

DATE: August 18, 2022

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In Re: )  
          [REDACTED] )     Claims Case No. 2021-WV-110803.2  
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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. Air Force requests reconsideration of the decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2021-WV-110803, dated March 7, 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**

The employee received a Term Appointment on March 1, 2018, to the position of Firefighter, GS-03, Step 01, effective July 9, 2018. The employee worked an 80-hour biweekly schedule during the period July 9, 2018, through October 13, 2018, and received the proper salary. A *Notification of Personnel Action*, SF-50, was issued effective October 14, 2018, changing the employee's tour of duty to 72 hours weekly/144 hours biweekly (unembedded). Unembedded (Firefighter Divisor Indicator N) means the employee's scheduled did not contain an embedded 40-hour work week. Unembedded employees' basic pay consists of two components, the first 106 hours and all remaining hours are paid at one and one-half times the supplemental hourly rate, capped as applicable. However, in this case, the employee worked from October 14, 2018, through November 24, 2018, based on an 80-hour biweekly schedule resulting in a

\$4,015.81 debt to the United States. After the employee's record was updated to reflect the proper schedule, another error resulted in the employee being underpaid \$1,034.00 during pay period December 23, 2018, through January 5, 2019, which reduced his debt to \$2,981.81.

The employee received his proper salary during the period January 6, 2019, through April 27, 2019. However, due to another administrative error, he erroneously received \$3,619.27 during the pay period ending (PPE) March 16, 2019, which represented the retroactive payments for the PPE October 27, 2018, through the PPE January 5, 2019.

DFAS recommended waiver of \$4,379.32, which DFAS stated represents the erroneous payments and erroneous retroactive payments the employee received during the period October 14, 2018, through March 16, 2019. DFAS recommended denial of waiver of the overpayments and retroactive overpayments that the employee received during the pay period March 17, 2019, through April 27, 2019, totaling \$2,221.76. DFAS based its recommendation on the employee's statement provided on his DD Form 2789, *Waiver/Remission of Indebtedness Application*. On that form, he stated that he received a letter from DFAS on March 30, 2019, notifying him of the pay errors. However, the DOHA adjudicator concluded the employee was reasonably unaware, during the period October 14, 2018, through March 2, 2019, that his salary was being miscalculated, and therefore he acted in good faith in accepting that portion of the overpayment in the amount of \$2,981.81. The adjudicator denied waiver of the erroneous retroactive payments received during the period March 3, 2019, through April 27, 2019, totaling \$3,619.27. The adjudicator noted the employee did not address the retroactive payments and that he had received leave and earnings statements (LESs) which he could have used to verify the accuracy of his pay. The adjudicator determined that an employee who receives LESs has a duty to carefully examine them and report any errors.

In his request for reconsideration, the employee notes he always acted in good faith, had been forthcoming and honest, and had been in contact with his management and pay personnel the entire time. He asserts he never received an SF-50, dated October 14, 2018, stating he was being transitioned from an 80-hour employee to a 144-hour employee. He questions the dates and disputes the accuracy of his LESs. He calls attention to the emails showing he reached out to two pay personnel to challenge the retroactive payments. He states he has received four debt letters. Three of the debt letters have been resolved but the fourth debt letter resulted in a garnishment of his wages. He states he contacted his management and pay personnel to get the payments to stop. He includes his LESs to show his total payment history and remaining balance of \$648.77, from a starting amount of \$5,230.20.

### **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 directive 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 relied on the record evidence provided by DFAS, including copies of the employee's LESs covering the overpayment periods in question. These LESs show substantial positive and negative retroactive earnings. These discrepancies would cause a reasonable person to be aware of or suspect the existence of an error, given the positive and negative changes in the pay. The employee should have questioned the substantial positive and negative retroactive earnings appearing on these LESs. Since the employee received official documentation (LESs) reflecting there was an ongoing discrepancy with his pay and there is no official record indicating that he questioned the large negative and positive earnings on his LESs, waiver under these circumstances is not appropriate. *See* DOHA Claims Case No. 2018-WV-103004.2 (May 6, 2019); and DOHA Claims Case No. 2017-WV-022302.2 (January 11, 2018).

The employee stated on his DD Form 2789 that he became aware of the debt when he received a debt notice on March 30, 2019, and that he immediately contacted his management and his Civilian Pay Office to resolve the debt issue. However, the emails he submits in his request for reconsideration to support his contention that he questioned the retroactive payments he received are dated December 15, 2018, and August 19, 2019, and contain factual statements pertaining to the work week generally for the different classifications of employees. Although he did request information specific to his situation, he did not question the large negative and positive earnings documented on his LESs.

The employee cites the debt letters he received and the deductions that have been made from his pay. 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 March 7, 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

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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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Member, Claims Appeals Board