

DATE: September 15, 2015

In Re:)
 [REDACTED]) Claims Case No. 2015-WV-050103.2
)
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 5 U.S.C. § 5584, the Defense Office of Hearings and Appeals (DOHA) has the authority to waive a claim for repayment of 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, provided that there is no evidence of fraud, fault, misrepresentation or lack of good faith on the part of the employee.

DECISION

An employee of the U.S. Army requests reconsideration of the July 31, 2015, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2015-WV-050103. In that decision, DOHA waived in part the collection of a debt owed by the employee. The employee seeks waiver of the remaining indebtedness.

Background

During the period May 26, 2011, through August 5, 2012, the employee attended the Defense Comptrollership Program (DCP). Since the employee's assignment to the DCP exceeded one year at the same location, she was considered to be on an Extended Temporary Duty (ETDY) assignment. If an employee is on an ETDY assignment, all allowances and reimbursements for travel expenses, plus travel expenses that the government pays directly to or on the employee's behalf in connection with the ETDY assignment are taxable income to the employee. As a result of her ETDY assignment, the employee was allowed to file an Income Tax Reimbursement Allowance (ITRA) claim for the reimbursement of the additional income taxes she incurred resulting from payments of her living expenses associated with the ETDY

assignment. The employee's ETDY covered two taxable years. The Defense Finance and Accounting Service (DFAS) has advised our office that the ITRA reimbursement is approximately equal to the taxes paid in the prior tax year and the taxes due on the ITRA in the upcoming tax year, but is paid in multiple years. DFAS further advised our office that in connection with the employee's ETDY assignment, during the period June 2012, through October 2013, she received \$31,151.75 in ITRA payments, but was only entitled to receive \$17,427.00. As a result, the employee was overpaid \$13,724.75 (\$31,151.75 - \$17,427.00). In addition, DFAS advised us that the employee was entitled to receive a supplemental payment in the amount of \$3,648.00 to her second year ITRA payment. However, since the employee was already indebted in the amount of \$13,724.75, DFAS applied this amount to the indebtedness reducing it to \$10,076.75 (\$13,724.75 - \$3,648.00). On November 7, 2014, DFAS notified the employee of her debt. However, due to an administrative error, on November 18, 2014, the employee erroneously received a \$4,538.00 ITRA payment. Thus, her indebtedness increased to \$14,614.75 (\$10,076.75 + \$4,538.00).

In their administrative report to DOHA, DFAS recommended waiver in the amount of \$1,733.36, and denial of the remaining \$12,881.37. The DOHA adjudicator disagreed with DFAS's recommendation, and determined that the employee acted in good faith in accepting the overpayment in the amount of \$10,076.75, but denied waiver of \$4,538.00. The adjudicator determined that since the employee was notified she was overpaid on November 7, 2014, she should have questioned the \$4,538.00 ITRA payment she received on November 18, 2014.

In her reconsideration request, the employee states that the DOHA decision indicates that her second year ITRA payment was applied to her debt reducing her indebtedness and that she then received a duplication of this second year ITRA payment. However, she states that these assumptions made by the adjudicator are incorrect. She again acknowledges that DFAS notified her that she was overpaid in the gross amount of \$12,646.75 in a debt notification letter dated November 7, 2014. However, she states that on November 12, 2014, she received an email from an accountant in DFAS's Public Debt office providing her with spreadsheets for her debt calculation and advising her that his supervisor and he would be contacting her to discuss her concerns. She states that she spoke to both individuals sometime between the 12th and 13th of November 2014. She states that during their phone conversation, she asked if she should file her second year ITRA payment request because she now had an existing ITRA debt. She states that she was told to file her second year ITRA payment request immediately. She states that she was advised that it would be impossible for DFAS to apply any payment due her directly to the debt. She states that she was advised that after she received the payment, she could return the funds to DFAS through the normal debt repayment process. She states that this conversation led her to believe that she was still due a second year ITRA payment.

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive collection of erroneous payments of salary made to specified federal government employees, if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee.

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, a person who receives an erroneous payment from the government acquires no right to it and is 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. *See* Instruction ¶ E4.1.1.

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 she possesses information which reasonably suggests that the validity of the payments may be in question. In such a case, 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 states that she was officially notified that she had been overpaid on November 7, 2014. She also states that she subsequently questioned the appropriate officials concerning the ITRA payment in the amount of \$4,538.00. She states that she was told that this payment could not be applied to the debt. However, she was advised that if she wanted it to be applied to the debt, once she received it, she could send the amount received to DFAS to reduce her debt. In the email to DFAS dated November 13, 2014, the employee states that she has filed her final ITRA reimbursement voucher and expects to pay the total amount toward her debt. In response to her email, a DFAS accounting technician responds that if the employee's ITRA claim is paid within the next few weeks, the employee can definitely submit a payment to help offset her debt. The technician states that her recommendation would be to send a payment from her ITRA claim to DFAS, at which point DFAS would have to issue another debt letter to lower her debt amount. The technician also requests that the employee notify her when the ITRA payment is made. After receiving the ITRA payment in the amount of \$4,538.00 on November 18, 2014, the employee emailed DFAS stating that she is going to wait to make payments on her debt. Although the employee was told that DFAS was unable to apply any additional amount she was due directly to her debt, she was informed that when she received any further amount on her ITRA claim, she could then use that amount to offset what she owed the government. The fact that the employee chose not to use the ITRA payment she subsequently received to offset her debt has no effect on the amount of her overpayment. Under the circumstances, since the employee knew she was overpaid on November 7, 2014, she did not acquire title to the subsequent payment she received on November 18, 2014, in the amount of \$4,538.00 and should have held it for eventual repayment to the government. *See* DOHA Claims Case No. 2014-WV-072910.2 (March 10, 2015); DOHA Claims Case No. 2013-WV-100301.2 (August 27, 2014); DOHA Claims Case No. 09080401 (August 11, 2009); and DOHA Claims Case No. 08050201 (May 21, 2008).

Conclusion

The employee's request for relief is denied, and we affirm the July 31, 2015, decision to deny waiver in the amount of \$4,538.00. In accordance with 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