

DATE: March 10, 2015

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In Re:

[REDACTED]

Claimant

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Claims Case No. 2014-WV-072910.2

**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 hold them for eventual repayment to the government.

**DECISION**

An employee of the Department of Defense requests reconsideration of the February 5, 2015, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2014-WV-072910. In that case, DOHA granted waiver of \$7,890.38 of the overpayment and denied waiver of \$1,033.60.

**Background**

A *Notification of Personnel Action*, SF-50, was issued granting the employee a promotion from an IA-01 with an annual salary of \$44,715.00 to an IA-02 with an annual salary of \$49,733.00, effective October 25, 2009. However, it was later determined that the employee's annual salary should have been set at \$48,179.00, instead of \$49,733.00. As a result, the employee was overpaid \$7,890.38 during the period October 25, 2009, through June 15, 2013.

On June 12, 2013, an SF-50 was issued correcting the employee's annual salary from \$49,733.00 to \$48,179.00, effective retroactive to October 25, 2009. However, as a result of this corrective SF-50, on July 5, 2013, the employee erroneously received a retroactive salary payment in the amount of \$1,033.60 for the period October 25, 2009, through June 15, 2013.

The DOHA adjudicator concluded that the employee acted in good faith in accepting the overpayment which occurred during the period October 25, 2009, through June 15, 2013, in the amount of \$7,890.38. She further concluded that because the employee was on notice by virtue of the corrected SF-50 issued on June 12, 2013, and his leave and earnings statement (LES) for the pay period ending (PPE) June 15, 2013, that he was being paid at the incorrect rate, when he received the unexplained retroactive payment on July 5, 2013, he should have at least questioned his entitlement to receive the payment. The adjudicator noted that the employee acknowledged reviewing the LES for the PPE June 15, 2013, and noticing that his grade and salary were reduced. The adjudicator further determined that although the employee's grade and salary for the PPE June 29, 2013, changed back to the higher grade and salary, he reasonably should have been aware at that point that there was a conflict in his salary. The adjudicator found that the changes in his salary between pay periods should have put the employee on notice that he could not rely on the accuracy of his salary.

In his reconsideration request, the employee states that he sent various emails and made numerous phone calls to his personnel office on this matter. He takes issue with the adjudicator stating that he should have questioned the unexplained substantial retroactive payment he received on July 5, 2013. He attaches email correspondence he had with a pay official concerning his promotion. He states that the Defense Finance and Accounting Service (DFAS) recommended an entire waiver of \$8,923.98. He points out that the salary amounts cited by the adjudicator on the SF-50 issued on October 25, 2009, were incorrect.

### **Discussion**

Under 5 U.S.C. 5584, we have the authority to waive collection of erroneous payments of salary made to specified federal employees, if collection 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 (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 receive a government payment erroneously 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.

The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the government is not sufficient basis in and of itself for granting a waiver. *See* Instruction ¶ E4.1.3. A waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. An employee is considered to be aware of erroneous payments when he possesses information which reasonably suggests that the validity of the payments may be in question. *See* DOHA Claims Case No. 2011-WV-100702.2 (January 31, 2012); DOHA Claims Case No. 07100101 (October 11, 2007); DOHA Claims Case No.

03072812 (July 30, 2003); DOHA Claims Case No. 02050613 (May 23, 2002); and DOHA Claims Case No. 97122313 (February 24, 1998). In such instances, the employee 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 this case, the employee suggests that he did question the appropriate officials concerning the retroactive payment issued to him on July 5, 2013. He states that the emails he attaches reflect that he did question the overpayment. However, after reviewing the email correspondence, we do not see where the employee specifically questioned why he was issued the retroactive payment in the amount of \$1,033.60 on July 5, 2013. However, we do see where the employee questioned why his LES for the PPE June 15, 2013, reflected that he was being paid at a GG-09, step 3, instead of a step 4, and that his annual salary decreased from \$55,354.00 to \$50,611.00. Specifically, in an email dated June 19, 2013, the employee writes that he just received his LES for the PPE June 15, 2013, and it reflects that an indebtedness was collected. He states that he was informed that he would be notified by letter when collection would begin and how much would be collected. On June 28, 2013, the pay official responds that a remedy ticket was submitted to DFAS and that the employee would receive information from DFAS on his debt. In addition, we note that the employee then responds to the official on July 2, 2013, prior to receiving the retroactive payment of \$1,033.60 on July 5, 2013. He acknowledges receiving a letter of indebtedness from DFAS on June 29, 2013. The letter of indebtedness notified the employee that he had been overpaid during the PPE June 2, 2012, through June 1, 2013, in the net amount of \$4,820.46. Therefore, the employee knew he was being overpaid when he received the unexplained retroactive payment on July 2, 2013. After notification of indebtedness, the employee should have specifically questioned the validity of the retroactive payment he received. Under the circumstances, the employee did not acquire title to the questionable payment and should have held it for eventual refund to the government.

We further note that the record contains the SF-50 issued on October 25, 2009. This SF-50 has the same salary amounts cited by the adjudicator in her decision. Even if she had made such an error, it has no bearing on our decision in this case. In addition, we note that DFAS did recommend full waiver in this case. However, our office is not bound by DFAS's recommendation, especially when we find an employee was aware he was being overpaid.

Since the employee has provided no new evidence which would cause us to overturn or modify the adjudicator's decision, we believe the collection of the \$1,033.60 would not be against equity and good conscience, nor contrary to the best interests of the United States.

## Conclusion

The request for reconsideration is denied, and the decision of February 5, 2015, is affirmed. 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

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Jean E. Smallin  
Chairman, Claims Appeals Board

Signed: Catherine M. Engstrom

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Catherine M. Engstrom  
Member, Claims Appeals Board

Signed: Natalie Lewis Bley

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Natalie Lewis Bley  
Member, Claims Appeals Board