

DATE: March 14, 2007

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In Re:

[REDACTED]

Claimant

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Claims Case No. 07030509

## CLAIMS APPEALS BOARD DECISION

### DIGEST

Waiver of a debt under 5 U.S.C. 5584 is not appropriate when an employee knows or should be aware that she was receiving pay to which she was not entitled.

### DECISION

An employee of the United States Air Force requests reconsideration of the February 5, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 07011104, in which DOHA denied the employee's application that the government waive collection of an indebtedness she owes due to overpayment of salary.

### Background

Due to a reduction in force (RIF), the employee accepted a position as a medical records technician GS 4, step 5, effective September 28, 2003. Initially she was advised that she was entitled to retain her grade before the RIF (GS 5, step 1) for two years. In September 2003, the annual salary with locality adjustment for a GS 5, step 1, was \$25,697, and the annual salary with locality adjustment for a GS 4, step 5 was \$26,028. Due to administrative error, the employee's annual salary was erroneously established as \$25,697 instead of \$26,028, causing an underpayment of \$102.40 during the period September 21, 2003, through January 10, 2004.

The record shows that in January 2004, the employee was advised by Notification of Personnel Action (SF 50) that she was not entitled to receive a retention allowance. As a result, the employee's annual salary with locality adjustments should have been established as \$27,044 (GS 4, step 5). Due to administrative error, the SF 50 that terminated the pay retention erroneously also established her annual salary with locality adjustment as that of a GS 4, step 10. It initially established the annual salary at \$30,437, and within two months increased it to \$31,020, the amount on the salary table for a GS 4, step 10. However, this error was not discovered until June 2006, and the employee's total overpayment by that time amounted to \$8,404.80 (after crediting her with \$102.40 that she was underpaid in 2003).

In denying her request for reconsideration, our adjudicators concluded that the employee had to know that the government made a mistake when in light of the RIF and no entitlement to retained pay, her annual salary with locality adjustment suddenly spiked by approximately \$5,000 per year.

The member's argument for reconsideration is as follows: She was reinstated into Federal service and hired in a term position in February 2003. At that time she thought that she would be hired as GS 5, step 5 (annual salary with locality adjustment \$29,122), and that the higher step was justified based on her prior federal and civilian experience. However, when the employee received her first paycheck, she realized that her salary was established as a GS 5, step 1. The subsequent SF 50 confirmed that her salary was at step 1. Because she had nothing in writing guaranteeing a step 5, the employee did not pursue this issue. She was upset when she was notified of the RIF and downgrade, and questions whether she received proper notice. She explains that when she received her first paycheck in September 2003, she "saw

even further decreases in pay" and was upset because she would have to take a second job just to pay her bills. She made an inquiry into her pay with the "understanding that my records were being reviewed from the date I was originally rehired in February 2003." The employee argues that when she "received the corrected pay check [January 2004] I believed at that time the pay was finely [sic] corrected right, based on my time in grade, my training, and my civilian work experience which I did not originally get credit for." The employee admits that she did not raise this argument before because she was "very upset and did not think about explaining as to why I believed it was right other than [sic] the administrative error."

As Department of the Air Force correspondence<sup>(1)</sup> indicates, in January 2004 the employee did return to finance to ensure that her pay was correct "as she thought she may have been overpaid." The Air Force admits that the pay technician informed the employee that she was being correctly paid because her pay and grade/step information coincided with what was in the system. The employee did not raise this matter again until the debt was discovered in 2006.

A review of the employee's finance records indicates that the employee's rate of pay was \$12.31 per hour, or \$984.80 over each pay period from February 2003 until the pay period ending January 24, 2004. For the pay period ending January 24, 2004, the employee's pay suddenly spiked to \$14.58 per hour, or \$ 1,166.40 for the 80-hour pay period. This was an increase of more than 18 percent. When her pay was changed again in March 2004 to reflect the annual salary for a GS 4, step 10 (\$31,020) in the final pay table for 2004, the employee had experienced an increase of over 20 percent between her 2003 salary and her 2004 salary.

### **Discussion**

The standards for waiver determinations are set forth in Enclosure 4 to Department of Defense Instruction (Instruction) 1340.23 (February 14, 2006). Generally, persons who receive a payment erroneously from the Government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. *See* Instruction at ¶ E4.1.1. However, we have authority to grant waiver to an employee under 5 U.S.C. § 5584 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. *See* Instruction at ¶ E4.1.2. A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant. *See* Instruction at ¶ E4.1.1.

The fact that an erroneous payment is solely the result of administrative error or

mistake on the part of the Government is not a sufficient basis in and of itself for granting a waiver. A waiver usually 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 to the Government, even if the Government fails to act after such notification. *See* Instruction at ¶¶ E4.1.3 and E4.1.4.

A waiver generally is not appropriate when a recipient of a significant unexplained increase in pay or allowances, or of any other unexplained payment of pay or allowances, does not attempt to obtain a reasonable explanation from an appropriate official. The recipient has a duty to ascertain the reason for the payment and to set aside the funds in the event that repayment should be necessary. A waiver may be inappropriate in cases where a recipient questions a payment (which ultimately is determined to be erroneous) and is mistakenly advised by an appropriate official that the payment is proper, if under the circumstances the recipient knew or reasonably should have known that the advice was erroneous. Financial hardship is not a factor for consideration in determining whether a waiver is appropriate. *See* Instruction at ¶¶ E4.1.5 through E4.1.7.

In the case before us, overpayment resulted from administrative error in placing the employee in the wrong step after she was downgraded in the RIF. There is no fraud, misrepresentation, or lack of good faith on the part of the employee. The only real issue is whether she is also partially at fault.

When an employee has been assigned to the wrong step within a grade upon promotion, demotion, or the assumption of a new position, the Comptroller General, and now our Office, has generally waived any resulting overpayments. The reason for this is that most employees cannot reasonably be expected to know the finer points of pay regulations governing those personnel actions, and generally they are not furnished with any pay or personnel records which, on their face, are erroneous or show assignment to the wrong step. Accordingly, in most instances, waiver is granted on the basis that the employee would not know or suspect that she was being overpaid, and therefore, she was not at fault. On the other hand, favorable consideration will not be given to an employee assigned to the wrong step within a grade if there is evidence that the employee actually knew of the error, or was furnished with pay or personnel records which, on their face, show the existence of error. *See* Comptroller General decision B-211166, Aug. 25, 1983.

A sudden pay increase in the range of 20 percent would have been obvious to a reasonable person, especially one who had just been downgraded in a RIF and was advised that she did not have a saved pay entitlement. As an experienced employee, the employee in this case suspected an error and raised the possibility of overpayment with the pay technician. She did not pursue it further. The question is whether the employee is also at fault for not going further and obtaining a reasonable explanation from an appropriate official. Even if we accept, solely for purposes of this reconsideration, that the pay technician was an appropriate official, a waiver may be inappropriate in cases where a recipient questions a payment (which ultimately is determined to be erroneous) and is mistakenly advised by an appropriate official that the payment is proper, if under the circumstances the recipient knew or reasonably should have known that the advice was erroneous. The record reasonably supports the view of the DOHA and Defense Finance and Accounting Service (DFAS) officials that the employee should have gone further to obtain an explanation of her pay from responsible officials.

The employee now says that she did not question the increase because she believed that Air Force and DFAS officials were addressing her claim that she should have been hired at a higher step when she re-entered the Federal service in February 2003. Normally, we are reluctant to disturb the decisions of DFAS and DOHA officials denying waiver when, on reconsideration, an employee or other waiver applicant raises a new basis for waiver that she had not raised earlier in the process. However, even if we consider the employee's new argument *de novo*, we find the employee's argument unpersuasive. The record does not corroborate any reasonable expectation of GS 5, step 5 pay based on the factors she mentioned. When it became apparent earlier in 2003 that the government would not pay her at the step 5 rate, the employee did not pursue a legal claim and was satisfied with the step 1 pay rate because she was learning a new job skill (personnel security specialist). The record also does not contain any documentation that the employee had otherwise pursued this matter and had a reasonable expectation by January 2004 that she would be granted favorable relief on the GS 5, step 5 pay issue.

### **Conclusion**

The member's request for relief is denied, and we affirm the February 5, 2007, decision to deny waiver in the amount of \$8,404.80. In accordance with paragraph E8.15 of the Instruction, this is the final administrative action of the Department of Defense in this matter.

Signed: Michael D. Hipple

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Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Jean E. Smallin

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Jean E. Smallin

Member, Claims Appeals Board

Signed: William S. Fields

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William S. Fields

Member, Claims Appeals Board

1. Commander, Financial Services Flight, Hq, 1<sup>st</sup> Fighter Wing (ACC), Langley AFB, VA, dated July 14, 2006.