

DATE: February 27, 2020

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In Re: )

[REDACTED] )

Claimant )

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) Claims Case No. 2019-WV-091204.2  
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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

When an employee is aware or should be aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to hold them for eventual repayment to the government.

**DECISION**

An employee of the U.S. Army Corps of Engineers requests reconsideration of the decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2019-WV-091204, dated January 15, 2020.

**Background**

The employee was in proper receipt of his salary through the pay period ending (PPE) November 10, 2018. On November 26, 2018, a *Notification of Personnel Action* (SF 50), was issued granting the employee a general annual salary adjustment from \$98,886.00 to \$105,880.00, retroactive to May 27, 2018. Another SF-50 was issued on November 28, 2018, granting the employee a within-range-increase from \$105,880.00 per annum to \$108,401.00 per annum, retroactive to September 16, 2018. However, it was then determined that the employee's annual salary should have remained \$98,886.00. As a result, the employee received his proper current earnings during the PPE November 24, 2018. However, during this pay period, he erroneously received retroactive payments totaling \$3,216.09.

A debt in the amount of \$3,216.09 was established against the employee, and was reflected on his leave and earnings statement (LES) for the PPE January 5, 2019. On January 19, 2019, the Defense Finance and Accounting Service (DFAS) sent the employee a formal letter notifying him of the debt. On February 11, 2019, the employee repaid his debt in a lump sum.

On March 1, 2019, the employee requested waiver of the debt. DFAS recommended that DOHA waive the debt in full because the employee detrimentally relied on the expertise of his personnel department to set his pay correctly and accepted the payment in good faith.

The DOHA adjudicator declined to follow DFAS's recommendation to waive the employee's debt. In reaching her conclusion that waiver was not appropriate, the adjudicator relied on the employee's statements in his *Waiver/Remission of Indebtedness Application*, DD Form 2789. He stated that he became aware of the error on November 27, 2018, when he received a notification by email alerting him to the fact that an SF-50 had posted to his electronic official personnel file (eOPF) granting him retroactive special salary. He stated that on November 30, 2018, he retrieved his LES for the PPE November 24, 2018, and discovered that he had been erroneously paid retroactive payments totaling \$3,216.09. He immediately contacted his supervisor and his Civilian Personnel Advisory Center (CPAC) to report the error. Since the employee actually received his salary, which included the erroneous retroactive payment of \$3,216.09, during the PPE November 24, 2018, on December 6, 2018, the adjudicator found that waiver was not appropriate since the employee knew he was being overpaid upon receipt of the erroneous payment.

In the employee's request for reconsideration, the employee explains that his statements on the DD Form 2789 were meant to relay his good faith attempts to inquire about the changes in his pay, and prevent erroneous payments and any future indebtedness. While he acknowledges he was aware of the potential discrepancy in awarding him a special salary rate based on his position and staffing, he states that due to the conflicting opinions and interpretations of his entitlement to that special rate, it was not clear to him that the payments were truly in error until January 2019. He further requests relief as a matter of equity. He states that there were multiple errors that erroneously established his salary which were no fault of his own, to which the government acknowledges. He cites the hardship created by the tax implications the error generated which he calculates to be valued at over \$1,000.00. This figure is the gross amount of his indebtedness minus the withheld Federal, State, Medicare, and OASDI taxes.

### **Discussion**

Under 5 U.S.C. § 5584, we have the authority to waive the Government's claim for repayment of erroneous payments of pay or allowances to an employee if collection would be against equity and good conscience and not in the best interests of the United States, provided there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. *See* DoD Instruction 1340.23 (Instruction) (February 14, 2006). Waiver is not appropriate when an employee knows, or reasonably should know, that a payment is erroneous. The employee 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 addition, a waiver generally is not appropriate when an employee who receives a significant unexplained increase in pay or allowances, or of any other unexplained payment of pay or allowances, does not attempt to obtain a reasonable explanation from an appropriate official. The employee has a duty to ascertain the reason for the payment and to set aside the funds in the event that repayment should be necessary. *See* Instruction ¶ E4.1.5. A waiver may be inappropriate in cases where an employee questions a payment (which ultimately is determined to be erroneous) and is mistakenly advised by an appropriate official that the payment is proper, if under the circumstances the employee knew or reasonably should have known that the advice was erroneous. *See* Instruction ¶ E4.1.6.

The employee acknowledges that he was aware that he was potentially receiving erroneous payments for the time period in question. He states that when he noticed the changes he immediately emailed his supervisor and informed his CPAC of the retroactive salary payments. Although the employee argues there was some question whether his position and staffing entitled him to the special rate leading to the retroactive payment, he still should have held the retroactive payment in the amount of \$3,216.09, until he received a definite determination of his entitlement. Therefore, the adjudicator reasonably concluded that it would not be against equity and good conscience to recover the retroactive special salary payment the employee received on December 6, 2018, for the PPE November 24, 2018. *See* DOHA Claims Case No. 2015-WV-060503.2 (October 29, 2015); and DOHA Claims Case No. 09080401 (August 11, 2009).

Finally, while we appreciate the steps the employee took to insure he was not overpaid, and recognize that he wanted to avoid a potential debt against him, we have consistently held that the employee is obligated to pay the gross amount of the overpayment. The employee's tax liability on an overpayment does not permit partial waiver of an amount not otherwise appropriate for waiver. *See* DOHA Claims Case No. 08091801 (September 2, 2008); and DOHA Claims Case No. 00073101 (August 21, 2000).

## Conclusion

The employee's request for relief is denied, and we affirm the January 15, 2020, decision. In accordance with the 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

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Catherine M. Engstrom  
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

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Charles C. Hale  
Member, Claims Appeals Board

SIGNED: Gregg A. Cervi

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Gregg A. Cervi  
Member, Claims Appeals Board