

DATE: September 17, 2013

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In Re: )

[REDACTED] )

) Claims Case No. 2013-WV-030508.2

Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Waiver is not appropriate when an employee knows, or reasonably should know, that a payment was erroneous. The recipient has a duty to set aside the funds for eventual repayment to the government.

**DECISION**

A former employee of the U.S. Army requests reconsideration of the August 20, 2013, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-WV-030508. In that decision, DOHA denied waiver of overpayment of an erroneous salary payment in the amount of \$2,965.60.

**Background**

The employee separated from the Army effective May 5, 2012, and a SF-50, *Notice of Personnel Action*, was issued effective May 6, 2012, transferring him to the Office of Surface Mining. However, due to an administrative error, his pay records were not timely updated to reflect his May 5, 2012, separation from the Army. As a result of this administrative error, the employee became indebted for the erroneous salary payment he received from the Army for the pay period ending (PPE) May 19, 2012, resulting in an overpayment in the gross amount of \$2,965.60.

On his DD Form 2789, *Waiver/Request for Indebtedness Application*, the employee requested that waiver be granted because, "I left the agency on 5 May 2012, and the agency failed to take the appropriate actions as directed by law to prevent payment from coming to me,

instead they willfully and intentionally submit [sic] payroll hours. The time and attendance system is set up where someone has to go in and input the time and certify it[.] I also did NOT CONCUR the time card.” In the employee’s waiver application, the employee stated that he did not receive a Leave and Earnings Statement (LES) in the mail; neither did he go to MyPay because he was not expecting/looking for pay from the agency. In the employee’s rebuttal to the Defense Finance and Accounting Service (DFAS) Administrative Report, he contended that he thought the money was his Veteran’s [Veteran Administration (VA)] benefit. Lastly, the employee stated that he had difficulties managing his account, and he provided documentation of his medical condition.

### **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 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.

While an administrative error may have occurred, our Office has consistently held that the waiver statute does not automatically apply to relieve the debts of all employees who, through no fault of their own, have received erroneous payments from the government. If it were merely a matter of right, then virtually all erroneous payments made by the government to employees would be excused from repayment. Additionally, our Office has consistently held that the United States is not liable for the erroneous actions of its officers, agents, or employees even though committed in the performance of their official duties. *See* DOHA Claims Case No. 2011-WV-021401.2 (July 21, 2011), and DOHA Claims Case No. 08021103 (February 13, 2008).

The employee stated that he did not receive a LES nor did he go to MyPay to review his pay. He also contended that he believed that the money was his VA benefit. The adjudicator noted in the appeal decision that the employee received three deposits listed on his bank statement in May 2012. His bank statement clearly reflected on May 15, 2012, he received from DFAS – Cleveland Fed [Federal] Salary: \$1,957.77; May 29, 2012, listed DFAS – Cleveland Fed Salary: \$1,957.76; and May 30, 2012, listed US Treasury 310 xx VA Benef [Benefit]: \$1,676.00. This Office has consistently held that an employee who has his pay deposited directly into his bank account has a duty to monitor his bank account, verify his statements, and question any discrepancies. Had the employee been taking these actions, he would presumably have been aware that he was being overpaid. When an employee knows, or reasonably should know, that he is receiving pay to which he is not entitled, he has a duty to retain such amounts for refund to the government. *See* DOHA Claims Case No. 2011-WV-021401.2 (July 21, 2011); DOHA Claims Case No. 2011-WV-092801.2 (December 29, 2011); DOHA Claims Case No. 09080601 (August 11, 2009); and DOHA Claims Case No. 08021103 (February 13, 2008).

The employee stated that he had major difficulties managing his account, and provided documentation of his medical condition. The adjudicator noted that the documentation presented

indicated that the physician saw the employee in September 2012 and November 2012. The documentation did not indicate that the employee's medical condition precluded him from verifying or understanding the pay received in May 2012, which was months prior to September 2012. In the employee's request for reconsideration, he provided additional medical documentation. The employee provided letters from two physicians. One letter, dated June 12, 2013, indicates that the employee would be attending intensive outpatient treatment starting immediately in one week increments of time, not to exceed four weeks. The second letter, dated September 5, 2013, states that the employee has been diagnosed with multiple physical and mental health disabilities for which he is being treated, and these diagnoses impact his focus and concentration and may temporarily impact his ability to perform activities related to managing finances.

We understand that the employee is suffering from medical problems. In prior decisions, we have recognized that waiver may be granted in extraordinary situations when the waiver applicant is able to provide clear and convincing evidence, in the form of medical records and other documentary proof, that during the relevant period of time he was in such poor mental or physical health that it was unlikely that he knew or could have known of the overpayment, or that he was otherwise unable to attend to ordinary financial affairs. *See* DOHA Claims Case No. 2010-WV-120706.2 (March 31, 2011); DOHA Claims Case No. 04032919 (March 31, 2004); and DOHA Claims Case No. 00062601 (September 19, 2000). However, neither letter submitted by the employee indicates that his medical condition precluded him from verifying or understanding the pay he received in May 2012.

Since the employee failed to verify his bank statements or question any discrepancies, this Office finds that collection of the overpayment would not be against equity and good conscience, nor would it be contrary to the best interests of the United States. The evidence the employee provided does not demonstrate that he could not attend to his ordinary financial affairs during the period of the overpayment.

### **Conclusion**

The employee's request for reconsideration is denied, and we affirm the August 20, 2013, appeal decision. In accordance with the Department of Defense Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

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Jean E. Smallin  
Chairman, Claims Appeals Board

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Catherine M. Engstrom  
Member, Claims Appeals Board

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Natalie Lewis Bley  
Member, Claims Appeals Board