

DATE: July 18, 2022

In Re:)
[REDACTED]) Claims Case No. 2022-WV-011003.2
Claimant)

**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 Claim No. 2022-WV-011003, dated March 22, 2022. 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

On September 12, 2010, a *Notification of Personnel Action*, SF-50, was issued increasing the employee's salary as a Supervisory Air Traffic Control Specialist, YC-02 (\$78,938.00 per annum) under the National Security Personnel System (NSPS) to the General Schedule Pay System (GS) as a Supervisory Air Traffic Control Specialist, GS-11, step 8 (\$80,625.00 per annum). The SF-50 reflected that the pay adjustment was made pursuant to a special rate of pay under 5 U.S.C. § 5305 as set forth on Special Pay Rate Table 0565. However, it was later determined that the employee's special rate of pay should be based on Special Pay Rate Table 0566, establishing his grade as a GS-11, step 9 (\$79,619.00 per annum). As a result of this administrative error, the employee was overpaid \$18,903.66 during the period September 12, 2010, through February 2, 2019.

The employee requested waiver of the resulting debt. On his DD Form 2789, *Waiver/Remission of Indebtedness Application*, he stated that he became aware he was being overpaid on September 7, 2017, when he received a memorandum from the Commander, Headquarters Air Force Personnel Center (AFPC), entitled *Notification of Air Traffic Control (ATC) Pay and Administrative Discrepancies*. That memorandum's stated purpose was to officially notify him that as result of an audit, his civilian record was identified as having a pay and/or administrative discrepancy in one or more of the listed areas. The memorandum specifically listed Table 0565 as one of the areas at issue and stated that the special rate of pay set forth under that table was limited to employees who perform radar approach control duties. After reviewing the employee's waiver request, the Defense Finance and Accounting Service (DFAS) recommended that DOHA 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 DFAS's recommendation for waiver finding that the employee acted in good faith in accepting the salary overpayments he received for the period September 12, 2010, through August 19, 2017, in the amount of \$12,454.01. However, the adjudicator concluded that since the employee was aware that there was a discrepancy in his pay when he received the Commander's memorandum on September 7, 2017, waiver was not appropriate for the erroneous salary payments the employee subsequently received for the period August 20, 2017, through February 2, 2019, in the amount of \$6,449.65. The adjudicator noted that the employee received his pay for the pay period August 20, 2017, through September 2, 2017, on September 8, 2017, after receiving notification of the pay error. Therefore, the employee had a duty to retain any funds after notification for subsequent return to the government.

In the employee's reconsideration request, he states that the pay audit specialist at the AFPC prepared his DD Form 2789, as well as his other employees' waiver requests. They were told to sign the forms and return them for waiver processing. He states that he was never aware of any overpayment or debt until he was notified by DFAS on March 2, 2019. He states that after receiving the memorandum in 2017, he made multiple inquiries to his local Human Resources Office concerning overpayments and debts. He cites the language of the Commander's memorandum which states "effective 17 September 2017, AFPC will stop overpayments of civilian ATC Airmen not entitled to these pays. Impacted employees will be contacted by AFPC within the next 30 days to address their specific case." He notes he was never contacted by the AFPC or the team conducting the audit until September 2018, and he was not informed that he was overpaid until DFAS sent him notification of his indebtedness on March 2, 2019. The employee also disputes the amount of his debt. He states that he was not overpaid through February 2, 2019. He asserts that his salary was correct as of June 2018, and attaches his SF-50 dated June 24, 2018, which shows he was under "Special rate table 0566." He also states that he was promoted to a GS-12 in June 2018, and prior to his promotion, he was paid at the same grade-level (GS-11), but at a lower step than two other employees affected by the audit. He states that those employees were overpaid and placed in debt for significantly lesser amounts than he was. He states that he has endured over four years of pay audit inquiries, with countless errors and countless requests for duplicated documentation. This has caused him

a tremendous amount of stress and anxiety. He requests relief on the basis of the financial hardship of paying back the remaining debt amount.

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, DFAS and the DOHA adjudicator relied on the record evidence which included the employee's statement on the DD Form 2789 of his original waiver request that he was notified of the discrepancy on September 7, 2017, by the Commander's memorandum. The adjudicator waived the portion of the erroneous salary payments the employee received for the period September 12, 2010, through August 19, 2017, but denied waiver of \$6,449.65, the erroneous salary payments he received after the Commander's notification. Although we appreciate the fact that the employee continued to question his salary payments after notification, and that he believed the matter would be resolved within a certain time, he was on notice that his salary was miscalculated on September 7, 2017, and had a duty to hold any funds he received after that date until he received a definite determination of his entitlement to them. The Commander's memorandum detailed the mission duties that distinguished the two salary rates in

question: under Table 0565 an employee must perform radar approach control duties as a position description requirement; whereas, under Table 0566 an employee must perform non-radar control duties as a position description requirement. Under the circumstances, the employee was aware that there was a discrepancy in his pay related to his mission duties, and should have continued to question his Human Resources Office until the matter was resolved. As a result, waiver is not appropriate. Therefore, we believe it would not be against equity and good conscience to deny the portion of the overpayment the employee received after notification. *See* DOHA Claims Case No. 2020-WV-112312.2 (February 9, 2022); DOHA Claims Case No. 2018-WV-103004.2 (May 6, 2019); and DOHA Claims Case 2017-WV-022302.2 (January 11, 2018).

Although we recognize the financial hardship caused by repayment of the debt, financial hardship is not a factor for consideration in determining whether a waiver is appropriate. *See* Instruction ¶ E4.1.7. As for the validity of the amount of the employee's debt, the employee should contact DFAS for questions concerning the calculation of his debt. In addition, he may contest the validity of the debt or the amount of the debt by disputing it and proving his entitlement to any amount to the Department of the Air Force and DFAS. Generally, an appeal of the Air Force/DFAS decision on his entitlement would be directed to the Office of Personnel Management (OPM) under 31 U.S.C. § 3702(a)(2).

Conclusion

The claimant's request for reconsideration is denied, and we affirm the decision dated March 22, 2022. 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: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Richard C. Ourand, Jr

Richard C. Ourand, Jr
Member, Claims Appeals Board