

DATE: August 13, 2013

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In Re: )  
[REDACTED] ) Claims Case No. 2013-WV-041501.2  
Claimant )

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**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 July 5, 2013, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-WV-041501. In that decision, this Office granted waiver in the amount of \$131,787.48, and denied waiver of \$7,310.24.

**Background**

On August 13, 2008, a SF-50, *Notification of Personnel Action*, was issued appointing the employee as a Highly Qualified Expert (HQE), effective August 17, 2008. The employee was assigned to Germany, and as part of his salary the employee received living quarters allowance (LQA) and post allowance (PA). However, it was later determined that since the employee was hired as a HQE, he was not entitled to LQA in the amount of \$106,120.74 and PA in the amount of \$32,976.98 during the period August 17, 2008, through September 25, 2010. This caused an overpayment of \$139,097.72.

In his original request for waiver, the employee stated that he was unaware of the debt until he was notified by the Director of the Civilian Senior Leader Management Office

(CSLMO), on August 27, 2010.<sup>1</sup> The documentation in the employee's file indicates that he accepted an employment opportunity for overseas assignment and had been informed that he would be eligible for LQA and PA. The adjudicator in this case determined that the employee acted in good faith when he accepted the erroneous LQA and PA payments that he received during August 17, 2008, through August 14, 2010, and waived that portion of the claim. She also determined that because the employee had been notified of the erroneous payments on or about August 27, 2010, that overpayments resulting from erroneously receiving LQA and PA during August 15, 2010, through September 25, 2010, should be denied. The employee became aware he was receiving erroneous payments, and yet continued to receive them. The adjudicator determined that since the employee was aware he was receiving erroneous payments, waiver was not appropriate for the period after he was notified.

The employee requests reconsideration of the decision of this Office because the letter from the CSLMO, dated August 27, 2010, that notified him of the error stated that he "may owe money" to the federal government. He also argues that since the Department of the Army (CSLMO) stated in the letter that the payments would be suspended effective September 26, 2010, that he had no notice he would be called upon to repay any funds up to the September 25, 2010 pay period. He notes that the Army also discussed the possibility of waiver through the Defense Finance and Accounting Service (DFAS), as well as recharacterization of some portion of the allowances by the Army. He contends he was not warned he should expect to pay back any portion of the allowances he received up to September 25, 2010, nor was he told to set aside any funds in order to accomplish this. He acted in good faith at all times, and would have followed more definitive instructions had he received them.

### **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 interests of the United States. Generally, these criteria are met by a finding that the claim arose from 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. This statute is implemented within the Department of Defense under Department of Defense Instruction 1340.23, *Waiver Procedures for Debts Resulting from Erroneous Pay and Allowances* (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.

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<sup>1</sup> Specifically, the employee stated that the Director advised him that the LQA and PA payments he received constituted a pay error.

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.

While the employee was not specifically told that he should hold any amounts received after notification for eventual repayment, he was clearly on notice that the amounts he subsequently received were at least questionable. 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. 2012-WV-101904.2 (December 27, 2012), 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 and PA payments paid prior to notification (\$131,787.48) were received by the employee in good faith, and with no knowledge they were erroneous. Therefore, that portion of the claim is properly waived. In contrast, the subsequent LQA and PA payments (\$7,310.27) were received after the employee was notified in August 2010 that his entitlement to LQA and PA was erroneous. At that point, the employee should have set aside any further LQA and PA payments for eventual repayment to the Government. *See* DOHA Claims Case No. 2012-WV-101904.2, *supra*.

As to any actions that the Army might have taken, as the adjudicator stated, we have no authority to waive or modify regulations or statutes. The employee should address his concerns to the Department of the Army and/or the Office of Personnel Management. *See* DOHA Claims Case No. 98120402 (January 14, 1998). In light of the above, it would not be against equity and good conscience nor contrary to the best interests of the United States to deny waiver of the erroneous overpayment in the amount of \$7,310.27. *See* DOHA Claims Case No. 2012-WV-062602.2 (August 23, 2012).

### **Conclusion**

The request for reconsideration is denied, and the appeal decision, dated July 5, 2013, is affirmed. The request for waiver of overpayment in the amount of \$7,310.24 is denied. In accordance with the Instruction ¶ E8.15, this is the final administrative action 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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Catherine M. Engstrom  
Member, Claims Appeals Board

*///Original Signed///*

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Natalie Lewis Bley  
Member, Claims Appeals Board