

DATE: December 29, 2011

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In Re: )  
          [REDACTED] ) Claims Case No. 2011-WV-092801.2  
                                  )  
Claimant \_\_\_\_\_)

**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

The fact that an employee has salary sent directly to a bank does not relieve him of the responsibility of verifying his bank statements, questioning any discrepancies, and setting the money aside for repayment.

A waiver is not appropriate when a recipient knows, or reasonably should know, that 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.

**DECISION**

A former employee of the U.S. Air Force requests reconsideration of the November 22, 2011, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2011-WV-092801. In that decision, DOHA sustained the initial determination of the Defense Finance and Accounting Service (DFAS) denying waiver relief under 5 U.S.C. § 5584.

**Background**

On December 21, 2008, the employee was hired by the U.S. Air Force. However, on December 30, 2008, he resigned from the position. During the pay period ending (PPE) January 3, 2009, he was entitled to receive salary in the gross amount of \$1,389.60. However, the employee was erroneously issued a salary payment in the gross amount of \$1,852.80, causing an overpayment of \$463.20. Due to an administrative error, the employee's pay account was not updated to reflect his resignation. In addition, the employee's direct deposit (banking) information was applied to another current employee's pay record. Due to this administrative error, the employee received erroneous salary payments from January 4, 2009, through May 9, 2009, directly deposited into his bank account, in the total amount of \$11,975.39. Thus, the total claim against the employee is \$12,438.59 (\$463.20 + \$11,975.39). The employee's \$1,641.00 tax refund was collected and applied to the \$12,438.59 overpayment reducing it to \$10,814.59.<sup>1</sup>

The DOHA adjudicator upheld the DFAS's denial of the employee's request for waiver because the employee acknowledged that he was aware in early February 2009 that he received erroneous salary payments directly deposited into his bank account. The adjudicator found that since the employee had his salary payment directly deposited into his bank account, if he had monitored his account, verified his statements, and questioned any discrepancies, he would have identified these payments as erroneous prior to expending any of the funds. The adjudicator applied the long-standing rule that it is inappropriate to waive overpayments of salary when an employee knows, or should know, that he is receiving salary to which he is not entitled.

In his request for reconsideration, the employee contests the amount of indebtedness. He states that he never received deposit payments to his account in the net amount of \$1,468.67 on January 9, 2009, and \$1,468.67 on January 23, 2009. He attached copies of leave and earnings statements (LES) for these pay periods which reflect that the money was directly deposited into a named bank account. However, he states that he never held an account with the named bank. He further presents evidence in the form of a letter from an official of the named bank attesting to the fact that the employee never held an account with the bank. He states that this evidence clearly shows that he never received the payment for \$1,389.60 for the 60 hours of pay he earned with the Air Force. He states that since he was entitled to this amount, it should reduce his debt to \$9,424.99 (\$10,814.59 - \$1,389.60). He also requests DOHA's assistance in setting up a repayment plan.

## **Discussion**

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<sup>1</sup>In the appeal decision, the DOHA adjudicator considered the total claim in the amount of \$12,438.59 for waiver under 5 U.S.C. § 5584.

Under 5 U.S.C. § 5584, we may waive the collection of erroneous payments of salary an employee received if collection would be against equity and good conscience and not in the best interest of the United States. However, the statute does not operate automatically to relieve debts but is a matter of grace and dispensation. *See* Comptroller General decision B-200118, Feb. 18, 1981.<sup>2</sup> Also, by statute, waiver is prohibited in certain situations. Therefore, if there exists in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee, waiver is precluded. *See* 5 U.S.C. § 5584(b)(1). Department of Defense (DoD) Instruction 1340.23, implements this statute within DoD, and the Standards for Waiver Determinations are found at Enclosure 4 of this Instruction. In relevant part, generally persons who receive a payment erroneously 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. Waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant.

When an employee receives a payment that he knows to be erroneous, he cannot reasonably expect to be able to retain the money. *See* DOHA Claims Case No. 2010-WV-113001.2 (May 3, 2011). 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* Instruction ¶ E4.1.4. We have consistently held that the fact that an employee has salary sent directly to a bank account does not relieve the person of the responsibility of verifying his statements and questioning any discrepancies. *See* DOHA Claims Case No. 04032919 (March 31, 2004); DOHA Claims Case No. 02030503 (March 14, 2002); and DOHA Claims Case No. 97011408 (June 10, 1997).

In this case, the erroneous payment of salary was made as a result of an administrative error, and there is no indication of fraud, misrepresentation, or lack of good faith on the employee's part. However, the employee stated in his original waiver request that he knew of the overpayment when he reviewed his bank statement in February 2009. He immediately contacted an appropriate official. Although the employee now contends that he never received the gross payment of \$1,389.60 for the 60 hours of pay he earned during PPE January 9, 2009, the record evidence clearly shows that he did receive this payment by direct deposit to his bank account. Specifically, the record contains a signed, notarized statement from the employee dated February 20, 2009, stating that he continued to be paid by direct deposit into his bank account by the Air Force after his resignation in the amount of \$1,319.21 every two weeks starting on January 8, 2009. The record contains the employee's submission of his monthly bank account statements which reflect beginning January 8, 2009, a net deposit of \$1,319.21 from DFAS.

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<sup>2</sup>This case was decided under 10 U.S.C. § 2774 because the claimant was a service member. However, the standards for waiver are the same for civilian employees and service members.

This payment was explained by the DOHA adjudicator in the appeal decision in terms of what the employee was due in the gross amount for 60 hours of work (\$1,389.60) for PPE January 3, 2009, and what the employee was actually paid in the gross amount (\$1,852.80), resulting in an overpayment of \$463.20. Also, as explained by the adjudicator and as reflected by the employee's own bank records, the employee continued to receive direct deposits of salary every two weeks into his bank account through PPE May 9, 2009, totaling \$11,975.39. Therefore, the employee was overpaid \$12,438.59.

The employee contends that at least one of the erroneous payments was sent to a particular financial institution to be deposited in his name. He has submitted a letter from that institution stating that he never had an account there. The employee requests that we investigate the disposition of that deposit. Our decisions are based on the written record only. We have no authority to investigate cases. Although the LES submitted by the employee does reflect this particular financial institution, as explained by the DOHA adjudicator, these two amounts were not included in the calculation of the employee's indebtedness. The employee has acknowledged receiving erroneous payments as set forth in the DOHA adjudicator's decision into his bank account. When an employee knows that he is being overpaid, he has a duty to set aside the erroneously paid funds for eventual repayment, even if the government fails to act after notification. *See* DOHA Claims Case No. 08051406 (May 21, 2008); and DOHA Claims Case No. 07110101 (November 8, 2007). Finally, the employee should contact DFAS, the agency with authority over collections, regarding the possibility of a repayment plan.

## **Conclusion**

The employee's request for relief is denied, and we affirm the November 22, 2011, appeal decision to deny waiver in the amount of \$12,438.59. In accordance with Department of Defense Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

Signed Jean E. Smallin

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Jean E. Smallin  
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board

Signed: Gregg A. Cervi

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Gregg A. Cervi  
Member, Claims Appeals Board