

DATE: July 31, 2017

In Re:)

[REDACTED])

) Claims Case No. 2017-WV-030703.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Waiver of a debt under 5 U.S.C. § 5584 is not appropriate when an employee knows or should be aware that he was receiving salary to which he was not entitled.

DECISION

An employee of the U.S. Navy requests reconsideration of the May 22, 2017, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2017-WV-030703. In that decision, DOHA denied waiver of the overpayment in the amount of \$44,609.19.

Background

On June 2, 2011, a *Notification of Personnel Action*, SF-50, was issued reassigning the employee from one duty station in San Diego, California, to another duty station in San Diego, effective June 5, 2011. However, due to an administrative error, the SF-50 reassigning the employee erroneously increased his salary from \$53,455.00 per annum to \$58,969.00 per annum. As a result, the employee was overpaid \$44,609.19 during the period June 5, 2011, through November 28, 2015.

In the appeal decision, the DOHA adjudicator upheld the Defense Finance and Accounting Service's (DFAS's) denial of the employee's request for waiver. In his reconsideration request, the employee, through his attorney, states that the adjudicator failed to address the lack of equity and good conscience in his case. He states that the appeal decision holds him strictly liable despite the fact that his claim arose from an administrative error with no

indication of fraud, misrepresentation, or lack of good faith on his part. He states that his debt should be waived to avoid a gross inequity. He further points out his Civilian Human Resources Office (CHRO) investigated the error and recommended that the debt be waived.

Discussion

Under 5 U.S.C. § 5584, we may waive a claim by the government for the erroneous payment of pay or allowances to an employee if collection would be against equity and good conscience and not in the best interests of the United States, provided there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. *See* DoD Instruction 1340.23 (Instruction) ¶ E4.1.2. 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 at ¶ E4.1.1. However, we have authority to grant waiver to an employee under 5 U.S.C. § 5584 if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation or lack of good faith on the part of the employee. *See* Instruction at ¶ E4.1.2. 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 at ¶ 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. 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 at ¶¶ E4.1.3 and 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. Financial hardship is not a factor for consideration in determining whether a waiver is appropriate. *See* Instruction at ¶¶ E4.1.5 through E4.1.7.

In the case before us, overpayment resulted from administrative error, and there is no fraud, misrepresentation, or lack of good faith on the part of the employee. The only real issue is whether he is also partially at fault. The standard employed to determine whether an employee was at fault in accepting the overpayment is whether under the particular circumstances involved, a reasonable person should have known or suspected that he was receiving more than his entitlement. *See* DOHA Claims Case No. 07030509 (March 14, 2007); DOHA Claims Case No. 98072904 (September 1, 1998); and DOHA Claims Case No. 97011408 (June 10, 1997).

The employee acknowledges that he received leave and earnings statements (LESs) during the period of overpayment. Prior to the error increasing his salary, the employee's LESs reflected that his basic pay was \$43,043.00 plus a locality adjustment of \$10,412.00, for a total adjusted basic pay of \$53,455.00. However, his LES for the pay period ending June 18, 2011, reflected that his basic pay was \$43,043.00 plus a locality adjustment of \$15,926.00, for a total adjusted basic pay of \$58,969.00. Therefore, when the employee's salary increased by over \$5,000.00 per annum in the PPE June 18, 2011, he should have at least questioned such a large increase in his salary. Since he failed to do so, waiver is not appropriate.

As for the employee's argument that his debt should be waived because his CHRO recommended it be granted, our decisions are based upon the underlying factual circumstances and the applicable precedents. We have reviewed the record *de novo* and our decision in this case, like all our decisions, is made independently of the arguments or recommendations of the agency. See DOHA Claims Case No. 03041512 (June 26, 2003).

Conclusion

The employee's request for relief is denied, and we affirm the May 22, 2017, appeal decision. 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: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board

Signed: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board