DATE: June 18, 2015

In Re:	)	
[REDACTED]	)	Claims Case No. 2013-WV-092301.3
Claimant	)	

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

Waiver is not appropriate when an employee knows or should know that he is receiving payments in excess of his entitlement.

DECISION

A retired employee of the U.S. Army requests reconsideration of the April 9, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2013-WV-092301.2. In that decision, DOHA denied the employee's request for waiver in the amount of $65,000.06.

Background

On March 19, 2007, the employee signed a *Retention Incentive Service Agreement*. In the agreement, the employee was granted a recruitment bonus in the amount of $15,097.00, which was 22% of his annual salary in the amount of $68,623.00 in exchange for serving in his position for five years from the effective date of the agreement. On April 18, 2007, a *Notification of Personnel Action* (SF-50) was issued granting the employee retention incentive to be paid biweekly in the amount of 22% of his earned basic pay to be paid from April 1, 2007, through December 31, 4712. It was later determined that the SF-50 should have terminated the employee's retention incentive effective April 2, 2008. However, due to an administrative error, the employee continued to receive retention incentive from the pay period ending (PPE) April 12, 2008, through June 18, 2011, causing the employee to be overpaid $65,000.06.

In his appeal of the Defense Finance and Accounting Service's (DFAS) denial of his request for waiver, the employee argued that he believed he was entitled to receive retention

incentive pursuant to the agreement for five years. In the appeal decision, the DOHA adjudicator upheld the Defense Finance and Accounting Service's (DFAS) denial of waiver of the claim. The adjudicator noted that the employee signed an agreement that indicated that he was only entitled to receive $15,097.00 and that it would be paid on a pro-rated biweekly basis for one year. The adjudicator also noted that there was no evidence in the record that the employee brought the termination date of December 31, 4712, an obvious error on the SF-50, to the attention of management or the proper officials.

In his reconsideration request, the employee states that he presented the agreement to a Staff Judge Advocate and was advised that it was ambiguous. The employee also states that he did bring the erroneous date of December 31, 4712, to the attention of management, but no action was taken to correct the date. He attaches two letters in support of his waiver request, one from his former Deputy Chief of Staff and one form the Inspector General indicating that they were aware of the SF-50 with the erroneous termination date for the retention incentive.

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). 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. Waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant. *See* Instruction ¶ E4.1.1.

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 waiver. Waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. 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. We have consistently held that waiver will generally be denied when an employee is furnished with documentary evidence or information which, if reviewed, would cause a reasonable person to be aware or suspect the existence of an error, but he fails to review such documents or otherwise fails to take corrective action. *See* DOHA Claims Case No. 98112018 (January 11, 1999).

Although the employee asserts that the *Retention Incentive Service Agreement* was ambiguous, we see no ambiguity in the agreement. In this regard, the agreement states that in exchange for a recruitment bonus in the amount of $15,097.00, the employee agrees to serve in his position with the Army for five years. In the agreement, he acknowledges that if his employment in the position is terminated during the period of the agreement at the convenience of the government, he will be entitled to retain the bonus. He further acknowledges that if his

employment in the position is terminated as a result of his poor performance or misconduct, he will be required to repay the recruitment bonus on a *pro rata* basis. There is nothing in the agreement stating that the employee was to continue receiving recruitment bonuses every year for five years.

In addition, the SF-50 granting the employee the retention incentive reflected an erroneous termination date. The employee acknowledges that the termination date was erroneous and states that he brought the matter to the attention of the proper officials. He attaches a statement from his former Chief of Staff. His former Chief of Staff supports the employee's contention that he brought the erroneous termination date to his attention. The Chief of Staff states that the matter was then forwarded to the Civilian Personnel Advisory Center for correction. The Chief of Staff further states that although the 4712 was an obvious error, the employee did sign an agreement in which he acknowledged that he was receiving a one-time bonus to be paid out in a year's time. As pointed out by the adjudicator in the appeal decision, there is no evidence that the employee received anything in writing reflecting that he was entitled to receive retention incentive continuously for five years. Under the circumstances, waiver is not appropriate. *See* DOHA Claims Case No. 2013-WV-091304.2 (January 15, 2015).

Conclusion

The employee's request for relief is denied, and we affirm the April 9, 2015, appeal decision. In accordance with the Instruction ¶ 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