

DATE: June 27, 2013

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In Re: )

[REDACTED] )

) Claims Case No. 2012-WV-111602.2

Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

A waiver is usually not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. In such instances, the recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government.

**DECISION**

An employee requests reconsideration of the appeal decision, dated May 14, 2013, of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-111602.2. In that decision, DOHA waived overpayment of basic salary and associated allowances in the amount of \$6,461.59 and denied waiver of \$8,265.35.

**Background**

The employee was issued a *Notification of Personnel Action* (SF-50) on March 27, 2008, granting him, a Police Officer, a change to a lower grade as a Security Specialist effective March 16, 2008. Due to an administrative error, the SF-50 effecting the change of position, erroneously granted the employee pay retention. The employee was not entitled to pay retention, and due to this administrative error, his pay was miscalculated during the period March 16, 2008, through September 10, 2011, causing an overpayment of \$14,726.94.

The adjudicator in the appeal decision determined that the employee met all conditions necessary for waiver in the amount of \$6,461.59, which resulted from his pay being miscalculated during the period March 16, 2008, through April 25, 2009. The adjudicator agreed with the determination of the Defense Finance and Accounting Service (DFAS) that the SF-50 issued on May 8, 2009, which promoted the employee put him on notice that he was no longer

entitled to receive pay retention. The SF-50 specifically stated that, "Pay retention entitlement terminated." Since the SF-50 was issued on May 8, 2009, the employee should have known that he was no longer entitled to pay retention prior to receiving his pay for the pay period April 26, 2009, through May 9, 2009.

In the employee's request for reconsideration, he provides three SF-50s that have an effective date of March 15, 2009. One indicates the employee is entitled to pay retention; one indicates that pay retention entitlement is terminated; and one corrects the figures to show a decrease in pay. The second SF-50 states that pay retention is terminated. It indicates a promotion and a small increase in pay. The employee argues that he relied on that SF-50 because he thought the promotion would bring about a pay increase in spite of the termination of pay retention. He contends he believed the third SF-50, which indicates a significant decrease in pay, was only an adjustment to the first two SF-50s. He states the overpayment occurred without his knowledge and through no fault of his. It was an administrative error caused by the Human Resource Service Center (HRSC). Additionally, while he understands that hardship is not a mitigating factor to allow relief from the requirement to pay the debt, he asks this Board to consider it as a portion of the total circumstances.

### **Discussion**

Title 5, United States Code, § 5584, provides authority for waiving claims for erroneous payments of pay and certain allowances made to specified 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 the claim arose from an administrative error with 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.

The above statute is implemented by Department of Defense Instruction (hereinafter 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 erroneously receive a payment 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.

A waiver is usually not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. In such instances, the recipient has a duty to notify an appropriate official and to set aside the funds for eventual repayment to the government. *See* Instruction ¶ E4.1.4.

In the present case, the Board finds that the employee should have at least questioned his entitlement to the retention pay since he had conflicting information concerning his entitlement on three different SF-50s, all issued on the same day. There is nothing in the record that reflects that the employee tried to resolve the ambiguity surrounding his pay. Since the employee presented no documentary evidence that he questioned his entitlement, we affirm the

adjudicator's determination to deny waiver. *See* DOHA Claims Case No. 09062401 (July 23, 2009), and DOHA Claims Case No. 09042401 (May 19, 2009).<sup>1</sup>

As to the request to consider hardship as a portion of the overall circumstances, the Instruction ¶ E4.1.7, clearly states that financial hardship is not a factor for consideration in determining whether waiver is appropriate. The employee may request that DFAS consider a more lenient payment plan, but that decision is entirely up to DFAS.

### **Conclusion**

The employee's request for reconsideration is denied, and we affirm the appeal decision dated May 14, 2013. In accordance with the Instruction ¶ E8.15, this is the final administrative decision of the Department of Defense in this matter.

*///Original Signed///*

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Jean E. Smallin  
Chairman, Claims Appeals Board

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Gregg A. Cervi  
Member, Claims Appeals Board

*///Original Signed///*

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Natalie Lewis Bley  
Member, Claims Appeals Board

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<sup>1</sup> These cases involve military personnel under 10 U.S.C. § 2774; however, the standards are the same.