

KEYWORDS: Waiver of Indebtedness

DIGEST: A waiver is generally not appropriate when a recipient of a significant increase 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.

CASENO: 2012-WV-070301.2

DATE: 10/25/2012

DATE: October 25, 2012

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| In Re: |) | |
| [REDACTED] |) | |
| Claimant |) | Claims Case No. 2012-WV-070301.2 |
| |) | |

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A waiver is generally not appropriate when a recipient of a significant increase 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.

DECISION

An employee of the U.S. Army requests reconsideration of the August 28, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-070301. In that decision, DOHA denied waiver of the overpayment in the amount of \$17,500.00.

Background

On January 8, 2009, a *Notification of Personnel Action* (SF-50) was issued granting the employee a general salary adjustment from \$173,602.00 per annum to \$175,000.00 per annum effective January 4, 2009. Due to an administrative error, the employee's salary did not include the local market supplement (locality pay). On January 16, 2009, another SF-50 was issued granting the employee a general salary adjustment from \$175,000.00 per annum to \$176,632.00 per annum effective January 4, 2009. However, due to an administrative error, this corrective action also did not include locality pay. As a result, the Defense Finance and Accounting Service (DFAS) determined that the employee was underpaid regular salary and retention incentive pay in the amount of \$31,434.00 from January 4, 2009, through January 2, 2010.

On January 5, 2010, an SF-50 was issued granting the employee a general salary adjustment and locality pay from \$176,623.00 per annum to \$204,891.00 per annum (\$179,273.00 basic salary + \$25,618.00 locality pay) effective January 3, 2010. On January 6, 2010, another SF-50 was issued granting the employee a regular performance pay increase and locality pay increase from \$204,891.00 per annum to \$208,810.00 per annum (\$182,702.00 basic salary + \$26,108.00 locality pay) effective January 3, 2010. As a result, the employee was paid properly from January 3, 2010, through February 13, 2010.

On March 1, 2010, a corrective SF-50 was issued recalculating the employee's 2009 salary and locality pay retroactive to January 4, 2009. As a result, the employee's total salary increased to \$232,932.00 per annum (\$203,808.00 basic salary + \$29,124.00 locality pay). Due to an administrative error, the employee's regular salary and retention incentive pay were miscalculated during the pay period ending (PPE) February 27, 2010, causing an overpayment of \$2,830.00. In addition, during the PPE February 27, 2010, the employee erroneously received retroactive regular salary and retention incentive pay for the PPE February 14, 2009, through May 23, 2009, causing an overpayment of \$11,168.00. Thus, he was overpaid \$13,998.00 (\$2,830.00 + \$11,168.00).

In addition, on March 1, 2010, another corrective SF-50 was issued erroneously increasing the employee's salary from \$232,932.00 per annum to \$267,872.00 per annum (\$234,379.00 basic salary + \$33,493.00 locality pay) retroactive to January 3, 2010. As a result, the employee's regular salary and retention incentive pay were miscalculated during the period February 28, 2010, through March 13, 2010, causing an overpayment of \$2,830.00. This increased the employee's debt to \$16,828.00 (\$13,998.00 + \$2,830.00).

On March 2, 2010, a corrective SF-50 was issued erroneously increasing the employee's salary from \$267,872.00 per annum to \$271,803.00 per annum (\$237,819.00 basic salary + \$33,984.00 locality pay) retroactive to January 3, 2010. As a result of this administrative error, the employee's regular salary and retention incentive pay were miscalculated during the PPE March 27, 2010, causing an overpayment of \$3,019.00. In addition, this administrative error caused the employee to erroneously receive retroactive regular salary and retention incentive pay during PPE March 27, 2010 for the period April 17, 2009, through May 23, 2009, causing an overpayment of \$15,812.00. This increased the employee's debt to \$35,659.00 (\$16,828.00 + \$3,019.00 + \$15,812.00). However, since the employee had been underpaid \$31,434.00, DFAS properly applied the \$35,659.00 to the debt, reducing the overpayment to \$4,225.00.

On April 5, 2010, a corrective SF-50 was issued decreasing the employee's salary to \$201,862.00 per annum (\$176,623.00 basic salary + \$25,239.00 locality pay) retroactive to January 4, 2009. However, due to an administrative error, the employee's pay records were not immediately updated to reflect the correction. As a result, the employee's regular salary and retention incentive pay were miscalculated during the period March 28, 2010, through May 8, 2010, causing an overpayment of \$8,490.00. This increased the employee's debt to \$12,715.00 (\$4,225.00 + \$8,490.00).

Finally, on April 12, 2010, another corrective SF-50 was issued increasing the employee's salary from \$201,862.00 per annum to \$208,809.00 per annum (\$182,701.00 basic salary + \$26,108.00 locality pay) retroactive to January 3, 2010. As a result, the employee erroneously received retroactive regular salary and retention incentive pay during PPE May 22, 2010, through June 19, 2010, for the period May 9, 2009, through July 18, 2009, causing an overpayment of \$4,785.00. As a result, the employee became indebted to the government in the amount of \$17,500.00 (\$12,715.00 + \$4,785.00).

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of the employee's request for waiver. The adjudicator concluded that the employee should have at least questioned the large increase to his salary since it increased by over \$98,000.00 per annum when he received pay actions increasing his salary from \$173,602.00 per annum to \$271,803.00 per annum. The adjudicator noted that although the employee stated that he attributed the increases to his position description (PD) upgrade, since his SF-50s did not indicate that the increase were for this reason, he should have questioned finance or personnel officials about such a large annual salary increase. The adjudicator further found that if the employee had reviewed his leave and earnings statements (LES), he would have noticed that his pay rate was \$100.05 per hour (\$208,810.00 per annum) and he received a gross salary payment of \$10,005.00 (\$8,004.00 for regular salary and \$2,001.00 for retention incentive pay) in PPE February 13, 2010. However, during the next pay period, PPE February 27, 2010, his LES reflected that his pay rate increased to \$128.35 per hour (\$262,872 per annum) and his gross salary increased to \$12,835.00 (\$10,268.00 for regular salary and \$2,567.00 for retention incentive pay). The adjudicator noted that this represented a \$2,830.00 gross salary increase. In addition, the employee received a \$11,168.00 retroactive payment for regular salary and retention incentive pay. Although the employee stated that he relied on his personnel office to pay him correctly and he was due back pay for locality, he still should have questioned such a large salary increase from one pay period to the next, especially since he received such large retroactive payments totaling \$11,168.00 and, admittedly, had no idea how much locality back pay he was entitled to receive. The adjudicator also noted that just two pay periods after receiving the \$11,168.00, the employee received \$15,812.00 in retroactive payments for regular salary and retention incentive pay. Therefore, the adjudicator denied the employee's request for waiver.

In his request for reconsideration, the employee encloses a copy of his PD that replaced his earlier PD. He states that his understanding was that the new PD salary was higher than the previous PD salary by approximately \$33,000.00. He encloses an SF-50 dated March 1, 2010 with an effective date of January 3, 2010, reflecting a similar adjustment to his salary. He also encloses a letter written by his then administrative specialist referring to the errors relating to the non-payment of locality pay.

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). Generally, persons who receive a payment erroneously from the government acquire not 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 ¶ E4.1.1. 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.

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 ¶ E4.1.4. A waiver generally is not appropriate in cases 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. *See* Instruction ¶ E4.1.5.

In this case, the employee was paid properly from January 3, 2010, through February 13, 2010. However, on the PPE February 27, 2010, the employee's regular salary and retention incentive pay were miscalculated causing an overpayment of \$2,830.00. In addition, he erroneously received retroactive regular salary and retention incentive pay for the PPE February 14, 2009, through March 23, 2009, causing an overpayment of \$11,168.00. As pointed out by the adjudicator, the employee's pay rate jumped from \$100.05 per hour (\$208,810.00 per annum) in PPE February 13, 2010, to \$128.35 per hour (\$267,872.00 per annum) in PPE February 27, 2010. Although the employee states that he believed that this increase was the result of a change in his PD, the SF-50 he provides does not reflect any change in his position title or pay plan that would mirror his new PD. In this regard, his old PD has a classified date of October 25, 2007, a position title of "Supervisory Physician (Nuclear Medicine)," and a pay plan of "YG." The new PD he provides has a classified date of February 4, 2009, a position title of "Supervisory Medical Officer (Nuclear Medicine)," and a pay plan of "YJ." However, the SF-50 he provides, issued on March 1, 2010, reflects the position title and pay plan of his old PD. In addition, he states that it was his understanding that his new PD salary was higher than his previous PD salary by \$33,000.00. However, he does not explain when his PD changed. The only date we have for the PD change is the date it was classified, February 4, 2009. If his PD changed on this date, we do not believe he could have reasonably believed that the SF-50 issued on March 1, 2010, with an effective date of January 3, 2010, increasing his salary from \$232,932.00 per annum to

\$267,872.00 per annum, resulted from a February 2009 change in his PD, especially since he had recently received an increase in his salary from \$176,623.00 per annum to \$204,891.00 per annum. Therefore, he should have at least questioned his pay no later than PPE February 27, 2010, when he received such a significant increase in pay. Since he failed to do so, he is not without fault in the matter, and the request for waiver was properly denied. *See* DOHA Claims Case No. 2011-WV-101206.2 (January 12, 2012) and DOHA Claims Case No. 09010501 (January 8, 2009).

Further, the letter written by the pay official states that the pay official was informed that the employee was not receiving locality pay from December 2007 through December 2009. The pay official points out that the employee had no idea what he was entitled to receive; he was only told that he never received his locality pay. As noted by the adjudicator, the employee should have questioned the retroactive payments he received, especially since he admits that he had no idea how much he was entitled to receive in back pay for locality pay. In addition, the retroactive payments the employee received were noted as “regular pay,” and “retention incentive pay,” on his LES. There was no indication that these retroactive payments were to compensate the employee for the underpayment of locality pay.

We also note that the employee’s LES for PPE April 10, 2010, reflects an indebtedness collected for retroactive payment of regular salary and retention incentive pay. In addition, the employee acknowledges that he was in receipt of a letter of debt notification dated April 24, 2010. After being notified he was indebted, the employee continued to receive overpayments totaling \$12,715.00. Under the circumstances, it is not against equity and good conscience to deny waiver of the claim.

Conclusion

The employee’s request for relief is denied, and we affirm the August 28, 2012, appeal decision. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

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