

DATE: May 2, 2013

In Re:)

[REDACTED])

) Claims Case No. 2012-WV-110902.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

To be considered under the provisions of 5 U.S.C. § 5584(b)(3), an employee's waiver request must be received within three years of the discovery of the debt.

DECISION

An employee of the U.S. Army requests reconsideration of the February 21, 2013, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-110902. In that decision, this Office decided that his application for waiver in the amount of \$6,935.80 could not be considered because it was not received within the 3-year statute of limitations.

Background

The employee worked overseas and was entitled to receive living quarters allowance (LQA). During the pay period ending (PPE) February 24, 2001, through the PPE July 27, 2002, the employee was entitled to receive LQA in the amount of \$22,743.17. However, due to an administrative error, the employee's pay account was not updated to reflect his LQA entitlement. As a result, the employee was underpaid LQA in the gross amount of \$22,743.17. During the PPE September 7, 2002 through the PPE September 21, 2002, the employee received a retroactive payment of LQA in the gross amount of \$24,673.43. Since the employee was only entitled to receive LQA in the amount of \$22,743.17, he was overpaid \$1,930.26 (\$24,673.43 - \$22,743.17).

In addition, on July 14, 2002, the employee requested to be placed in a military furlough leave without pay (LWOP) – called to active duty status effective July 15, 2002. However, due to an administrative error, the *Notification of Personnel Action*, SF-50, affecting his LWOP

status was not issued until January 3, 2005. As a result, the employee erroneously received LQA payments during the PPE April 5, 2003, through the PPE November 27, 2004, causing an overpayment of \$5,005.54. Therefore, the employee was overpaid \$6,935.80 (\$1,930.26 + \$5,005.54).

In January 2006 the Defense Finance and Accounting Service (DFAS) discovered the overpayment. On January 31, 2006, DFAS sent a notice of indebtedness to the employee. The employee states that he never received this notice and first became aware of the debt on July 28, 2011. On September 28, 2011, the employee submitted a request for waiver.

In the appeal decision, the DOHA adjudicator upheld DFAS's determination that the employee's application for waiver in the amount of \$6,935.80 could not be considered because it was not received within the 3-year statute of limitations.

In his request for reconsideration, the employee states that he never received any LQA payments for the PPE February 24, 2001, through July 27, 2001. He states that DFAS did not provide him with adequate notification of the indebtedness within three years of the discovery of the overpayment which prohibited him from filing a proper response. He states that he provided the Civilian Personnel Advisory Center (CPAC) and DFAS with his current addresses for the entire time he was performing military service. He lists three addresses and states that he provided CPAC with all three when he out-processed from his civilian position on July 14, 2002. He maintains that all three addresses remained active until July 2011. He states that DFAS apparently disregarded his three current addresses and sent the notification of indebtedness to his expired APO address. He states that he first became aware of the indebtedness when he reactivated his civilian pay account in July 2011 and unknown pay deductions suddenly started. He states that it is the opinion of the DFAS-Europe Office and the CPAC that the time period allowed for him to respond to the indebtedness should have been extended for a period of six months from the date he was first notified which was when he returned from military service and reactivated his civilian pay account in July 2011. He also contends that the debt is not valid because his personnel and pay account status entitled him to receive both payments for military leave and the LQA payments in accordance with the Office of Personnel Management's (OPM) regulations. He attaches an excerpt from an OPM Manual which he states supports his entitlement. He states that in July 2002 when he out-processed his civilian pay and personnel accounts to temporarily reenter the military, he requested his duty status change to military furlough, *i.e.*, LWOP. He states that this should have been done by CPAC's submission of the SF-50. However, the employee states that, unbeknownst to him, the SF-50 was not submitted by CPAC until January 2005. Therefore, he asserts that he was in a present-for-duty-non-pay status from July 15, 2002, through January 3, 2005, and thus, entitled to LQA.

Discussion

Our authority in this matter is restricted to a consideration of whether the employee's debt may be waived under 5 U.S.C. § 5584. Under 5 U.S.C. § 5584, we may waive a claim for an erroneous payment of pay or allowances if collection would be against equity and good conscience and not in the best interests of the United States, provided there is no evidence of

fraud, fault, misrepresentation, or lack of good faith on the part of the employee. However, we may not waive collection of an erroneous payment if the employee's application for waiver is received after the expiration of three years immediately following the date on which the erroneous payment was discovered. *See* 5 U.S.C. § 5584(b)(3). The employee's actual or imputed knowledge of the time limitation is irrelevant under 5 U.S.C. § 5584(b)(3). *See* DOHA Claims Case No. 2011-WV-041101.2 (December 20, 2011); and DOHA Claims Case No. 00080116 (October 11, 2000).¹ The 3-year period runs from the date that the error is discovered by an appropriate official, in this case January 31, 2006. Since the employee's written waiver application was not received until September 28, 2011, we have no authority to consider it. *See* DOHA Claims Case No. 2012-WV-091003.2 (February 12, 2013); DOHA Claims Case No. 2011-WV-041101.2, *supra*; DOHA Claims Case No. 06070704 (July 17, 2006); DOHA Claims Case No. 99050610 (May 27, 1999); and Comptroller General decision B-189170, July 5, 1977.

First, the record contains the employee's Master Pay Histories, which contain the same information reflected on the employee's leave and earnings statements (LES). For the PPE September 7, 2002, through the PPE September 21, 2002, the employee received retroactive payments of LQA in the amount \$24,673.43, for the PPE February 24, 2001, through the PPE August 24, 2002.² Specifically, in the PPE September 7, 2002, the employee received retroactive payments of LQA in the gross amount of \$16,756.74 (net \$16,646.37) for the PPE August 25, 2001, through the PPE August 24, 2002. In the PPE September 21, 2002, the employee received retroactive payments of LQA in the gross amount of \$7,916.69 (net \$7,806.33) for the PPE February 24, 2001, through the PPE August 11, 2001. Since the employee was only entitled to receive \$22,743.17 for the PPE February 24, 2001, through the PPE July 27, 2002, he was overpaid \$1,930.26 (\$24,673.43 - \$22,743.17).

Second, the employee contends that the 3-year statute of limitations under the waiver statute should not begin to run until six months after he returned from active duty. We interpret this argument to be that the employee was covered by the Servicemembers Civil Relief Act, codified at 50 U.S.C. app. § 526, and therefore, the act tolls the 3-year limitation period while on active duty to file an application for waiver under 5 U.S.C. § 5584. However, the application period in 5 U.S.C. § 5584 is not tolled by the Servicemembers Civil Relief Act. *See* B-234163, Mar. 8, 1990. The 3-year period referenced in 5 U.S.C. § 5584 is a limit on our authority to waive claims of the government against employees, whereas the Servicemembers Civil Relief Act operates to toll periods of limitation on rights that accrue to service members. By the terms of 5 U.S.C. § 5584, we may not exercise our waiver authority unless the waiver application is received within 3 years of the date the erroneous payment is discovered.

Even if we were able to consider the employee's request for waiver, we believe waiver would not be appropriate under the circumstances. Waiver is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. *See* DOHA Claims Case No. 08091801 (September 23, 2008); and DOHA Claims Case No. 01092001 (October 29, 2001). In the employee's original waiver request, he states that he properly received base pay for military

¹This decision was decided under 10 U.S.C. § 2774 because the applicant for waiver was a service member. However, the standards for waiver under 10 U.S.C. § 2774 and 5 U.S.C. § 5584 are the same.

²The employee was not entitled to receive the retroactive payments of LQA from July 15, 2002, through August 24, 2002, because he was in a military LWOP status.

leave he requested while on active duty.³ He states that he received \$6,210.71 in base pay. He states that one third of this was paid on each of three occasions. He states that he requested three times to be placed on military leave for one full pay period of 80 hours. He states each base pay check was for \$2,070.00. He further states that the LQA payments may have been improperly disbursed to him during his military LWOP but there is no record of a request for them or receipt of the payments. He states:

There are no SF-50s showing in my records requesting payment of LQA during the period of 2002 through 2011; and it would have been refused anyway by the Civilian Pay chain as improper; Since I was receiving full Military Pay and Allowances during this entire time and totally ineligible for any Civilian LQA payments of any type.

In his rebuttal to DFAS's administrative report, the employee states:

I was physically absent from my civilian workplace on Military Furlough from July, 2002 thru July, 2011. At irregular intervals during that time, I requested payment of my accruing Military Leave hours to avoid losing them. Apparently, I was erroneously paid LQA during several of those Military Leave Pay Periods, for which I was temporarily not eligible, due to active military service.

He further states that he had no reason to check his civilian pay account while on active duty. As explained by the DOHA adjudicator in the appeal decision, given the fact that the employee requested payment of his accrued military leave throughout the period of his military LWOP, he had a duty to verify the accuracy of the pay he received. If he had reviewed his LES for the PPE April 5, 2003, he would have noticed that he received a salary payment of \$242.64 for eight hours of work. However, his net pay for the same period was \$911.12, of which \$623.35 represented an erroneous LQA payment. In addition, even if the employee was expecting to be paid for military leave in the approximate amount of \$6,000.00 during the period April 2003 through November 2004, we note that he received net pay during this period in the amount of \$14,976.91. We have consistently held that a recipient of unexplained payments has a duty to at least question the reason for the payments and to set aside the funds in the event that repayment should be necessary. *See* DOHA Claims Case No. 09010501 (January 8, 2009); DOHA Claims Case No. 07103109 (November 15, 2007); and DOHA Claims Case No. 07101502 (October 19, 2007). Further, we have consistently held that an employee who has his pay directly deposited into his bank account has a duty to monitor his bank account, verify his statements and question any discrepancies. *See* DOHA Claims Case No. 02022603 (April 17, 2002). If a recipient of an overpayment is furnished with documentation or information which, if reviewed, would cause a reasonable person to be aware of or suspect the existence of an error, but fails to review such documents (LES and bank statements) or otherwise fails to take corrective action, waiver will generally be denied. *See* DOHA Claims Case No. 2011-WV-0411101.2, *supra*; DOHA Claims Case No. 2010-WV-082601.2 (November 3, 2010); and DOHA Claims Case No. 02022603, *supra*.

³An employee is entitled, upon request, to use annual leave, military leave, earned compensatory time off for travel, or sick leave intermittently with leave without pay while on active duty.

As for the employee's contention that the debt is not valid because he was entitled to LQA, our authority in this matter is limited to the equitable remedy of waiver. The validity of the debt is an issue separate from the waiver process. Moreover, DOHA has no authority to adjudicate the validity of debts that arise from disputes involving civilian employees. If the employee wishes to dispute the validity of the debt by proving his entitlement, he should contact his agency and DFAS. Finally, the employee seems to frequently reference the remedy of remission of the indebtedness. We have no jurisdiction over remission issues. The employee should contact DFAS concerning the remedy of remission.

Conclusion

We affirm DOHA's appeal decision of February 21, 2013, that waiver of repayment of the employee's debt may not be considered due to the fact that the request was not received for more than three years after the discovery of the debt. 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

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