

DATE: August 21, 2015

In Re:)

[REDACTED])

) Claims Case No. 2014-WV-101402.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

To be considered under the provisions of 5 U.S.C. § 5584(b)(2), an employee's waiver request must be received within three years of the discovery of the debt.

DECISION

A former employee of the U.S. Army Corps of Engineers requests reconsideration of the July 2, 2015, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2014-WV-101402. In that decision, this Office affirmed the determination of the Defense Finance and Accounting Service (DFAS) that the employee's application for waiver in the amount of \$12,500.00 could not be considered because it was not received within the 3-year statute of limitations.

Background

On March 23, 2004, the employee signed a *Voluntary Separation Incentive Payment Agreement*. Under the agreement, the employee agreed to voluntarily retire effective April 2, 2004, and in exchange, was entitled to receive a voluntary separation incentive payment (VSIP) in the amount of \$25,000.00, in two installment payments of \$12,500.00 each. He would receive the first payment after his separation and the second payment six months later. On April 7, 2004, a *Notification of Personnel Action*, SF-50, reflected that the employee voluntarily retired effective April 2, 2004, and that he was due a VSIP in the amount of \$25,000.00. The employee received a VSIP in the amount of \$25,000.00 in the pay period ending (PPE) April 3, 2004, and another VSIP six months later in the amount of \$12,500.00 in the PPE October 2, 2004. Since

the employee was only entitled to receive VSIP in the amount of \$25,000.00, he was overpaid \$12,500.00.

DFAS discovered the overpayment in April 2004. In this regard, the employee's leave and earnings statement (LES) for the PPE April 17, 2004, reflected a debt in the amount of \$25,000.00.¹ By letter dated July 15, 2013, DFAS sent the employee a notification of indebtedness in the gross amount of \$25,000.00 (net \$17,137.50). On August 19, 2013, the employee requested a hearing to contest the validity of the debt. In his letter to DFAS, he stated that his *Voluntary Separation Incentive Payment Agreement* was for two installment payments and that DFAS erred in including the second installment payment in his final salary which he received in April 2004. He stated that he requests reconsideration of the amount of the overpayment. On August 26, 2013, DFAS notified the employee that his debt was actually \$12,500.00, not \$25,000.00. DFAS stated it had adjusted the employee's debt for all payments and offsets and determined that the employee owed \$12,500.00. DFAS attached a debt worksheet detailing the overpayment. On September 25, 2013, the employee again requested a hearing to contest the validity of the debt. The employee stated that the debt amount of \$12,500.00 did not reflect all payments and offsets. He attached his LES for the PPE October 2, 2004, reflecting that his gross pay was \$12,500.00, and after deductions totaling \$3,900.25, he only received \$8,599.75. DFAS subsequently advised the employee that he was not entitled to a hearing since he was no longer an employee of the Department of Defense. On December 2, 2013, the employee requested waiver of the debt in the amount of \$12,500.00.

In the appeal decision, the DOHA adjudicator upheld DFAS's determination that the employee's application for waiver in the amount of \$12,500.00 could not be considered because it was not received within the 3-year statute of limitations.

In his request for reconsideration, the employee states that the remark on his LES for the PPE April 17, 2004, was not sufficient notification of the debt. He continues to argue that his debt should only be \$8,599.75 (\$12,500.00 - \$3,900.25). Therefore, he states that he is only requesting waiver in the amount of \$3,900.25 since he did not directly receive all the monies for which he is indebted.

Discussion

Our authority in this matter is restricted to a consideration of whether the employee's debt may be waived under 5 U.S.C. § 5584. Under 5 U.S.C. § 5584, we may waive a claim for an erroneous payment of pay or allowances if collection would be against equity and good conscience and not in the best interests of the United States, provided there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. However, we may not waive collection of an erroneous payment if the employee's application for waiver is received after the expiration of three years immediately following the date on which the erroneous payment was discovered. *See* 5 U.S.C. § 5584(b)(2). This provision is implemented

¹Specifically, under "Remarks" on the employee's LES for the PPE April 17, 2004, it states "Net pay includes voluntary separation incentive pay. Indebtedness collected from retroactive earnings and/or adjusted deductions."

within the Department of Defense (DoD) by DoD Instruction 1340.23 (February 14, 2006). Enclosure 5 of this Instruction states that the date of discovery is the date it is definitely determined by an appropriate official that an erroneous payment has been made. *See* ¶ E5.6 of this Instruction. Therefore, the date of notice to the employee is not relevant in fixing such date. *See* DOHA Claims Case No. 2012-WV-122002.2 (September 5, 2013); and DOHA Claims Case No. 97111908 (January 9, 1998). Although the employee states that the remark on his LES for the PPE April 17, 2004, was not adequate notification of the indebtedness, the 3-year period runs from the date that the error is discovered by an appropriate official, in this case April 2004. Since the employee's written waiver application was not received until December 2, 2013, we have no authority to consider it. *See* DOHA Claims Case No. 06070704 (July 17, 2006); and DOHA Claims Case No. 99050610 (May 27, 1999).

Even if we were able to consider the employee's request for waiver, we believe waiver would not be appropriate under the circumstances. The employee knew that he was only entitled to receive VSIP in the total amount of \$25,000.00. Therefore, when he received a lump sum VSIP in the amount of \$25,000.00 in the PPE April 2, 2004, he should have known that he was not entitled to receive any more VSIP. However, in the PPE October 2, 2004, the employee received another VSIP in the amount of \$12,500.00. Further, the employee admits that he received LESs during the period of overpayment. He also acknowledges that DFAS committed an error when they paid him the lump sum payment of VSIP with his final salary in April 2004. Waiver 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, even if the government fails to act after such notification. *See* Instruction ¶ E4.1.4. Under circumstances in which an employee should have been aware of an error, we have held that when an employee has records which, if reviewed, would indicate an overpayment, and the employee fails to review such documentation for accuracy or otherwise fails to take corrective action, he is not without fault and waiver will be denied. *See* DOHA Claims Case No. 2011- WV-021401.2 (July 21, 2011); DOHA Claims Case No. 02030503 (March 14, 2002); and DOHA Claims Case No. 01110112 (November 29, 2001). If a recipient of an overpayment is furnished with documentation or information which, if reviewed, would cause a reasonable person to be aware of or suspect the existence of an error, but fails to review such documents (LESs and SF-50s) or otherwise fails to take corrective action, waiver will generally be denied. *See* DOHA Claims Case No. 2011-WV-040402.2 (October 24, 2011); DOHA Claims Case No. 2010-WV-082601.2 (November 3, 2010); and DOHA Claims Case No. 02022603 (April 17, 2002).

Finally, we have consistently held that the employee is obligated to pay the gross amount of the overpayment. *See* DOHA Claims Case No. 07032202 (March 29, 2007). DFAS has advised us that the \$12,500.00 represents the gross amount of the overpayment which includes pay, all taxes, benefits and other deductions. The employee's tax liability on an overpayment does not permit partial waiver of an amount not otherwise appropriate for waiver. *See* DOHA Claims Case No. 08091801 (September 2, 2008); and DOHA Claims Case No. 00073101 (August 21, 2000).

Conclusion

We affirm DOHA's appeal decision of July 2, 2015, that waiver of repayment of the employee's debt may not be considered due to the fact that the request was not received for more than three years after the discovery of the debt. 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