

KEYWORDS: Waiver of Indebtedness

DIGEST: When an employee is aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to retain them for eventual repayment to the government.

CASENO: 2012-WV-101904.2

DATE: 12/27/2012

DATE: December 27, 2012

)	
In Re:)	
[REDACTED])	Claims Case No. 2012-WV-101904.2
Claimant)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

When an employee is aware that he is receiving payments in excess of his entitlements, he does not acquire title to the excess amounts and has a duty to retain them for eventual repayment to the government.

DECISION

An employee requests reconsideration of the November 16, 2012, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-101904. In that decision, this Office granted waiver in the amount of \$81,290.29, and denied waiver of the overpayment in the amount of \$6,925.85.

Background

The record shows that the employee, who was located in Japan, was reassigned from Tokyo, Japan to Okinawa, Japan. Upon his arrival in Okinawa, he was granted living quarters allowance (LQA). However, the Defense Finance and Accounting Service (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 during the period March 29, 2009, through January 6, 2011, causing an overpayment of \$88,216.14.

The employee stated that he was unaware he was being overpaid until he received a letter from the Civilian Human Resources Office (CHRO), dated December 1, 2010, that an administrative error was made during the original LQA eligibility determination. In his request for reconsideration, the employee states that while he was notified by the letter dated December 1, 2010, he was also given the right to submit a written response prior to the final eligibility determination. Although his appeal was denied, CHRO was reviewing his response and did not issue their final decision until January 19, 2011. Therefore, the employee contends that he should be granted waiver for the LQA payments during the period of review until the final decision was made.

Discussion

Title 5, United States Code, § 5584, provides authority for waiving claims for 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 interest of the United States provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee or any other person having an interest in obtaining the waiver. This statute is implemented within the Department of Defense under Department of Defense Instruction 1340.23 (February 14, 2006) (hereinafter Instruction).

Generally, persons who receive a payment erroneously from the Government acquire no 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. A waiver is not a matter 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 is usually not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. In such circumstances, 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.

The employee received a letter from CHRO, dated December 1, 2010, stating that the Director, CHRO “initially determined that [the employee was] not eligible to receive LQA payments and [has] been receiving these payments erroneously.”¹ Although the employee was given the right to appeal before a final decision was issued, he was clearly on notice as of December 1, 2010, that the LQA payments he was receiving were at least questionable.

¹ This determination was based upon a review of the employee’s original LQA eligibility. The employee was notified that his LQA eligibility was identified for review by letter from CHRO, dated June 14, 2010.

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. *See* DOHA Claims Case No. 2011-WV-072902.2 (March 8, 2012), and Comptroller General decision B-204410, Mar. 18, 1982.

The DOHA adjudicator has determined the LQA paid prior to November 21, 2010 (\$81,290.29) was received by the employee in good faith, and with no knowledge it was not correct. Therefore, that portion of the claim is properly waived. In contrast, the subsequent LQA payments (\$6,925.85) were received after the employee was notified in December 2010 that his entitlement to LQA was, at a minimum, in doubt. At that point, the employee should have set aside any further LQA payments for eventual repayment to the Government. *See* DOHA Claims Case No. 2011-WV-072902.2, *supra*. Therefore, it would not be against equity and good conscience to deny waiver of the erroneous overpayment in the amount of \$6,925.85. *See* DOHA Claims Case No. 2012-WV-062602.2 (August 23, 2012).

Conclusion

The employee's request for reconsideration is denied and the decision of November 16, 2012 is sustained. In accordance with the Instruction ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

///Original Signed///

Jean E. Smallin
Chairman, Claims Appeals Board

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Catherine M. Engstrom
Member, Claims Appeals Board

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