

DATE: August 8, 2013

In Re:)

[REDACTED])

) Claims Case No. 2013-WV-021303.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Due to an administrative error, an employee's salary was miscalculated, causing her to be overpaid. She was unaware she was being overpaid until she was notified on September 6, 2012. Under 5 U.S.C. § 5584, the amounts she was overpaid before notification may be waived. However, the amounts she received after notification may not be waived because she did not acquire title to the excess amounts and has a duty to return them to the government.

DECISION

An employee requests reconsideration of the July 11, 2013, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-WV-021303. In that decision, the DOHA adjudicator waived \$1,629.60 of the \$3,686.40 that the employee owed the government due to the overpayment of salary, but denied waiver of the \$2,056.80 balance of the indebtedness.

Background

Effective January 29, 2012, the employee was reassigned, and her salary was established as \$99,348.00 per annum. However, it was later determined that the employee's salary should have been established as \$96,109.00 per annum. Due to this administrative error, the employee's salary was miscalculated during the period January 29, 2012, through September 8, 2012, causing an overpayment of \$1,984.00.

During the period September 9, 2012, through September 22, 2012, the employee was underpaid in the amount of \$106.40. Since the employee was underpaid in the amount of

\$106.40, DFAS properly applied that amount to the \$1,984.00, reducing the overpayment to \$1,877.60. In addition, due to an administrative error, during the pay period ending (PPE) October 6, 2012, the employee erroneously received a retroactive salary payment of \$1,808.80. Therefore, the employee was overpaid \$3,686.40 (\$1,877.60 + \$1,808.80).

The DOHA adjudicator concluded that the employee acted in good faith in accepting the portion of the overpayment which occurred during the period January 29, 2012, through August 11, 2012, and that all conditions necessary for waiver of this portion of the claim have been met. She further concluded that since the employee became aware of the overpayment on September 6, 2012,¹ it was not against equity and good conscience to deny waiver of the portion of the overpayments she received during the period August 12, 2012, through October 6, 2012.

In her request for reconsideration, the employee states that although she was notified of the overpayment on September 6, 2012, at 2:00 PM, she had already received her salary on September 5, 2012, for the pay period August 12, 2012, through August 25, 2012. She attaches her bank deposit slip reflecting that she was paid on September 5, 2012. In addition, she states that the *Notification of Personnel Action (SF-50)* correcting the error in her salary was not issued until September 17, 2012. Therefore, she states that the salary overpayment she received during the PPE September 8, 2012, should be waived because the delay in processing the corrective SF-50 was not within her control. She states that she does not understand how she could have been retroactively overpaid \$1,808.80 in October 2012, and requests this amount be recalculated. Finally, she states that over employees have been granted full waivers in the same circumstance.

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 interests of the United States. This statute is implemented within the Department of Defense under Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006). 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 employee acknowledges that she was notified of the overpayment in a meeting on September 6, 2012. Waiver is inappropriate if the employee is aware she is being overpaid when she receives the payment. *See* DOHA Claims Case No. 2012-WV-

¹In the employee's original waiver request, she states that she first became aware of the debt on September 6, 2012, at a meeting.

060506.2 (November 27, 2012); DOHA Claims Case No. 2012-WV-070306.2 (September 17, 2012); and DOHA Claims Case No. 2011-WV-030802.2 (August 24, 2011). Once the employee was notified on September 6, 2012, that her salary was set incorrectly, she did not acquire title to any overpayments she received after that point, and has a duty to return the excess amounts to the government.² *See* DOHA Claims Case No. 2011-WV-030802.2, *supra*.

In regard to the employee receiving the money in her bank account on September 5, 2012, but not being notified until September 6, 2012, it is not against equity and good conscience to recover the erroneous payment when the government makes prompt notification, as it did here. *See* DOHA Claims Case No. 06071717 (July 31, 2006); DOHA Claims Case No. 03111712 (December 2, 2003); and DOHA Claims Case No. 98062401 (October 13, 1998). We consider notification within one day to be prompt notification.

As for the retroactive payment the employee received in the PPE October 6, 2012, in the amount of \$1,808.80, waiver is not appropriate when the employee knows she has been overpaid. We note that in the employee's original waiver request, she acknowledges receiving LES during the period of overpayment. Her LES for the PPE September 22, 2012, reflects an indebtedness on her account in the amount of \$1,789.60. In the PPE October 6, 2012, her LES reflects under the heading, "Retroactive Earnings," that the employee received a retroactive payment of regular pay in the amount of \$1,808.80. Although the employee states that she does not understand how she was overpaid in this amount, she should have examined her LES carefully and questioned the retroactive payment, especially since she knew she had been overpaid. Under the circumstances, the employee does not acquire title to the overpayment, and has a duty to return the excess to the government. *See* DOHA Claims Case No. 2012-WV-101906.2 (February 28, 2013); and DOHA Claims Case No. 2012-WV-121006.2 (February 26, 2013).

Finally, the employee's contention that other similarly situated employees received full waivers is irrelevant to our decision in this matter. A waiver determination is based on the written record of the person requesting the waiver without regard to waiver relief that may or may not have been granted to a person that a party regards as similarly situated. We have consistently held that each case is considered on the basis of its own merits, and that we have no authority to investigate a waiver applicant's assertions that another person received similar overpayments and is not repaying them. *See* DOHA Claims Case No. 07090603 (September 11, 2007); and DOHA Claims Case No. 02032601 (May 13, 2002).

²The employee's leave and earnings statement (LES) for the PPE August 25, 2012, reflects that her pay date is September 6, 2012.

Conclusion

The employee's request for relief is denied, and we affirm the July 11, 2013, decision to deny waiver in the amount of \$2,056.80. In accordance with ¶ E8.15 of the Instruction, this is the final administrative action of the Department of Defense concerning the employee's request for waiver under 5 U.S.C. § 5584.

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