

DATE: September 15, 2015

In Re:)

[REDACTED])

Claimant)

) Claims Case No. 2014-WV-072405.2
)
)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A waiver is not appropriate when a recipient of a significant unexplained increase in pay or allowances, or of any other unexplained payment of pay or allowances, does not attempt to obtain a reasonable explanation from an appropriate official. The recipient has a duty to ascertain the reason for the payment and to set aside the funds in the event that repayment should be necessary.

DECISION

A retired employee of the U.S. Army requests reconsideration of the June 30, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2014-WV-072405.

Background

On January 30, 2010, the employee, a professor at the Defense Language Institute (DLI), retired from Federal Service. At that time, she was entitled to receive current regular earnings (CRE) salary for 80 hours in the gross amount of \$3,304.00, and a payment of \$10,572.80 for 256 hours of lump-sum annual leave, which she subsequently received. As a result of her retirement, she was no longer entitled to receive any CRE salary payments, but instead became entitled to receive retirement benefits.

As a result of a merit pay review process in 2010 by the Federal Labor Relations Authority of the faculty pay system that managed the pay system for the DLI, a settlement agreement was reached which initiated changes in the faculty pay scales retroactive to the

academic year 2007. Based on the settlement agreement, the Defense Finance and Accounting Service (DFAS) determined that the employee became entitled to receive increases in her salary and changes to her merit pay calculations retroactive to academic year 2007 through January 30, 2010, the date of her retirement. On March 11, 2010, a *Notification of Personnel Action* (SF-50) was issued which retroactively corrected the employee's annual salary from \$85,201.00 to \$88,011.00 effective January 30, 2010. The employee was subsequently issued a payment during the pay period ending (PPE) March 13, 2010, in the gross amount of \$2,849.92 (net payment of \$1,911.21). In addition, as a result of the settlement agreement, DFAS issued the employee payments totaling \$9,072.38, in the PPE September 11, 2010 and in the PPE October 23, 2010. DFAS has advised us that these payments were proper.

In order to process the salary and merit pay increases due the employee retroactive to academic year 2007, her payroll record had to be reactivated. On September 25, 2010, an SF-50 was issued which cancelled the employee's retirement and reactivated her payroll record. However, due to an administrative error, when her payroll record was reactivated, the employee erroneously received a CRE salary payment in the amount of \$366.56 for 8 hours during the PPE September 25, 2010. In addition, the employee erroneously received a CRE salary payment in the amount of \$3,665.60 for 80 hours during the PPE February 12, 2011. Since the employee was retired, she was not entitled to receive any CRE salary payments. Therefore, she became indebted to the United States in the amount of \$4,032.16 (\$366.56 + \$3,665.60).

In the appeal decision, the DOHA adjudicator upheld DFAS's denial of waiver of the overpayment. In reaching her decision, the adjudicator noted that the employee indicated that she visited her Civilian Personnel Advisory Center (CPAC) in September 2010 to advise them that she was again in receipt of leave and earnings statements (LES), even though she had retired in January 2010. The employee stated that the LES reflected that no payment was due her. However, the adjudicator also noted that the record did not contain LES and the employee did not provide copies of her LES that she received. The adjudicator did note that the record contained the master pay histories, which reflected the information listed on the employee's LES. After reviewing this documentation, the adjudicator found that the master pay history for the PPE January 30, 2010, reflected a CRE salary payment for 80 hours in the gross amount of \$3,304.00 (\$41.30 per hour). The master pay histories for the PPE September 25, 2010, and the PPE February 12, 2011, reflect CRE salary payments for 8 hours and 80 hours respectively at a rate of \$45.82 per hour. The adjudicator noted that in contrast, the master pay histories for the PPE September 11, 2010, and the PPE October 23, 2011, which reflected the payments made to the employee as a result of the settlement agreement, reflected no CRE salary payments. Therefore, the adjudicator found that if the employee had carefully examined her LES, she could have discovered the overpayment.

In her reconsideration request, the employee states that all the notifications and communications she received from DFAS during the period of overpayment were confusing. She states that while the settlement agreement was being implemented, she remained active in the payroll system. She states that she was also erroneously appointed as a reemployed annuitant from January 2010 through September 2010. She states that since she was active in the system for a long period after her retirement, debts were created for the lump-sum annual leave payment she received at her retirement and for unpaid Federal Employees Health Benefits (FEHB)

premiums. She states that she had to provide proof to DFAS that she was never reappointed. She states that she brought the CRE salary payments made to her in the PPE September 25, 2010, and in the PPE February 12, 2011, to the attention of her CPAC. She states that waiver should be granted because DFAS caused the error and she made multiple attempts to have it corrected.

Discussion

Section 5584 of title 5, United States Code, provides authority for waiving claims of erroneous payments of pay and allowances made to employees, if the collection of the claim would be against equity and good conscience and not in the best interest of the United States. This statute is implemented within the Department of Defense under Department of Defense Instruction 1340.23 (February 14, 2008). 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.

While an administrative error did occur, our office has consistently held that the waiver statute does not apply automatically to relieve the debts of all employees who, through no fault of their own, have received erroneous payments from the government. Waiver action under 5 U.S.C. § 5584 is a matter of grace or dispensation, and not a matter of right. If it were merely a matter of right, then virtually all erroneous payments made by the government to employees would be excused from repayment. *See* Instruction ¶ E4.1.1.

Generally, debts may be waived only when collection would be against equity and good conscience and would not be in the best interest of the United States. *See* Instruction ¶ E4.1.2. The fact that an erroneous payment is the result of administrative error or mistake on the part of the government is not sufficient basis in and of itself for granting 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. In such instances, the recipient has a duty to notify an appropriate official and set aside funds for eventual repayment to the government. *See* Instruction ¶ E4.1.4.

As stated above, waiver is inappropriate if an employee is aware or should be aware that she is being overpaid. The emails submitted by the employee in her reconsideration request reflect that she knew she was erroneously receiving CRE salary payments from DLI after her retirement. In this regard, in an email to CPAC on November 7, 2010, the employee states that she received a letter in August 2010 concerning a correction to her merit pay. She states that since receiving the letter, she has received one paycheck from DFAS. However, she states that she has not received any notice from the Office of Personnel Management (OPM) concerning a change to her retirement benefits. She states that in order for DFAS to pay any money due her, they had to reactivate her employment status. She states that since then, she has been receiving LES every two weeks. However, she states that DFAS is now saying that she has been overpaid and are demanding that she return all money that she was paid at the time of her retirement for

unused annual leave. She states that she just received another LES on November 4, 2010, that reflects that she is still earning salary from DLI. On March 24, 2011, the employee again emails DLI concerning her continued receipt of LES. She states that the last LES she received reflects that she was paid for two weeks of salary. She states that she is afraid that if she keeps the money, eventually the government will ask her to pay it back with interest. She states that she should not have to pay the interest on money that she was not entitled to receive. Although it appears that many errors occurred leading the employee to be overpaid CRE salary after she retired, and we recognize the employee's attempts to correct the errors, this does not change the fact that the employee acknowledges that she knew she was erroneously receiving salary payments. *See* DOHA Claims 2010-WV-113001.2 (May 3, 2011); DOHA Claims Case No. 06111201 (November 14, 2006); and DOHA Claims Case No. 97090809 (September 23, 1997). Under the circumstances, waiver is not appropriate.

Conclusion

The employee's request for relief is denied, and we affirm the June 30, 2015, appeal decision. In accordance with Department of Defense Instruction 1340.23 ¶ 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