

DATE: October 27, 2021

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In Re: )

[REDACTED] )

) Claims Case No. 2020-WV-081007.2

Claimant )

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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 retain them for eventual repayment to the government.

**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. 2020-WV-081007, dated July 29, 2021. In that decision, DOHA waived in part the collection of the debt owed by the employee. The employee seeks waiver of the remainder of the debt.

**Background**

Effective February 18, 2018, the employee was promoted to a GS-13, step 3. Due to an administrative error, the *Notification of Personnel Action*, SF-50, promoting the employee erroneously classified the employee's status under the Fair Labor Standards Act (FLSA) as nonexempt instead of exempt. Therefore, when the employee worked overtime, he erroneously received overtime pay at a higher rate than allowed by law. As a result of this administrative error, the employee was overpaid \$22,203.36 during the period February 18, 2018, through October 12, 2019. The record further reflects that during the pay period ending (PPE) October 26, 2019, the employee erroneously received a retroactive payment in the amount of \$1,574.66, which represented salary for the period February 17, 2019, through October 12, 2019. Therefore, the employee's debt totaled \$23,778.02.

The record shows that the employee received two debt notifications from the Defense Finance and Accounting Service (DFAS); the first one he received on June 22, 2019, and the second he received on September 28, 2019. In addition, the employee stated in his request for waiver that he noticed he was no longer being paid time and a half for overtime pay in June 2019. The DOHA adjudicator followed the recommendation of DFAS in reaching her decision on the employee's request for waiver. She waived \$18,885.82, the portion of the erroneous salary payments the employee received before the first notification of a pay error on June 22, 2019, but denied waiver of \$4,892.20, the erroneous salary payments he received after notification. The adjudicator noted that \$1,574.66 of the \$4,892.20, resulted from the employee receiving an erroneous retroactive payment during the PPE October 26, 2019. She noted that although the employee did not specifically address this portion of the overpayment in his initial waiver request, under the circumstances, he should have at least questioned his entitlement to the retroactive payment.

In his request for reconsideration, the employee states that in the PPE September 14, 2019, DFAS did not pay him an allotment in the amount of \$800.00, and deducted retroactive earnings from his regular salary, overtime and holiday premium pay. He immediately questioned what was going on with his pay and again questioned the retroactive payment he received in the PPE October 26, 2019, but received no answers. He also states that when he received the debt notification in his MyPay account in June 2019, he emailed his Civilian Pay Office for an explanation. He states that when he accepted the promotion, he was told his status would be nonexempt under the FLSA. He further states that he questioned why he continued to be paid as nonexempt under the FLSA after receiving the debt notification in June 2019. He attaches the email exchanges regarding his inquiries.

### **Discussion**

Under 5 U.S.C. § 5584, we have the authority to waive collection of 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, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. The implementing regulation for our waiver authority is set forth under Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006). Paragraph E4 of the Instruction sets forth the standards for waiver. A waiver is not a matter of right but is available to provide relief as a matter of equity, if the circumstances warrant. Generally, persons who receive a payment erroneously from the Government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. *See* Instruction ¶ E4.1.

The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the Government is not sufficient basis in and of itself for granting a waiver. *See* Instruction ¶ E4.1.3. A waiver usually 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. A waiver generally is not appropriate when a recipient of 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 recipient 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. Further, a waiver may be inappropriate in cases where a recipient 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 recipient knew or reasonably should have known that the advice was erroneous. *See* Instruction ¶ E4.1.6.

In this case, the DOHA adjudicator waived the portion of the erroneous salary payments the employee received before the first notification of a pay error on June 22, 2019, but denied waiver of \$4,892.20, the erroneous salary payments he received after notification. Although we appreciate the fact that the employee continued to question his salary payments after notification, he was on notice that his salary was miscalculated in June 2019, and that his FLSA status was at least questionable. Therefore, we believe it would not be against equity and good conscience to deny the portion of the overpayment the employee received after notification, especially considering a portion of that overpayment resulted from an erroneous retroactive payment he received during the PPE October 26, 2019, and after the second debt notification he received in September 2019. Under the circumstances, waiver is not appropriate for the \$4,892.20 after the employee received notification and by his own acknowledgements, continued to question the accuracy of his salary payments. *See* DOHA Claims Case No. 2019-WV-031107.2 (September 10, 2019); and DOHA Claims Case 2011-WV-121301.2 (April 19, 2012).

## Conclusion

The claimant's request for reconsideration is denied, and we affirm the decision dated July 29, 2021. In accordance with DoD Instruction 1340.23 (February 14, 2006) ¶ E7.15.2, 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: Richard C. Ourand, Jr

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Richard C. Ourand, Jr  
Member, Claims Appeals Board