

DATE: May 6, 2022

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In Re: )

[REDACTED] )

) Claims Case No. 2021-WV-072004.2

Employee )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Under 5 U.S.C. § 5584, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for repayment 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 that there is no evidence of fraud, fault, misrepresentation or lack of good faith on the part of the employee.

**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. 2021-WV-072004, dated October 1, 2021. In that decision, DOHA waived \$62,368.15 of the \$135,451.79 that the employee owed the government due to the overpayment of living quarters allowance (LQA), but denied waiver of the \$73,083.64 balance of the indebtedness.

**Background**

The employee was an active duty member of the U.S. Marine Corps assigned to Rota, Spain. On January 17, 2014, the member received a tentative employment offer from the U.S. Navy as a continental United States (CONUS) hire for a civilian position in Rota. On February 4, 2014, he received a firm offer from the Navy addressed to his active duty address in Rota. On February 13, 2014, he signed a receipt for permanent change of station (PCS) orders transferring him from his active duty location in Rota to Camp Pendleton, California, for release from active duty service.

On March 6, 2014, a SF-50, *Notification of Personnel Action*, was issued appointing the employee to a career-conditional appointment in Rota. As a result, he was granted LQA as an overseas recruitment incentive. However, it was later determined that the employee did not meet the eligibility criteria to receive LQA because he executed his government-funded return transportation from Rota to the United States, prior to his civilian service appointment; he applied for the civilian position while he was physically located in Rota; and he was subsequently issued PCS orders from his home of record in the United States to Rota. As a result, the employee erroneously received LQA during the pay period ending (PPE) April 5, 2014, through June 8, 2019, causing an overpayment of \$135,451.79.

On August 16, 2016, the employee received a memorandum titled *Notification Regarding Audit of Living Quarters Allowance (LQA)*, from his Human Resources Office (HRO) in Rota. The memorandum advised him that an audit dated March 14, 2016, identified him as an employee recruited outside the United States, and therefore, he was considered locally hired. The audit was attached to the memorandum. The audit stated that in order for the employee to be eligible for LQA, he must be able to answer affirmatively to the following statements, with supporting documentation:

The employee was recruited from the United States by their former employer;

They remained employed by the same employer since assignment to the overseas area;

The employment was under conditions that provide for return transportation to the U.S.; and

They were appointed to the appropriated fund position without having intervening employment.

In his request for waiver of the debt, utilizing the DD Form 2789, *Waiver/Remission of Indebtedness Application*, the employee stated that on August 16, 2016, he met with the HRO Director who signed the memorandum notifying him of the audit. During the meeting, the procedure for the audit was explained to the employee and he was briefed for the first time why he was part of the LQA inquiry. He was advised that he was part of the LQA inquiry because he had used part of his transportation agreement when he took a flight back to Camp Pendleton in February 2014 to retire from the Marine Corps. He was reassured that the error in his receipt of LQA was not attributable to any fault on his part. He stated that he was not afforded the ability to either stop or suspend the continued payment of LQA until the inquiry was completed. He was advised that the inquiry would take a couple of weeks. However, the employee stated that the weeks became months, and months became three years until he was given the final results of the inquiry. On the DD Form 2789, he indicated he did not become aware of the resulting indebtedness until he received notification from his Human Resources Office in Rota on August 22, 2019.

In DOHA Claim No. 2021-WV-072004, issued on October 1, 2021, the adjudicator concluded that the employee acted in good faith in accepting the overpayments which occurred

during the PPE April 5, 2014, through August 6, 2016, in the amount of \$62,368.15, and that all conditions for waiver of that portion of the claim had been met. She further concluded that because the employee was notified by his Human Resources Office in Rota that he was identified as a locally hired employee recruited outside the United States on August 16, 2016, prior to receipt of the erroneous LQA payments for the period August 7, 2016, through June 8, 2019, it was not against equity and good conscience to deny waiver of \$73,083.64. In denying waiver of that portion of the debt, the adjudicator cited three decisions as case precedent: Comptroller General decision B-204419, March 18, 1982; DOHA Claims Case No. 03041512 (June 26, 2003); and DOHA Claims Case No. 98112018 (January 11, 1989).

In the employee's reconsideration request, through his attorney, he states that the LQA audit information provided to him was not documentation that put him on notice that his receipt of LQA was questionable. He states that the case precedent cited by the DOHA adjudicator does not support the conclusion that he was on notice by virtue of the audit. He distinguishes the cited case precedent on the basis that each individual involved was specifically notified of an error or given documents clearly showing an error. In contrast, he states that he was not notified there was an error with his LQA entitlement. He was notified that the Navy was performing a department-wide audit of all locally hired employees who were receiving LQA, including himself. He states that receiving notification of an audit is not the same as receiving notification of an error. He cites DOHA Claims Case No. 2013-WV-100216.2 (June 12, 2014). In that decision, he states that a service member, who was in receipt of aviation continuation pay, was advised that his commander had requested an audit of the aviation continuation pay program be conducted. He states that later the member was advised that he was not entitled to receive aviation continuation pay. He states that DOHA found that the member had reason to know of or suspect an error as of the date he was notified that his pay was incorrect, not the date he was notified of an audit. He further states that the notification of the audit did not reasonably cause him to suspect a pay error. He states that at the time he received notification of the audit, he knew he was an employee recruited outside of the United States because he was in Spain on active duty at the time he applied for and accepted the position. However, this fact gave him no reason to question his receipt of LQA since the applicable regulations, the Department of State's Standardized Regulations (DSSR), section 031.12, provide that LQA be paid to former members who are hired directly from active duty overseas. He states that the audit notification directed him to submit his orders bringing him to Rota, his retirement/separation orders from the Marine Corps, and a written statement from the transportation officer regarding the use of his military transportation agreement. The audit notification provided that if he did not provide the documents, his prior LQA eligibility may be deemed erroneous. He states that because he promptly provided the information, he had no reason to believe that the prior determination of his entitlement to LQA was erroneous. He states that he was only provided with the notification of the audit dated August 16, 2016, and did not receive a copy of the LQA questionnaire. He states that he reasonably understood that he was not ineligible for LQA after receiving the notification of the audit. He submits a statement dated October 22, 2021, from the Deputy Officer in Charge of the Rota Detachment at the time of the audit. In that statement, the Deputy Officer states the employee came to work at the Detachment in March 2014 and it was about two years later that the Rota HRO Director informed them both that an official audit was being done of the employee's LQA. The Deputy Officer states that the Director indicated that it would not take a long time for the Navy, an estimate of 90 days, to complete the audit. He states that the

employee was concerned and asked if he should have LQA discontinued until the audit was completed and was informed that this would not be necessary as the audit would be completed soon. The Deputy Officer states that both he and the employee checked with HRO frequently to ascertain the status of the audit, acknowledging that it was an important matter with huge financial ramifications if it went unresolved. The Deputy Officer states that after each follow up, they were told that the audit would be completed shortly. However, after more than one year, the HRO information they received was something to the effect that if the employee had not heard about the completion of the audit, it was not an issue. Under the circumstances, the Deputy Officer believes collection of the debt would be against equity and good conscience because of the Navy's failure to adhere to its own timelines with regard to completion of the audit. Finally, the employee disputes that debt resulting from the payment of LQA by asserting his entitlement to the allowance. He cites the DSSR, section 031.12b., and the Office of Personnel Management (OPM) Decision 13-0047, dated March 20, 2014.

### **Discussion**

Title 5, United States Code, § 5584, provides authority for waiving claims for 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, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining the waiver. This statute is implemented within the Department of Defense under Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006).

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. 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.

The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the Government is not a sufficient basis, in and of itself, for granting a waiver. Waiver 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, even if the Government fails to act after such notification. *See* Instruction ¶ E4.1.4.

In this case, the employee was notified of the audit of his LQA account on August 16, 2016, and met with his HRO Director who signed the memorandum notifying him of the audit on that same date. During the meeting, the procedure for the audit was explained to him and he was briefed why he was part of the LQA inquiry. He was told that he was part of the LQA inquiry because he had used part of his transportation agreement when he took a flight back to Camp Pendleton in February 2014 to retire from the Marine Corps. Although he was reassured that the

error that led to the erroneous payment of LQA was not attributable to any fault on his part, he was told that his LQA could not be stopped or suspended until the LQA inquiry was completed. Although the employee was not given the final results of the audit until August 2019, he was clearly on notice as of August 16, 2016, that the LQA payments he was receiving were at least questionable. Under the circumstances, he should have held the LQA payments until he obtained further verification in writing of his entitlement. In the meantime, he did not acquire title to the erroneous payments and should have held them until a final determination was made that they were his or until he was asked to repay them. *See* DOHA Claims Case No. 2013-WV-041501.2 (August 13, 2013); DOHA Claims Case No. 2012-WV-101904.2 (December 27, 2012); and DOHA Claims Case No. 2011-WV-072902.2 (March 8, 2012). Therefore, it would not be against equity and good conscience to deny the portion of the overpayment the employee received for the period August 7, 2016, through June 8, 2019, in the amount of \$73,083.64.

As set forth above, we believe the adjudicator properly found that the employee was on notice of a possible error concerning his LQA when he was notified of the audit in August 2016. Therefore, the case precedent cited by the adjudicator is not distinguishable from the facts involved here. In addition, the employee's reliance on DOHA Claims Case No. 2013-WV-100216.2, *supra*, is not persuasive. In that case, the record in the waiver file reflected that the member was verbally informed that he was receiving erroneous payments in December 2011, and the DOHA adjudicator waived collection of the erroneous installment payments of ACP (\$25,000.00 each) that the member received prior to that date, totaling \$75,000.00, but denied the \$25,000.00 ACP payment the member received in December 2011, once he was on notice that he was being overpaid. However, on reconsideration, the DOHA Claims Appeals Board was provided with the member's written statement to the Secretary of the Air Force Remissions Board (SAFRB). In his remission request to the SAFRB, the member stated that he was verbally advised in November 2011 that an audit had deemed his ACP payments erroneous. The Board upheld the adjudicator's decision to waive the installment payments the member had received totaling \$75,000.00, and found that since the member was put on notice by his Commander in November 2011 that he was in receipt of erroneous payments, he should have held the ACP payment he received in the amount of \$25,000.00 until he obtained further verification of his entitlement.

Finally, the member disputes the validity of his debt and cites an OPM decision in support of the fact that he was entitled to receive LQA under the DSSR. DOHA's authority in this matter is limited to the consideration of the employee's application for waiver under 5 U.S.C. § 5584, and the well-established principles that apply to the granting of waivers. *See* DOHA Claims Case No. 2016-WV-091302.2 (February 13, 2017); and DOHA Claims Case No. 073009 (August 6, 2007). In addition, the establishment of a debt is a matter primarily for administrative determination, and DOHA will ordinarily not question a determination in the absence of clear error. *See* DOHA Claims Case No. 2012-WV-051703.2 (October 18, 2012). Our authority in this matter pertains only to the availability of the equitable remedy of waiver. The validity of the debt is an issue separate from the waiver process. Moreover, our office has no authority to adjudicate the validity of debts that arise from disputes involving civilian employee compensation. The validity of such debts must be resolved by the agency concerned, here the Navy, and ultimately OPM. *See* 31 U.S.C. § 3702(a)(2).

## Conclusion

The employee's request for relief is denied, and we affirm the decision dated October 1, 2021, is sustained. In accordance with DoD 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: Richard C. Ourand, Jr

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Richard C. Ourand, Jr  
Member, Claims Appeals Board