

DATE: January 31, 2012

\_\_\_\_\_) )  
In Re: ) )  
          [REDACTED] ) Claims Case No. 2011-WV-100702.2  
                                  ) )  
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 January 12, 2012, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2011-WV-100702. In that decision, DOHA followed a recommendation of the Defense Finance and Accounting Service (DFAS), and waived \$16,632.84 of the \$19,659.84 that the employee owed the government due to the overpayment of salary, but denied waiver of the \$3,027.00 balance of the indebtedness. The employee seeks waiver of the remaining \$3,027.00 of the indebtedness.

**Background**

Effective August 17, 2008, the employee was reassigned. Due to an administrative error, the employee's occupational code was erroneously changed on the *Notification of Personnel Action*, SF-50, effecting the reassignment. As a result, the employee was erroneously given a 30% local market supplement (LMS) to his basic pay. Despite this error, the employee was correctly paid from August 17, 2008, through June 20, 2009.<sup>1</sup> Effective June 7, 2009, the employee was given a general pay adjustment from \$84,931.00 per annum to \$96,857.00 per annum. The SF-50 granting him the adjustment reflected the employee's correct occupational code. However, his salary included the erroneous 30% LMS. DFAS later determined that the employee's salary should have remained \$84,931.00 per annum.<sup>2</sup> Due to the erroneous salary increase, the employee's salary was miscalculated during the period June 21, 2009, through September 25, 2010, causing an overpayment in the amount of \$16,842.44. In September 2010, in an attempt to correct the error in the employee's salary, the employee was underpaid \$209.60 during the period September 26, 2010, through October 23, 2010. The underpayment was applied to the overpayment, reducing it to \$16,632.84 (\$16,842.44 - \$209.60). In addition, during the period October 10, 2010, through November 6, 2010, the employee erroneously received retroactive payments in the total amount of \$3,027.00,<sup>3</sup> for the period January 3, 2010, through October 23, 2010. Therefore, the employee was overpaid \$19,659.84.

In DOHA Claim No. 2011-WV-100702, the DOHA adjudicator concluded that the employee acted in good faith in accepting the overpayment which occurred during the period June 21, 2009, through September 25, 2010, in the amount of \$16,632.84, 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 DFAS of the overpayment by letter dated October 23, 2010, prior to receipt of the retroactive payments during the period October 10, 2010, through November 6, 2010,<sup>4</sup> it was not against equity and good conscience to deny waiver of the \$3,027.00.

In his request for reconsideration, the employee states he did not know he was being overpaid when he received the retroactive payments during the period October 10, 2010, through November 6, 2010. He acknowledges receiving the letter of indebtedness dated October 23, 2010. However, he states that after receiving the letter, he noticed large amounts being deducted from his pay beginning in the first pay period in November 2011. He states that he agreed to

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<sup>1</sup>The record reflects that effective June 1, 2009, employees with the occupational code erroneously assigned to this employee, became eligible for a LMS of 30% to their basic pay.

<sup>2</sup>Although the erroneous increase in salary was effective June 7, 2009, the employee was paid correctly through June 20, 2009.

<sup>3</sup>In the pay period ending (PPE) October 23, 2010, he erroneously received retroactive payments for basic salary (\$2,880.00) and overtime (\$48.60). In PPE November 6, 2010, he erroneously received a retroactive payment for basic salary in the amount of \$98.40.

<sup>4</sup>The record reflects that the employee received his pay for the pay period October 10, 2010, through October 23, 2010, on October 29, 2010.

have the remainder of the debt paid in installments. He states that when he received a letter dated July 13, 2011, notifying him that he owed more, he agreed and started another payment plan to repay the debt. He states that the first time he realized that the overpayment in the amount of \$3,027.00 was for the period October 10, 2010, through November 6, 2010, was when he read the adjudicator's decision.

### **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 interest of the United States. This statute is implemented within the Department of Defense under Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006). The Standards for Waiver Determinations are found at Enclosure 4 of this Instruction. In relevant part, generally, persons who receive a government payment erroneously 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.

The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not sufficient basis in and of itself for granting a waiver. *See* Instruction ¶ E4.1.3. A waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. An employee is considered to be aware of erroneous payments when he possesses information which reasonably suggests that the validity of the payments may be in question. *See* DOHA Claims Case No. 07100101 (October 11, 2007); DOHA Claims Case No. 03072812 (July 30, 2003); DOHA Claims Case No. 02050613 (May 23, 2002); and DOHA Claims Case No. 97122313 (February 24, 1998). In such instances, the employee has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government. *See* Instruction ¶ E.4.1.4.

In this case, the employee does not dispute the fact that he was notified by DFAS on October 23, 2010, that he was overpaid. The letter of indebtedness notified the employee that he had been overpaid during the pay period ending (PPE) January 2, 2010, through September 25, 2010, in the amount of \$15,133.76. However, the employee contends that he did not know he was being overpaid when he received the retroactive payments during the period October 10, 2010, through November 6, 2010. We note that the employee has acknowledged receiving leave and earnings statements (LES) during the period of overpayment. A review of his LES for the PPE October 23, 2010, reflects that he received retroactive payments for basic salary (\$2,880.00) and overtime (\$48.60). His LES for the PPE November 6, 2010, reflects that he received a retroactive payment for basic salary in the amount of \$98.40. After receiving notification of the indebtedness for the PPE January 2, 2010, through September 25, 2010, the employee should have at least questioned the validity of the retroactive payments he received in the PPE October

23, 2010, for basic salary and overtime, and in the PPE November 6, 2010, for basic salary. Our decisions and those of the Comptroller General stress the importance of an employee's monitoring of his LES and other finance and personnel documents. *See* DOHA Claims Case No. 98120401 (March 4, 1999); and Comptroller General decision B-188822, June 1, 1997. We have consistently held that waiver is not appropriate when an employee has records which indicate an overpayment and fails to review such documents for accuracy or otherwise fails to take corrective action. *See* DOHA Claims Case No. 98120401, *supra*, and DOHA Claims Case No. 98112018 (January 11, 1999).

### **Conclusion**

The employee's request for relief is denied, and we affirm the January 12, 2012, decision to deny waiver in the amount of \$3,027.00. In accordance with ¶ E8.15 of the Instruction, 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: Natalie Lewis Bley

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Natalie Lewis Bley  
Member, Claims Appeals Board