

DATE: March 27, 2007

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In Re:

[REDACTED]

Claimant

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Claims Case No. 07031603

**CLAIMS APPEALS BOARD**  
**RECONSIDERATION DECISION**

**DIGEST**

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

**DECISION**

The employee, through her attorney, requests reconsideration of the February 22, 2007, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim

No. 07012902. In that decision, DOHA allowed in part the employee's application for waiver of erroneous payments of salary in the amount of \$25,283.28 and denied waiver in the amount of \$10,534.70.

**Background**

On January 23, 2002, the employee filed an Equal Employment Opportunity (EEO) complaint. On July 8, 2003, a settlement was reached. As a condition of the settlement agreement, a Notification of Personnel Action (SF-50) was issued removing the employee from her civilian position due to physical disqualification. As a result, the employee became entitled to severance pay for 52.17 weeks beginning August 9, 2003, in the weekly gross amount of \$1,053.47, for a total of \$54,965.00. The employee received a retroactive payment in the gross amount of \$23,176.34 in the pay period ending January 24, 2004. This represented severance pay from August 9, 2003, through January 10, 2004. She also received severance pay in the amount of \$2,106.94, for a total of \$25,283.28.

The employee subsequently applied for disability retirement. On February 5, 2004, the Office of Personnel Management (OPM) approved her application.<sup>(1)</sup> Her disability retirement was made retroactive to the last day she was in a pay status (August 9, 2003). Thus, she was not entitled to receive severance pay from August 9, 2003, through January 24, 2004. Since the employee was not eligible for severance pay under a disability retirement, she was overpaid \$25,283.28. In addition, the employee erroneously continued to receive severance pay from January 25, 2004, through April 3, 2004, causing an overpayment of \$10,534.70. Therefore, the employee was overpaid \$35,817.98 (\$25,283.28 + \$10,534.70).

Our Office granted waiver of the overpayment in the amount of \$25,283.28, because there was no indication that the employee knew or should have known that she was receiving an erroneous payment. However, our Office denied the overpayment occurring during the period January 25, 2004, through April 3, 2004, in the amount of \$10,534.70, because the employee should have suspected that the approval of her disability retirement would affect her severance pay and therefore questioned her entitlement to receive it. On February 5, 2004, OPM advised the employee that her disability retirement had been approved and that payment of her disability retirement could not begin until after her last day of pay. In addition, an SF-50 dated February 24, 2004, was issued.<sup>(2)</sup> The SF-50 stated that the employee was not entitled

to severance pay under a disability retirement and that the severance pay needed to be paid back.

In the employee's request for reconsideration, she states that DOHA's appeal decision referred to two letters from the Defense Finance and Accounting Service (DFAS), one dated November 22, 2006, and the other dated January 23, 2007. (3) She did not receive either letter and requests a copy of each. She also disputes the validity of the underlying debt. She asserts that there was no overpayment. She contends that she was entitled to the severance pay because it arose out of an EEO settlement. She states that one of the conditions of the settlement agreement was that she could receive both severance pay and disability retirement. Therefore, she contends that when she was awarded disability retirement retroactive to the date of her separation, her severance pay did not become an erroneous payment. For the agency now to insist on repayment of the severance pay could be viewed as a violation of the settlement agreement. She asserts that if she cannot receive both severance pay and disability retirement for the same period of time, it would make sense for her to delay the effective date of her disability retirement to April 3, 2004.

In the alternative, the employee asserts that if her severance pay is an erroneous payment, the remaining \$10,534.70 should be waived because she had no reason to know that she was receiving amounts to which she was not entitled or that she had a duty to retain such amounts for subsequent refund to the government or that she had a duty to make prompt inquiry to the appropriate officials concerning her severance pay. She also disputes the period of overpayment denied by the our Office. She states that since OPM's approval was dated February 5, 2004, and since the SF-50 was dated February 24, 2004, denial of the overpayment should only apply after one of these two dates. Finally, she states that the Defense Finance and Accounting Service (DFAS) has not responded to her request for a copy of all records regarding the debt and her request to have the collection efforts cease.

### **Discussion**

Under 5 U.S.C. § 5584, we have the authority to waive collection of erroneous overpayments of pay and allowances 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, misrepresentation, fault or lack of good faith on the part of the employee. *See* DoD Instruction 1340.23 (Instruction) ¶ E4.1.2. Waiver under 5 U.S.C. § 5584 does not apply automatically to relieve the debts of all employees who, through no fault of their own, receive an erroneous payment from the government. An employee is not entitled to waiver as a matter of right merely because she was overpaid due to administrative error. *See* Instruction ¶ E4.1.3. Waiver is not appropriate if an employee knew or should have known that she was receiving payments in excess of her entitlements. 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. *See* DOHA Claims Case No. 04082704 (September 20, 2004). When the employee has knowledge of the questionable payments, she does not acquire title to the excess amounts and has a duty to hold them until their validity is established or until she is asked to repay them.

*See* Instruction ¶ E4.1.4 and DOHA Claims Case No. 04082704, *supra*.

As discussed above, our jurisdiction in this matter is limited to consideration under the waiver statute, 5 U.S.C. § 5584. Therefore, we do not have jurisdiction over any of the issues raised regarding the validity of the underlying debt. The Director of OPM has the authority to review the issues raised relating to the employee's claimed entitlement to severance pay because he has the authority under 31 U.S.C. § 3702(a)(2) to settle claims involving Federal civilian employees' compensation and leave. OPM also has sole authority over the effective date of the employee's disability retirement. If the employee has questions or concerns regarding repayment of the debt and suspension of the collection action, she should address them to DFAS. In addition, the employee may also request that DFAS provide her with copies of her records and the two referenced letters.

As for the employee's request for waiver of the \$10,534.70, the adjudicator had a reasonable basis to find that the employee knew or should have known upon receipt of OPM's approval of her disability retirement that the severance payments she was receiving were questionable. When she received OPM's approval of her disability retirement by letter dated February 5, 2004, she should have realized that her entitlement to severance pay was at least questionable now that she would receive a disability retirement annuity. OPM's letter advised the employee that payment of her annuity could not start until after her last day of pay. In addition, an SF-50 was issued on February 24, 2004, which specifically stated that the employee was not eligible for severance pay under a disability retirement and that her severance pay

needed to be paid back. While the employee questions actual receipt of the SF-50 dated February 24, 2004, we note that the SF-50 reflects the current address of the employee. Further, we note that in her request for reconsideration she states that when she received her final check for severance pay in the amount of \$7,000, she tried to send it back to the government but the government sent the money back to her. Therefore, the record shows that the employee possessed information that reasonably suggested the validity of the severance pay was questionable.

The date of OPM's approval letter was February 5, 2004, which fell during the pay period January 25, 2004, through February 7, 2004. The employee did not receive her severance pay for this pay period until February 13, 2004. She was thus aware that the payment she received on that date was at least questionable. Consequently, denial of the overpayment during the period January 25, 2004, through April 3, 2004, was appropriate.

### **Conclusion**

The employee's request for relief is denied, and we affirm the September 21, 2006, decision. In accordance with DoD Instruction ¶ E8.15, 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: Catherine M. Engstrom

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Catherine M. Engstrom

Member, Claims Appeals Board

1. OPM's letter dated February 5, 2004, advised the employee of the following: "According to information received from your agency, you have not been separated from government service. Therefore, we are notifying your agency of the approval and asking them to separate you. We are also asking them to give us your last day of pay. Payment of annuity cannot start until after your last day of pay. This information, when received, will enable us to begin sending you interim annuity payments. You should receive the first payment within 14 to 20 calendar days from the date your agency gives us the last day of pay, and on the first business day of the month thereafter until we are able to complete the full processing of your claim."

2. The SF-50 dated February 24, 2004, specifically stated: "Employee is not eligible for severance pay under a disability retirement. Severance Pay needs to be paid back. This is a result of a cancellation of a removal transaction. Employee has an approved disability retirement. Per OPM Guidelines, if the employee was removed and the disability retirement is later approved, then the effective date of retirement will be the date the employee was removed."

3. January 23, 2007, is the date of a letter from DFAS to DOHA explaining the government's claim against the employee. DOHA has no record of a letter dated November 22, 2006.