

DATE: May 16, 2017

In Re:)
 [REDACTED]) Claims Case No. 2017-WV-031702.2
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When an employee is aware that she is receiving salary in excess of her entitlement, she does not acquire title to the excess amount and has a duty to retain the excess for eventual repayment to the government.

DECISION

An employee of the U.S. Army requests reconsideration of the April 5, 2017, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2017-WV-031702. In that decision, DOHA waived in part the collection of a debt owed by the employee. The employee seeks waiver of the remaining indebtedness.

Background

On November 17, 2015, a *Notification of Personnel Action*, SF-50, was issued changing the employee from a GS-13, step 00, to a GS-12, step 00, effective November 29, 2015. Due to the change to a lower grade, the employee was granted retention pay. As a result, the employee's salary was established as \$134,278.00 per annum. However, it was later determined that the employee's salary should have been established as \$99,352.00 per annum. Due to this administrative error, the employee's basic salary was miscalculated during the period December 13, 2015, through January 23, 2016, causing an overpayment of \$2,392.00

In DOHA Claim No. 2017-WV-031702, the adjudicator concluded that the employee acted in good faith in accepting the overpayment which occurred during the period December 13, 2015, through January 9, 2016, in the amount of \$1,574.40, and that all other conditions necessary for waiver of this portion of the claim have been met. She further concluded that

because the employee became aware of the error on February 3, 2016, prior to receiving her pay for the pay period ending (PPE) January 23, 2016, it was not against equity and good conscience to deny waiver of \$817.60. The adjudicator also stated the long-standing rule that when an agency promptly notifies an employee of an overpayment, the employee is precluded from relying on the accuracy of the payment to her detriment.

In her request for reconsideration, the employee states that the case cited by the adjudicator regarding “prompt notification of a debt” is distinguishable from the facts in her case. She states that she believed that she had been underpaid in December 2015, and immediately contacted her Civilian Personnel Advisory Command (CPAC). She also states that as of January 28, 2016, CPAC was still assuring her that her salary was being corrected and any retroactive payments would be issued to her. The employee acknowledges that CPAC called her on February 3, 2016, advising her that she had been overpaid because her base salary was set incorrectly. However, she states that although her leave and earnings statement (LES) reflects that she was paid on February 4, 2016, her pay was actually deposited into her bank account on February 3, 2016, the same day she was notified by CPAC of the salary error. She states that she did not receive a formal, written notification of the error until February 22, 2016, even though the Defense Finance and Accounting Service (DFAS) made the first deduction from her salary in the PPE February 6, 2016.

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive collection of erroneous payments of salary an employee received if collection would be against equity and good conscience and not in the best interests of the United States. This statute is implemented within the Department of Defense under Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006). In relevant part, generally, persons who erroneously receive a payment from the government acquire no right to it and are bound in equity and good conscience to make restitution, no matter how careless the act of the government may have been. 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.

A waiver is usually inappropriate when a recipient knows, or reasonably should know, that a payment is erroneous. In such instances, the recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government. *See* Instruction ¶ E4.1.4.

In the present case, the employee acknowledges that she was notified of the overpayment by a phone call from her CPAC on February 3, 2016. Waiver is inappropriate if the employee is aware she is being overpaid when she received the payment. *See* DOHA Claims Case No. 2013-WV-021303.2 (August 8, 2013); and DOHA Claims Case No. 2011-WV-030802.3 (August 24, 2011). Once the employee was notified on February 3, 2016, that her salary was miscalculated, she did not acquire title to any overpayments she received at that point, and has a duty to return

the excess amounts to the government.¹ *See* DOHA Claims Case No. 2011-WV-030802.2, *supra*.

The employee states that she received the money in her bank account on February 3, 2016, the same day she was notified that she had been overpaid. However, it is not against equity and good conscience to recover the erroneous payment when the government makes prompt notification, as it did here. *See* DOHA Claims Case No. 2013-WV-021303.2, *supra*; and DOHA Claims Case No. 09080401 (August 11, 2009). We consider notification within one day to be prompt.

Conclusion

The employee's request for relief is denied, and we affirm the April 5, 2017, decision to deny waiver in the amount of \$817.60. In accordance with Instruction ¶ 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

¹The employee's LES for the PPE January 23, 2016, reflects that her pay date is February 3, 2016.