DATE: April 30, 2019

In Re:
[REDACTED]

Claimant

Claims Case No. 2018-WV-112805.2

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

Waiver is not appropriate under 5 U.S.C. § 5584 when an employee is found to be at least partially at fault in not providing accurate information which may have contributed to the accrual of the erroneous payments.

DECISION

A former employee of the U.S. Army requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-WV-112805, dated January 16, 2019.

Background

On May 18, 2015, the employee was appointed to a civilian position with the Army. On January 21, 2017, the appointment was cancelled after it was determined that she was appointed in violation of 5 U.S.C. § 3110, the anti-nepotism statute. The employee's mother was the director of the employee's agency and the selecting official on the appointment to the position. As a result, the employee was not entitled to pay for her service to the Army, and all such payments received for her employment were erroneous payments. Therefore, recoupment of the employee's salary she erroneously received during the period May 18, 2015, through January 21, 2017, in the amount of $74,851.12 was required.

In the appeal decision, the DOHA adjudicator sustained the Defense Finance and Accounting Service's decision to deny waiver of the debt. The adjudicator found that the record evidence showed that the employee was at least partially at fault in the accrual of the debt because she failed to disclose that her mother was the director of the hiring agency/selection official of her appointment.

In her request for reconsideration, the employee states that waiver should be granted because of financial hardship in repaying the debt. She also states that she was unaware of the hiring error. She states that she worked for almost two years with exceptional performance ratings. She also contends that the agency should have known of her relationship with the selecting official because she worked for the agency from July 2010 through July 2012, and she noted on her *Declaration for Federal Employment* (OF-306), at that time that her mother, father and step-father worked for the agency. She also argues that her mother was not involved in hiring her.

Discussion

The anti-nepotism statute, 5 U.S.C. § 3110, provides in pertinent part, the following:

> (b) A public official may not appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position in the agency in which he is serving or over which he exercises jurisdiction or control any individual who is a relative of the public official. An individual may not be appointed, employed, promoted, or advanced in or to a civilian position in an agency if such appointment, employment, promotion, or advancement has been advocated by a public official, serving in or exercising jurisdiction or control over the agency, who is a relative of the individual.
>
> (c) An individual appointed, employed, promoted, or advanced in violation of this section is not entitled to pay, and money may not be paid from the Treasury as pay to an individual so appointed, employed, promoted, or advanced.

In this case, the employee's mother, as the director of the hiring agency, was the selecting official for her May 2015 appointment to the position. The Army did not discover this until over a year later in the processing of the employee's promotion. The Army then conducted an investigation into the appointment action. In January 2017 the Army determined that the employee's appointment violated the anti-nepotism statute. Therefore, the employee's appointment was cancelled and as required by statute a recoupment action was initiated for the salary she received from May 2015 through January 2017. Although the employee states that she worked hard for almost two years with exceptional performance ratings, the anti-nepotism statute's absolute prohibition on payment bars any ability for the employee to be compensated for her services during the period of her illegal employment. However, all such payments

received for her employment were erroneous payments which can be considered for waiver under the authority of 5 U.S.C. § 5584.

Under 5 U.S.C. § 5584, we have the authority to waive collection of erroneous payments of salary an employee receives if collection would be against equity and good conscience and not in the best interests of the United States, provided there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the employee. Under section 5584(b)(1), DOHA is precluded from exercising equitable waiver authority where an employee is found at least partially at fault in not providing accurate information that gave rise to the erroneous payment. *See* Comptroller General decision B-224647, Sept. 28, 1987.

We have consistently interpreted the word "fault" to include something more than a proven overt act or omission by the employee. We thus consider fault to exist if in light of all the facts it is determined that the employee should have known that an error existed and taken action to have it corrected. Our standard is whether a reasonable person should have been aware that she was receiving payment in excess of her proper entitlement. *See* B-256296, June 14, 1994.[1]

Both DFAS and the DOHA adjudicator found evidence in the record that the employee was at least partially at fault in the accrual of her debt for the failure to inform her employing agency of her relationship to the selecting official. She failed to disclose her mother's name on her May 2015 OF-306, as she was instructed to do. As a result, the appropriate officials did not realize at the time of her in-processing for her federal appointment that she was employed in contravention of the above-mentioned anti-nepotism statute. If the employee had listed her mother's name on the OF-306, presumably, her illegal appointment would have been discovered thereby preventing the erroneous salary payments. Thus, the employee's omission of required information precipitated the error in her hiring. Although the employee noted on her OF-306 when she worked for the agency from 2010 through July 2012 that she had family members working at the agency, she also listed their names at that time as required on the form. However, when she subsequently filled out another OF-306 for the position at the agency in 2015, she did not disclose their names. In addition, as noted by the DOHA adjudicator in the appeal decision, in a sworn statement after discovery of the violation in hiring, she stated that she understood the fact that her mother could not hire her. Under the circumstances, we find no error in the appeal decision imputing fault on the part of the employee in the accrual of the debt, which statutorily precludes waiver.

Finally, financial hardship does not provide a basis for waiver. *See* DOHA Claims Case No. 00081602 (November 22, 2000).

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[1]This decision was decided under 10 U.S.C. § 2774 because the applicant for waiver was a military member. However, the standards for waiver under 5 U.S.C. § 5584 and 10 U.S.C. § 2774 are the same.

Conclusion

The employee's request for relief is denied, and we affirm the January 16, 2019, appeal decision to deny waiver of the debt. In accordance with Department of Defense Instruction 1340.23 ¶ 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