

DATE: May 6, 2020

In Re:)
[REDACTED]) Claims Case No. 2019-WV-012208.2
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to an administrative error, an employee was overpaid cost of living allowance (COLA). She was unaware she was being overpaid until she was notified on August 11, 2012. Under 5 U.S.C. § 5584, the amounts the employee received before notification may be waived. However, the amounts she received after notification may not be waived because she did not acquire title to the excess amounts and has a duty to return them to the government.

DECISION

An employee of the U.S. Army requests reconsideration of the decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2019-WV-012208.2, dated December 23, 2019. In that decision, DOHA waived a portion of the claim in the amount of \$1,617.60 and denied waiver of the remaining \$10,213.92.

Background

The employee was receiving a cost of living allowance (COLA) at the rate of 16.07% of her salary. Effective January 1, 2012, she received a general adjustment increase to her salary. At that time, her COLA rate should have decreased from 16.07% to 12.25%. However, due to an administrative error, she continued to be paid COLA at the incorrect rate, causing her to be overpaid \$11,831.52 during the period January 1, 2012, through October 18, 2014.

The employee requested waiver of the debt and the Defense Finance and Accounting Service (DFAS) recommended partial waiver in the amount of \$1,617.60, based on the

employee's acknowledgement that she was aware that she was being overpaid when she received a debt notification letter from the DFAS dated August 11, 2012.

The DOHA adjudicator followed the recommendation of DFAS, and waived \$1,617.60 of the employee's debt, and denied waiver of \$10,213.92, the portion of the debt that occurred after the employee received DFAS's notification of indebtedness. The adjudicator found that even though the employee stated on her *Waiver/Remission of Indebtedness Application*, DD Form 2789, that she did not become aware of the COLA overpayment until September 12, 2014, she did acknowledge receiving notification from DFAS of a debt in August 2012. In addition, the adjudicator also found that once the employee was in receipt of the debt notification from DFAS, she should have at least questioned two subsequent retroactive payments she received in the pay period ending September 22, 2012, one in excess of \$3,750.00 and the other in excess of \$600.00. The adjudicator further noted that there was no evidence that the employee received any documentation assuring her she was entitled to these retroactive payments in September 2012 after receiving the debt notification in August 2012, nor was there any evidence that the employee's pay issue leading to the overpayment was resolved.

In the employee's request for reconsideration, the employee explains that she should not be held responsible for the resulting COLA debt that began in January 2012 that coincided with notification of a salary overpayment she received in September 2012. She states that she should not be accountable for the COLA overpayments for over two years on the basis that she received a debt notification in August 2012.

Discussion

Under 5 U.S.C. § 5584, we have authority to waive erroneous payments of pay and allowances if collection 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. A waiver usually is not appropriate when an employee knows, or reasonably should know, that a payment is erroneous. The employee 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* DoD Instruction 1340.23 (February 14, 2006) (Instruction) ¶ E4.1.4. In addition, a waiver generally is not appropriate when an employee who receives 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 employee 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.

We have consistently held that an employee is considered to be aware of an erroneous overpayment when in possession of information which reasonably suggests that the validity of the payments received may be in question. Once an employee receives such information which reasonably suggests that the validity of salary payments may be in issue, they should set aside the overpayment for return to the government of any excess amounts received from that time forward. *See* DOHA Claims Case No. 09012806 (February 11, 2009); DOHA Claims Case No. 07011606 (January 25, 2007); DOHA Claims Case No. 06112735 (December 6, 2006); DOHA

Claims Case No. 97031009 (July 18, 1997); and Comptroller General decision B-259124, Feb. 23, 1995.

On August 11, 2012, the employee was sent a debt notification letter by DFAS advising her that she was overpaid \$3,728.00 for the period January 1, 2012, through July 14, 2012. The employee does not dispute that she received this notification. Although the employee argues that this debt notification did not alert her to the fact that she was being overpaid COLA, and would continue to be overpaid COLA for the next two years, she still should have questioned the two large retroactive payments she received in September 2012, and held them until she received a definite determination of her entitlement. Without any official assurances that her pay issue had been resolved, she should have further sought guidance on her entitlements. Therefore, the adjudicator reasonably concluded that it would not be against equity and good conscience to recover the overpayments the employee received after she received the debt notification letter from DFAS in August 2012. *See* DOHA Claims Case No. 2015-WV-060503.2 (October 29, 2015); and DOHA Claims Case No. 09080401 (August 11, 2009).

Conclusion

The employee's request for relief is denied, and we affirm the decision dated December 23, 2019. In accordance with the Department of Defense Instruction 1340.23 ¶ 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: Gregg A. Cervi
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Member, Claims Appeals Board