

DATE: September 30, 2019

In Re:)

[REDACTED])

) Claims Case No. 2018-WV-122003.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When an employee is aware that he is receiving salary in excess of his entitlement, he does not acquire title to the excess amount and has a duty to retain the excess for eventual repayment to the government.

DECISION

An employee of the U.S. Army requests reconsideration of the decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-WV-122003, dated July 23, 2019. In that decision, DOHA waived in part the collection of a debt owed by the employee. The employee seeks waiver of the remaining indebtedness.

Background

Effective June 8, 2009, the employee received a seasonal, excepted appointment with the Army. Since the employee's position was seasonal, he was subject to release in a non-pay status and recall to duty to meet workload requirements. During the period January 17, 2010, through January 30, 2010, the employee was in a non-pay status and not due any salary. However, due to an administrative error, the employee was erroneously paid salary for 80 hours during the pay period ending (PPE) January 30, 2010, causing an overpayment of \$1,658.40. In addition, during the period April 12, 2010, through April 16, 2016, the employee's basic salary, overtime, Sunday and holiday premium pay, and shift differentials were miscalculated causing an overpayment in the amount of \$7,253.19.

In DOHA Claim No. 2018-WV-122003, the adjudicator followed the recommendation of the Defense Finance and Accounting Service (DFAS), and waived the overpayment of

\$7,253.19, but denied waiver of \$1,658.40. The adjudicator concluded that the employee should have known that he was not entitled to receive any salary while he was in a non-pay status during the period January 17, 2010, through January 30, 2010. The adjudicator found that there was no indication that the employee questioned the payment of \$1,658.40, or was told that he was entitled to the money.

In his request for reconsideration, the employee states that he was indeed overpaid \$1,658.40 as a result of an administrative error. However, he states that he immediately questioned his pay clerk about the net amount of \$1,214.87 deposited in his bank account while he was in a non-pay status. He states that the clerk told him to hold the money until he was back in a pay status and his debt would be collected at that time. He states that he followed those instructions and held the money. He states when he returned to a pay status, DFAS began collection out of his bi-weekly pay check before he could write a check for the full debt amount. He states that DFAS ultimately collected \$190.69 of the debt and on June 23, 2010, he wrote a check for the remainder, \$1,024.18. He states that his debt has been paid in full for the \$1,658.40, and he owes no more money. Finally, he seeks clarification concerning the \$7,253.19, the amount DOHA has already waived. He states that he has already paid \$6,904.22 of the \$7,253.19 debt, and wants to know if he will be refunded.

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. This statute is implemented within the Department of Defense under Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006). In relevant part, generally, persons who erroneously receive a payment from the government acquire no right to it and are bound in equity and good conscience to make restitution, no matter how careless the act of the government may have been. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant. *See* Instruction ¶ E4.1.1.

A waiver is usually inappropriate when a recipient knows, or reasonably should know, that a payment is erroneous. In such instances, the recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government. *See* Instruction ¶ E4.1.4.

In the present case, the employee acknowledges that he knew he was overpaid \$1,658.40 while he was in a non-pay status and immediately informed his pay clerk. Waiver is inappropriate if the employee is aware he is being overpaid when he received the payment. *See* DOHA Claims Case No. 2017-WV-031702.2 (May 16, 2017); DOHA Claims Case No. 2013-WV-021303.2 (August 8, 2013); and DOHA Claims Case No. 2011-WV-030802.3 (August 24, 2011).

The employee expresses concern about the refund of the amount of the \$7,253.19 debt he has already paid. Under Instruction ¶ E3.5, DFAS is required to refund the amount the employee has repaid since this portion of the debt was previously waived. DFAS has informed DOHA that his refund was processed on August 17, 2019. If he has any further questions concerning his refund, he should contact DFAS.

Conclusion

The employee's request for relief is denied, and we affirm the decision dated July 23, 2019, to deny waiver in the amount of \$1,658.40. 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: Gregg A. Cervi

Gregg A. Cervi
Member, Claims Appeals Board