

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 total of \$34,126.00 in ITRA payments during the period May 2012 through May 2013. However, the employee was actually entitled to receive a total of \$31,047.00 in ITRA payments. Therefore, the employee was overpaid \$3,079.00.

On October 9, 2014, DFAS emailed the employee concerning the recalculation of her prior year ITRA payments. On November 5, 2014, DFAS advised the employee that an audit was performed on her ITRA payments; and as a result, it was found that a computational error had occurred resulting in an overpayment of \$10,163.12.¹ DFAS also informed the employee that she 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 her debt. However, they informed her that she could use the underpayment to help offset her debt.

DFAS further advised us that due to an administrative error, during the period November 17, 2014, through November 28, 2014, the employee received a total of \$9,264.60 in ITRA payments. Therefore, the employee's indebtedness increased to \$12,343.60 (\$3,079.00 + \$9,264.60).

On December 16, 2014, the employee repaid DFAS \$10,163.12. On February 6, 2015, DFAS again notified the employee that she was overpaid. DFAS stated that their letter of February 6, 2015, superseded the debt notification she received on November 5, 2014. DFAS advised the employee that the overpayments occurred on May 30, 2013, November 17, 2014, November 25, 2014, and November 28, 2014. DFAS also advised the employee that her adjusted debt for all payments, offsets and taxes owed was determined to be the net amount of \$1,243.81.

The DOHA adjudicator upheld DFAS's recommendation to waive \$3,079.00 and deny \$9,264.60. The adjudicator determined that since the employee was notified she was overpaid on November 5, 2014, she should have questioned the ITRA payments totaling \$9,264.60 she received on November 17, 2014, November 25, 2014, and November 28, 2014.

In her reconsideration request, the employee requests waiver of the remaining indebtedness. She states that she received the ITRA payments totaling \$9,264.60 after DFAS made corrections to prior payment computational errors cited in DFAS's debt notification dated November 5, 2014. She states that all three payments were made after DFAS had discovered its own computational error, had conducted an extensive review and recalculated prior ITRA payment amounts. Therefore, she states that she was unaware that the payments were erroneous.

¹However, we note that as of November 5, 2014, the employee was not overpaid \$10,163.12. The employee was overpaid \$3,079.00 as explained by the DOHA adjudicator.

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 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 was notified by DFAS on November 5, 2014, that she was overpaid in the net amount of \$10,163.12. The employee was also informed that she was underpaid and that if she wanted the underpayment to be applied to the debt, once she received it, she could use it to offset her debt. Therefore, as of November 5, 2014, the employee was on notice that she was overpaid ITRA in the amount of \$10,163.12, and that the underpayment was not applied to her debt. We have consistently held that DFAS should properly apply all underpayments to an employee's overpayments when establishing a debt. Here, DFAS informed the employee that she had been overpaid, and it appears that the employee may have used the ITRA payments subsequently received to repay the \$10,163.12 debt DFAS informed her about on November 5, 2014. In this case, the adjudicator properly waived the amount of \$3,079.00, since the employee was not aware she was overpaid until November 5, 2014. Under the circumstances, she did not acquire title to the subsequent payments she received, and should have held them for eventual repayment to the government. *See* DOHA Claims Case No. 2015-WV-050505.2 (November 9, 2015) and DOHA Claims Case No. 2015-WV-050103.2 (September 15, 2015).

Conclusion

The employee's request for relief is denied, and we affirm the April 19, 2016, decision to deny waiver in the amount of \$9,264.60. 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