

DATE: February 9, 2022

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2020-WV-112312.2
)
)

**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. Air Force requests reconsideration of the decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claims Case No. 2020-WV-112312, dated December 14, 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 September 12, 2010, based on a special pay rate table the employee's salary was increased from a YC-02, step 00 (\$77,404.00 per annum) to GS-11, step 07 (\$78,446.00 per annum). However, it was later determined that the employee's salary should have been established as \$77,524.00 per annum. Due to that administrative error, the employee was overpaid \$10,669.86 during the period September 12, 2010, through March 30, 2019. In addition, during the pay period ending (PPE) April 13, 2019, the employee erroneously received retroactive payments totaling \$322.27, for the period January 6, 2019, through March 30, 2019. Therefore, the employee's debt totaled \$10,992.13 (\$10,669.86 + \$322.27).

The record shows that the employee was notified by memorandum dated September 7, 2017, from his Command that there was an administrative pay discrepancy in regards to his salary. On the employee's original request for waiver, the DD Form 2789, *Waiver/Remission of Indebtedness Application*, he acknowledged that he first became aware he was being overpaid on September 7, 2017, when he received the memorandum. Therefore, the Defense Finance and Accounting Service (DFAS) recommended our office waive the portion of the employee's indebtedness resulting from the erroneous salary payments he received prior to notification of the error, and deny the remainder of the debt. The DOHA adjudicator followed the recommendation of DFAS in reaching her decision on the employee's request for waiver. She waived \$9,100.69, the portion of the erroneous salary payments the employee received before notification of a pay error on September 7, 2017, but denied waiver of \$1,891.44, the erroneous salary payments he received after notification. The adjudicator noted that \$322.27 of the \$1,891.44, resulted from the employee receiving an erroneous retroactive payment during the PPE April 13, 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 the memorandum he received on September 7, 2017, cited simply that a pay and or administrative discrepancy was identified with his pay. He notes that the memorandum identified one or more of several corrective actions that applied to his pay record: reimbursement of entitled payments; stoppage of payments not entitled; payment changes related to SRC; and administrative corrections related to PDs (no pay impacts). He states that there was no indication that he had been overpaid. He states that his pay did not change and he was not contacted about any debt until March 16, 2019 when he received the first of two debt notifications. He explains that he should have answered March 16, 2019, on the question in Block 12 on the DD Form 2879, which asked "State the date and how you first became aware of the debt or erroneous payment." He states that he answered this question September 7, 2017, by memorandum regarding pay and administrative pay discrepancies because he was advised to do so by the audit specialist who helped him prepare the DD Form 2789. He also explains that after he received the retroactive payment of \$322.27 on April 13, 2019, he then received a payroll deduction of \$297.33 on May 3, 2019, which he assumed was to counter the erroneous payment.

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. 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. 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. 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. Instruction ¶ E4.1.6.

In this case, DFAS and the DOHA adjudicator relied on the record evidence included in the employee's original waiver request, specifically, the employee's statements on the DD Form 2789 and the Air Force memorandum dated September 7, 2017. The employee now contends that he was notified of a pay discrepancy by the memorandum, not a debt or erroneous payment, and he was not aware of his indebtedness until notification on March 16, 2019. However, this does not change the fact that he was informed by the Air Force of a possible overpayment for civilian employees in his occupational series. Specifically, the memorandum explained the pay discrepancies and stated that effective September 17, 2017, the Air Force would stop overpayments to civilian employees not entitled to the payments. Under the circumstances, since the employee was aware that there was a discrepancy in his pay, by the memorandum, he should have continued to follow up with his Human Resource Office concerning the reason why he was notified of a potential overpayment in his salary requiring action. Under the circumstances, waiver is not appropriate. *See* DOHA Claims Case No. 2018-WV-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).

The employee states that a deduction was made from his pay on May 3, 2019, which he believed was for the collection of the erroneous retroactive payment he received in April 2019. However, he later was advised by DFAS that the deduction made from his pay was automatic based on the debt letters he received. He states that he filed for a suspension of the collection of his debt by payroll deductions until after the waiver process was completed. Under the circumstances, we uphold the adjudicator denial of waiver of the erroneous retroactive payment made in the amount of \$322.27. The adjudicator properly waived the portion of the erroneous salary payments the employee received before the first notification of a pay error on September 7, 2017, but denied waiver of \$1,891.44, the erroneous salary payments (including the erroneous retroactive payment) he received after notification. Finally, the employee should contact DFAS with any questions concerning the amount of his remaining indebtedness.

Conclusion

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

Richard C. Ourand, Jr
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

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