KEYWORDS: Waiver of Indebtedness

DIGEST: Waiver is not appropriate when an employee knows or should know that he is receiving payments in excess of his entitlement.

CASENO: 2012-WV-121006.2

DATE: 02/26/2013

DATE: February 26, 2013

	)	
In Re:	)	
[REDACTED]	)	Claims Case No. 2012-WV-121006.2
	)	
Claimant	)	

CLAIMS APPEALS BOARD
RECONSIDERATION DECISION

DIGEST

Waiver is not appropriate when an employee knows or should know that he is receiving payments in excess of his entitlement.

DECISION

An employee of the U.S. Army requests reconsideration of the December 18, 2012, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2012-WV-121006. In that decision, DOHA granted waiver in the amount of $40,637.24, and denied waiver of the overpayment in the amount of $2,068.70.

Background

On March 25, 2008, a *Notification of Personnel Action* (SF-50) was issued appointing the employee as a Highly Qualified Expert (HQE) to a position overseas with a salary of $135,000.00 per annum, effective March 24, 2008. As part of his salary, the employee received post allowance (PA) and temporary quarters subsistence allowance (TQSA). However, it was later determined that since the employee was hired as a HQE, he was not entitled to receive PA

or TQSA. Due to this administrative error, the employee was erroneously paid PA during the period March 24, 2008, through September 25, 2010, causing an overpayment of $42,313.46. In addition, during the pay period ending (PPE) October 23, 2010, the employee erroneously received a retroactive TQSA payment in the amount of $392.48. Therefore, the employee was overpaid $42,705.94 ($42,313.46 + $392.48).

In his original waiver request, the employee states that he was unaware he was being overpaid until he was informally notified in late August 2010 by the Director of Civilian Senior Leader Management Office (CSLMO) that he along with many other employees had probably been erroneously paid PA. He states that the CSLMO had been informed that PA was not authorized to a HQE. He states that he was further advised that the Army was looking at potential options to rectify the error and he was told to do nothing until the matter was reviewed by the Army.

In the DOHA adjudicator's decision dated December 18, 2012, she concluded that the employee acted in good faith in accepting the erroneous PA payments that he received during the period March 24, 2008, through August 14, 2010, in the amount of $40,637.24. However, the adjudicator found that since the employee became aware that he had been receiving erroneous PA payments in late August 2010, waiver was not appropriate for the erroneous PA payments he received after notification. In addition, the adjudicator found that since the employee was on notice that he was overpaid in late August 2010, he should have at least questioned the retroactive payment of TQSA he received in the PPE October 23, 2010. Therefore, the adjudicator denied waiver of the PA payments he received after notification in the amount of $1,676.22 and denied waiver of the retroactive payment of TQSA in the amount of $392.48.

In the employee's request for reconsideration, he states that although he stated in his original waiver request that he was notified in late August 2010 that he was being overpaid, he believes that he was actually notified by telephone in early September 2010. He states that during the telephone conversation with the Chief of CSLMO, he was told that his overpayment was significant and that the Army was not sure how they would handle the problem. He states that he believes that she said that the Army would terminate the payment of PA to him in late September. The employee states that he was told to continue with his permanent change of station (PCS) to the continental United States and his retirement. He states that he was told he would be notified by the Army, in coordination with the Defense Finance and Accounting Service (DFAS), how they decided to handle the situation. He states that he received no further notification until he received a letter from DFAS in December 2010. He states that he first saw the memorandum dated August 21, 2010, from the Chief of CSLMO in an email he received on February 15, 2013. He states that he never saw the memorandum prior to this date. He states that he does not understand why he never received a copy of it. In regards to the TQSA he received in the PPE October 23, 2010, he states that no one ever told him that he was not authorized TQSA until he received DOHA's decision dated December 18, 2012. Therefore, he believes that a full waiver is appropriate.

Discussion

Under 5 U.S.C. § 5584, we have the authority to waive collection of erroneous payments of salary an employee received if collection would be against equity and good conscience and not in the best interests of the United States. This statute is implemented within the Department of Defense under 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. 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 ¶ 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 ¶ E4.1.4. A waiver generally is not appropriate in cases 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. *See* Instruction ¶ E4.1.5.

The record reflects that the employee received a memorandum from the Chief of CSLMO dated August 27, 2010, notifying him that an error was discovered regarding his compensation as a HQE. Specifically, the memorandum explains that the employee's receipt of PA was determined to be in error. The Chief further explains that the Army is able to pay the employee an additional $50,000.00 in any 12-month period, either as a recruitment, retention or relocation incentive, or to recognize specific accomplishments, contributions or performance. She explains that the Army will use this authority to recharacterize past overpayments, up to $50,000.00, in a 12-month period, as allowable expenses. She advises the employee that if the overpayments exceed the maximum for recharacterization ($50,000 in a 12-month period), DFAS will notify the employee with a letter to repay the debt or establish a monthly payment plan. Although the employee states that he never received this memorandum until February 2013, he does acknowledge that he received a telephone call from the Chief of CSLMO. The employee now states that he believes he was not notified by telephone until early September 2010, not late August 2010. However, we note that the employee did not receive his salary for the pay period August 15, 2010, through August 28, 2010, until September 9, 2010. Since the employee was aware of the error concerning his salary prior to receiving his pay for the PPE August 28, 2010, it is not against equity and good conscience to deny waiver of the overpayment of PA in the amount of $1,676.22. *See* DOHA Claims Case No. 2012-WV-060506.2 (November 27, 2012); DOHA Claims Case No. 2012-WV-070306.2 (September 17, 2012); and DOHA Claims Case No. 2011-WV-030802.2 (August 24, 2011).

As for the overpayment of TQSA the employee received retroactively in the PPE October 23, 2010, when he received this payment, he should have at least questioned appropriate officials about his entitlement, especially since he was on notice that he was being overpaid. Waiver is

precluded because he failed to make inquiries or bring the matter to the attention of the appropriate officials. *See* DOHA Claims Case No. 98072904 (September 1, 1998); and DOHA Claims Case No. 98121616 (February 18, 1999).

Conclusion

The employee's request for relief is denied, and we affirm the December 18, 2012, appeal decision. In accordance with the 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