

DATE: November 9, 2015

In Re:)
 [REDACTED]) Claims Case No. 2015-WV-050505.2
)
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 September 30, 2015, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2015-WV-050505. In that decision, DOHA waived in part the collection of a debt owed by the employee.

Background

During the period May 2009 through August 2010, the employee attended the Defense Comptrollership Program (DCP). Since the employee's assignment to the DCP exceeded one year at the same location, he 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 his ETDY assignment, the employee was allowed to file an Income Tax Reimbursement Allowance (ITRA) claim for the reimbursement of the additional income taxes he incurred resulting from payments of his 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, the employee received a \$6,324.04 ITRA payment on June 8, 2010. However, the employee was actually entitled to receive a \$10,975.00 ITRA payment. Therefore, the employee was underpaid \$4,650.96 ($\$10,975.00 - \$6,324.04$). In addition, during the period May 5, 2011, through August 28, 2013, the employee received a total of \$23,297.96 in ITRA payments. However, DFAS later determined that the employee was only entitled to receive \$15,020.00 in ITRA payments, causing him to be overpaid \$8,277.96 ($\$23,297.96 - \$15,020.00$).

On November 5, 2014, DFAS advised the employee that an audit was performed on his ITRA payments; and as a result, it was found that a computational error had occurred resulting in an overpayment of \$6,815.23. DFAS also informed the employee that he was underpaid. DFAS specifically informed the employee about their limitations due to system constraints and prior year taxes and explained that they were unable to deduct the underpayment from his debt. However, they informed him that he could use the underpayment to help offset his debt.

DFAS further advised us that on November 20, 2014, the employee erroneously received a \$247.45 ITRA payment. Therefore, the employee's indebtedness increased to \$8,525.41 ($\$8,277.96 + \247.45). On February 3, 2015, DFAS again notified the employee that he was overpaid. DFAS stated that their letter of February 3, 2015, superseded the debt notification he received on November 5, 2014. DFAS advised the member that the overpayments occurred on May 5, 2011, August 28, 2013, and November 20, 2014. DFAS also advised the employee that his adjusted debt for all payments, offsets and taxes owed was determined to be the net amount of \$7,930.56.

DFAS advised us that on May 6, 2015, the employee received a \$4,650.96 ITRA payment. Since this amount represented the amount the employee was underpaid, DFAS should have applied it to his debt, thereby reducing it to \$3,874.45 ($\$8,525.41 - \$4,650.96$). However, DFAS paid it to the employee. Therefore, the employee remained in debt in the amount of \$8,525.41.

In their administrative report to DOHA, DFAS recommended waiver in the amount of \$8,277.96, and denial of the remaining \$247.45. 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 \$3,627.00, but denied waiver of \$4,898.41. The adjudicator determined that since the employee was notified he was overpaid on November 5, 2014, he should have questioned the ITRA payments totaling \$4,898.41 ($\$247.45 + \$4,650.96$), he received on November 20, 2014, and May 6, 2015.

In his reconsideration request, the employee requests that DOHA waive \$4,650.96 of the remaining debt in the amount of \$4,898.41. He states that although the payment of \$247.45 was made after DFAS notified him of his indebtedness, the additional payment of \$4,650.96 was made after DFAS assured all students that that it had thoroughly reviewed their payment procedures and confirmed with the General Services Administration (GSA), as well as their legal

counsel, that all payments received after the employees' individual consultations would be accurate and valid payments, and would cause no further debt. He takes issue with the adjudicator characterizing the \$4,650.96 payment as erroneous in her decision. He states that he was told in the February 3, 2015, notification of indebtedness from DFAS that his debt was established after all offsets were made. He states that he was also subsequently informed to expect payment of the \$4,650.96 on June 8, 2010. He states DFAS also informed him that the \$4,650.96 underpayment was a payment owed to him. He states that he was told that DFAS was handling all underpayments separately from any overpayments in his case. He was advised that DFAS was handling the \$4,650.96 underpayment separately from his debt in the amount of \$8,525.41. Therefore, he states that he accepted the \$4,650.96 payment in good faith as a valid payment. He states that this payment was made by DFAS in order to correctly calculate his ITRA payments as a final settlement voucher. The employee further states that after receiving DOHA's decision dated September 30, 2015, he contacted DFAS and asked whether the \$4,650.96 payment was ever applied to his total debt owed to the government. DFAS responded that they performed no offsets to the debt amount.

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 interests 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 he 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 he was officially notified that he had been overpaid on November 4, 2014. He also acknowledges that he was advised that he was due an underpayment of \$4,650.96, but that DFAS would be handling his overpayment of \$8,525.41 separately from the underpayment. In addition, the employee was informed that if he wanted the underpayment to be applied to the debt, once he received it, he could use it to offset his debt. Although the adjudicator may have detailed the debt differently from the way DFAS explained the debt to the employee, the fact remains that the employee was aware that he was in debt in the amount of \$8,525.41, and that the underpayment in the amount of \$4,650.96 was not applied to

his debt. We have consistently held that DFAS should properly apply all underpayments to an employee's overpayments when establishing a debt. Here, DFAS did not reduce the debt by the amount of the underpayment but instead paid it to the employee. If the employee chooses not to use the underpayment he received to offset his debt, it has no effect on the amount of his overpayment. Therefore, the total overpayment DOHA considered for waiver was \$8,525.41. Of the \$8,525.41, the adjudicator properly waived the amount of \$3,627.00, since the employee was aware he was overpaid on November 4, 2014. Under the circumstances, he did not acquire title to the subsequent payment he received on May 6, 2015, and should have held it for eventual repayment to the government. *See* DOHA Claims Case No. 2015-WV-050103.2 (September 15, 2015); DOHA Claims Case No. 2014-WV-072910.2 (March 10, 2015); and DOHA Claims Case No. 2013-WV-100301.2 (August 27, 2014).

Conclusion

The employee's request for relief is denied, and we affirm the September 30, 2015, decision to deny waiver in the amount of \$4,898.41. 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