

DATE: March 8, 2012

In Re:)
) [REDATED]) Claims Case No. 2011-WV-072902.2
))
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 5 U.S.C. § 5584, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for repayment 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 that there is no evidence of fraud, fault, misrepresentation or lack of good faith on the part of the employee.

DECISION

An employee of the U.S. Navy requests reconsideration of the December 5, 2011, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claims No. 2011-WV-072902. In that decision, DOHA followed the recommendation of the Defense Finance and Accounting Service (DFAS), and waived \$48,075.62 of the \$67,291.74 that the employee owed the government due to the overpayment of living quarters allowance (LQA), but denied waiver of the \$19,216.12 balance of the indebtedness. The employee seeks waiver of the remaining \$19,216.12 of the indebtedness.

Background

On March 31, 2005, the employee retired from the military. On April 15, 2005, the employee, who was located overseas, was appointed as a locally hired employee in a competitive appointment from a local recruitment action. The employee's appointment to the position did not authorize him to receive LQA. On April 2, 2007, the employee was promoted to a position with the same Command, and he continued to be ineligible to receive LQA. Effective August 31, 2008, the employee was reassigned to another position within the same Command. As a result of his reassignment, during the period October 12, 2008, through March 27, 2010, he received LQA. However, DFAS later determined that the employee was not entitled to LQA because he was a local overseas hire. Due to this administrative error, the employee was erroneously paid LQA, causing an overpayment of \$67,291.74.

The employee became aware of the overpayment on November 6, 2009, when he received notification from his Command. In his original waiver request, he states that in November 2009, his Human Resources Office (HRO) reviewed his entitlement to LQA and found that they had made an error in granting it to him. In DOHA Claim No. 2011-WV-072902, the DOHA adjudicator concluded that the employee acted in good faith in accepting the overpayment which occurred during the period October 12, 2008, through October 24, 2009, in the amount of \$48,075.62, and that all conditions for waiver of this portion of the claim had been met. She further concluded that because the employee was notified by his Command of the overpayment by letter dated November 6, 2009, prior to receipt of the erroneous LQA payments during the period October 25, 2009, through March 27, 2010,¹ it was not against equity and good conscience to deny waiver of the \$19,216.12.

In his request for reconsideration, the employee states that in 2008 he applied for a position with his current Command that was announced worldwide and had the benefits of a stateside hire (including a transportation agreement). When he was selected for the position, he asked an HRO official if he was authorized LQA. He states that she asked him if his transportation agreement was still in effect from his military service and that no other agreement had been used. He replied that his retired entitlements were still in effect, that he had extended his retired entitlements yearly with his local personal property office. He states that she asked for a copy of the approved extensions; and after further review, she phoned him to inform him he qualified for LQA. He states that she told him that since his retired entitlements were still in effect, she would void the transportation agreement that was part of the worldwide announcement. He further states that the November 6, 2009, letter from his Command was titled, "Notification of LQA Review." He states that the purpose of this letter was to notify him of certain irregularities in his entitlement to LQA and specifically advise him that he may have been erroneously granted LQA. Thus, he contends that at this point, his HRO was unsure of his LQA entitlement. He states that his entitlement to LQA was yet to be determined. In addition, he states that the letter provided that if after review of all available information it is determined

¹The record reflects that the employee received his pay for the pay period October 25, 2009, through November 7, 2009, on November 13, 2009.

that he is not eligible to receive LQA, he may be eligible for one of three options to lessen the financial impact of terminating his LQA. After receiving this letter, in December 2009 he spoke to the head of HRO, who confirmed that his entitlement to LQA was in question because he was a local hire. He states that he was further told: (1) to remain in his current residence until HRO's review was completed; (2) that the three options in the letter would always be available to him to lessen the financial impact; and (3) that any resulting indebtedness would be waived due to HRO's mistakes. The employee states that he asked the head of HRO if he should move on base immediately since he was residing on the economy. He states that he was told to remain at his current residence until DFAS stopped paying him LQA. Once DFAS stopped paying him LQA, he could move on base for six months as stated in the November 6, 2009, letter. The employee states that it was not until mid March 2010 when he received the February 16, 2010, letter titled, "Termination of Your Overseas Allowances and Entitlements." After receiving this letter, the employee states that he again contacted the head of HRO, and asked him if he should move into on-base housing. He states that he was told to do so immediately, that DFAS would notify him of the indebtedness and that the head of HRO would assist him in submitting his waiver request. The employee requests waiver of the remaining \$19,216.12 on the basis that he trusted the experts and remained at his residence until the decision was final. He states that he used the money for its intended purpose. He attaches a statement from his landlord that reflects he was paying rent in the amount of \$3,062.00 per month. He also states that DOHA did not take into consideration the amount DFAS has already collected from him during the period June 19, 2010, through October 23, 2010, in the amount of \$4,393.22. Finally, he states that by letter dated December 14, 2011, from DFAS, which he received on February 16, 2012, he was advised that DFAS is getting ready once again to garnish his pay to collect the \$19,216.12. The letter advised him that if he did not repay the debt in full or establish a voluntary repayment schedule within 30 days, DFAS would begin to collect the debt involuntarily from his pay on February 11, 2012. He requests that DOHA stop, delay or even reverse the final decision in this matter.

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. The fact that an erroneous payment is solely the result of an administrative error or mistake on the part of the government is not sufficient basis in and of itself for granting a waiver. *See* Department of Defense Instruction 1340.23 (Instruction)

¶ E4.1.3. Waiver 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, even if the government fails to act after such notification. *See* Instruction ¶ E4.1.4.

In this case, the employee does not dispute the fact that he was notified by his Command on November 6, 2009, that he may have erroneously been granted LQA. In his original waiver request, on his *Waiver/Remission of Indebtedness Application*, DD Form 2789, in response to the

question “State the date and how you first became aware of the debt or erroneous payment,” the employee wrote, “See attach document. Enclosure (1).” Enclosure (1) is the November 6, 2009, notification letter from his Command. On reconsideration, he now contends that this notification was not a final determination of his entitlement and he reasonably relied on the advice given to him by the head of HRO telling him to remain in his residence until a final determination had been made. However, the language contained in the November 6, 2009, letter was very specific and explained the employee’s situation, the date he retired from the military, the date he was hired as a local hire with no entitlement to LQA, and the subsequent position he accepted in the same Command with no entitlement to LQA. Specifically, the letter stated, “Therefore, the change in your allowance eligibility in 2008 was erroneous and as a result, must be corrected.” The letter further explained that if the employee has additional information/documentation that he believes will impact his eligibility for LQA, he should forward the information within fourteen calendar days to the Director of Human Resources Office. The letter then advised the employee that if the employee did not send any additional information and is found to be ineligible, DFAS would be notified of his ineligibility. DFAS would then notify the employee of the amount of indebtedness and would advise him of his right to request waiver. The letter referenced and included DFAS’s procedures for requesting waiver of the indebtedness. Although the employee states that he was then approached by the head of HRO in December 2009, there is nothing in the record to reflect that he submitted any information or documentation to the address listed in the letter or attempted to contact the named employee at the office listed in the letter. We have consistently held that an employee is considered to be aware of an erroneous payment when he possesses information which reasonably suggests that the validity of the payment may be in question. *See* DOHA Claims Case No. 2011-WV-100702.2 (January 31, 2012), DOHA Claims Case No. 03072812 (July 30, 2003) and DOHA Claims Case No. 03041512 (June 26, 2003). Although the November 6, 2009, letter may not have been the final determination of the employee’s entitlement, it contained detailed information to put the employee on notice that his entitlement to LQA was in question. Even though a final determination of the employee’s entitlement was not made until February 2010, this does not change the fact that he was informed on November 6, 2009, that his entitlement to LQA was questionable. Under these circumstances, he should have held the LQA payments until he obtained further verification. In the meantime, he did not acquire title to the erroneous payments and should have held them until a final determination was made that they were his or until he was asked to repay them. Since he knew he was receiving questionable payments, waiver of the \$19,216.12 is not appropriate. *See* DOHA Claims Case No. 2011-WV-022307.2 (July 11, 2011) and DOHA Claims Case No. 2011-WV-030802.2 (August 24, 2011).

Additionally, while the employee may have relied on the advice given to him by the head of HRO, and remained in his residence, he has not submitted any corroborating, written evidence of his version of events. As for the balance due on the indebtedness, any credits for the amounts already collected and the possibility of establishing a payment plan, the employee should contact DFAS.

Conclusion

The employee's request for relief is denied, and we affirm the December 5, 2011, decision to deny waiver in the amount of \$19,216.12.

Signed: Jean E. Smallin

Jean E. Smallin
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

Natalie Lewis Bley
Member, Claims Appeals Board