

DATE: February 13, 2017

In Re:)

[REDACTED])

) Claims Case No. 2016-WV-091302.2

Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

A debt that arises due to reconciliation of an employee's living quarters allowance (LQA) cannot be considered for waiver under 5 U.S.C. § 5584, unless it is shown that the LQA payments were erroneous when made.

DECISION

An employee of the U.S. Air Force requests reconsideration of the November 2, 2016, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2016-WV-091302.

Background

The employee worked for the Air Force in Japan and was entitled to receive LQA. During the period September 27, 2011, through November 15, 2014, she was paid LQA in the amount of \$277,873.34. However, during the reconciliation of her account, the Defense Finance and Accounting Service (DFAS) found that the authorized amount was \$219,797.58. Therefore, the employee was overpaid LQA in the amount of \$58,075.76.

As the DOHA adjudicator explained, generally, an overpayment in advances of LQA is not eligible for waiver consideration because the bi-weekly estimated advances, which are subject to reconciliation, are not erroneous when made. The adjudicator determined that the overpayment resulting from the reconciliation of the employee's LQA did not represent an erroneous payment, and could not be considered for waiver under the provisions of 5 U.S.C. § 5584.

In the employee's reconsideration request, through her attorney, she requests that her debt resulting from the overpayment of LQA be deemed erroneous in order to be considered under the waiver statute. She states that DOHA's precedent regarding this issue is contradictory and there is no clear definition regarding what payments may be deemed erroneous. She states that the inconsistent and vague labeling of the underlying cause of her debts as "allowance change" or "personnel and allowance change" prevent her from being able to find out with any accuracy what caused the overpayment of LQA. She argues in the alternative that her debt collected after DFAS's review in October 2012 be categorized as erroneous because she relied on DFAS's assurances that her pay was correct for over three years until she was again advised she had been overpaid. She further requests that her debt be waived under the principle of equitable estoppel. She states that she relied to her detriment on DFAS's assurances that the amount of LQA she was receiving was correct; and she now suffers a nearly \$60,000.00 loss due to DFAS's incorrect representation that her LQA was correct.

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive collection 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 there is no indication of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. *See* DoD Instruction 1340.23 (Instruction) ¶ E4.1.2.

In order to be considered for waiver under 5 U.S.C. §5584, the debt must have resulted from an erroneous payment. *See* Instruction ¶ E2.1. In this case, the overpayment that resulted from the reconciliation of the employee's LQA cannot be considered for waiver because the LQA payments were proper when made. Payment of LQA is governed by 5 U.S.C. §§ 5922-5923, and by implementing regulations issued by the Department of State. Under 5 U.S.C. § 5922(b), LQA may be paid in advance, and this statute anticipates that periodically a reconciliation is performed, after which the employee is required to repay the amount by which the amount she received exceeds her allowable expenses. Thus, we have held that 5 U.S.C. § 5584 does not apply to excess advances of LQA unless LQA payments were made erroneously. *See* DOHA Claims Case No. 2014-WV-081901.2 (June 10, 2015); DOHA Claims Case No. 2012-WV-082001.2 (January 7, 2013); DOHA Claims Case No. 07060603 (June 26, 2007); DOHA Claims Case No. 02011609 (February 15, 2002); DOHA Claims Case No. 99050610 (May 27, 1999); and DOHA Claims Case No. 97111908 (January 9, 1998).

In this case, the LQA payments made were not erroneous at the time of disbursement. Thus, the employee was not erroneously overpaid. Although the employee was advised in September 2012 and October 2012 that she had been overpaid LQA, the Government's inaction on completing another reconciliation on her LQA account for a period of three years does not make the subsequent overpayment of LQA erroneous. We also note that the overpayment discovered by DFAS in October 2012 was partially based on the employee's rent changing under a new lease agreement. Beginning in June 2010 the employee leased an apartment for ¥380,000 per month. In September 2011, the employee moved to another apartment and signed a new lease agreement for ¥340,000 per month. However, the employee continued to be paid the

quarters portion of her LQA at the rate of the prior lease, ¥380,000 per month. When this error was discovered during reconciliation, it was corrected and she was advised in October 2012 of the overpayment. We note that even if we could consider the portion of the debt discovered in October 2012 for waiver, waiver would be inappropriate because the employee should have expected the portion of her quarters allowance for LQA to decrease after signing the new lease agreement. *See* Comptroller General decisions B-218722, Dec. 17, 1985; and B-199800, Aug. 12, 1994.

The employee also asserts that the debt should be waived under the doctrine of equitable estoppel. DOHA only has the authority to consider an employee's application for waiver in accordance with the well-established principles that apply to the granting of waivers. *See* DOHA Claims Case No. 07100905 (October 16, 2007). Equitable estoppel is inapplicable in cases of overpayments to Government employees, since the relationship between the Federal Government and its employees is not a simple contractual relationship and the ordinary principles of contract law do not apply. *See* B-2082903, Jan. 26, 1983. Further, equitable estoppel cannot be applied against the government due to the inaction or inattentiveness of its representatives. *See OPM v. Richmond*, 496 U.S. 414, 420-428 (1990), *reh'g denied*, 497 U.S. 1046 (1990).

In addition, the establishment of a debt is a matter primarily for administrative determination, and our office will ordinarily not question a determination in the absence of clear error. *See* DOHA Claims Case No. 2012-WV-051703.2 (October 18, 2012). Our authority in this matter pertains only to the availability of the equitable remedy of waiver. The validity of the debt is an issue separate from the waiver process. Moreover, our office has no authority to adjudicate the validity of debts that arise from disputes involving civilian employee compensation. The validity of such debts must be resolved by the agency concerned, here the Air Force, and ultimately the Office of Personnel Management. *See* 31 U.S.C. § 3702(a)(2). The employee should address her concerns about obtaining any records DFAS provided DOHA, with DFAS, since DFAS compiled the case file which included DFAS's administrative report and all attachments.

Conclusion

The employee's request for reconsideration is denied, and we affirm the appeal decision of November 2, 2016. In accordance with the Instruction ¶ E8.15, this is the final administrative decision of the Department of Defense in this matter.

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

Signed: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

Signed: Ray T. Blank, Jr.

Ray T. Blank, Jr.
Member, Claims Appeals Board