 2789, *Waiver/Remission of Indebtedness Application*, in answer to the question, "State the date and how you first became aware of debt or erroneous payment?" the employee responded, "HRO notified me that I may have been erroneously reinstated in September 2016, but they were researching ways to correct my hire." Also on the DD Form 2789, in answer to the question, "If you were aware of debt or erroneous payment, explain the actions you took to correct situation?" the employee responded, "I have been waiting on HRO to determine if they would be able to correct my hiring action. In February 2017 they notified me that they were not able to correct my hiring action and I would be indebted." In response to why the employee was requesting waiver, he stated that he is not aware of Human Resources rules and regulations regarding reinstatements, and was not responsible for his incorrect appointment.

The Defense Finance and Accounting Service (DFAS) originally responded to the employee by sending him a letter advising him that his debt issue may be remedied by treating it as a *De Facto* case. However, after DFAS researched the issue and received documentation from the employee's Human Resource Office (HRO), DFAS concluded that the employee's debt should be considered for waiver and not as a *De Facto* case. Although DFAS noted that the employee stated that he was notified in September 2016 by his HRO that he may have been erroneously reinstated but HRO was searching for ways to correct the hiring action, DFAS determined that waiver was appropriate because the employee reasonably relied upon the expertise of HRO to correctly pay him. DFAS found that after the HRO informed him of the error, he waited several months for them to try to rectify the problem, and his HRO did not notify him until February 2017 that they could not correct the hiring error in his favor. Therefore, DFAS recommended our office waive the employee's indebtedness resulting from the erroneous salary payments.

Based on the employee's statement on his waiver application and the record evidence, the DOHA adjudicator declined to follow the recommendation of DFAS and denied waiver of the erroneous salary payments. The adjudicator cited the employee's statements on the DD Form 2789, and concluded that the employee was on notice that his reinstatement was potentially erroneous in September 2016 when he was advised of the issue by his HRO. The adjudicator also acknowledged that the employee may have been told by his HRO in September 2016 that they were researching ways to correct the hiring action. However, the adjudicator further noted that the employee was sent an email by his HRO on November 17, 2016, explaining that based on their prior conversation, the employee's reinstatement had to be to a Boilermaker Leader, WL-10, step 3, at the salary of \$25.93 per hour, with the effective date of August 22, 2016. His HRO also advised him at that time that he would be placed in debt for the overpayment of salary he received as a Boilermaker Supervisor. However, his HRO would assist him with requesting

waiver of the indebtedness. Therefore, the adjudicator found that since the employee was aware of a potential error in his salary in September 2016, he should have held the erroneous funds for eventual repayment.

In his reconsideration request, the employee states that he was relying upon the HRO to fix the hiring error, and that he was not aware he was being paid incorrectly or that management was not going to correct the error. The employee states that he was notified by his HRO on November 17, 2016, that he was ineligible for the reinstatement as a Boilermaker Supervisor, WS-10, step 1, because he did not hold it permanently before he resigned in December 2015. He states that he had many conversations with his HRO and was told that HRO was trying to find a way to legally hire him into the position as a WS-10, step 1. He states that he did not receive final confirmation that the hiring action would be changed to a Boilermaker Leader, WL-10, until he was notified on February 2, 2017. He states he was being utilized by management in a supervisory capacity and told he was needed in that capacity. He attaches e-mails from his HRO and supervisory reports he submitted for the period in question.

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive collection of erroneous payments of salary an employee received if collection would be against equity and good conscience and not in the best interests of the United States. The fact that an erroneous payment is solely the result of an administrative error or mistake on the part of the government is not sufficient basis in and of itself for granting waiver. *See* Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006) ¶ E4.1.3. Waiver is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government, even if the government fails to act after such notification. *See* Instruction ¶ E4.1.4.

In this case, the DOHA adjudicator relied on the record evidence included in the employee's original waiver request, specifically, the employee's acknowledgement that he was aware of a potential error in his reinstatement in September 2016. Although the employee states that he did not have final confirmation until February 2017 that the hiring action could not be corrected, this does not change the fact that the adjudicator found he was on notice in September 2016 that his reinstatement appointment was incorrect. In his reconsideration request, he does not address his acknowledgement on his waiver application that he was notified of the potential error in September 2016. In addition, on November 17, 2016, he was advised that his reinstatement would be changed to a Boilermaker Leader, WL-10, effective August 22, 2016, and he would be indebted for the amount of salary he received in his supervisory pay grade position. Under the circumstances, since the employee was aware that there was a discrepancy in his appointment and his pay, he should have continued to follow up with his HRO concerning the accuracy of his salary and the possibility of any collection of overpayments. In the meantime, he should have retained any excess amount for possible repayment. Therefore, waiver is not appropriate. *See* DOHA Claims Case No. 2018-CL-103004.2 (May 6, 2019); DOHA Claims Case No. 2017-WV-022302.2 (January 11, 2018); DOHA Claims Case No. 2012-WV-121006.2 (February 26, 2013); and DOHA Claims Case No. 06112735 (December 6, 2006).

Conclusion

The employee's request for relief is denied, and we affirm the DOHA decision to deny waiver. In accordance with Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

Ray T. Blank, Jr.
Member, Claims Appeals Board