

DATE: June 5, 2023

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In Re: )  
[REDACTED] ) Claims Case No. 2022-WV-091303.2  
Claimant )

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**CLAIMS APPEALS BOARD  
RECONSIDERATION DECISION**

**DIGEST**

Although a military member's entitlement to disability severance pay (DSP) at separation was not subject to federal income tax, the Defense Finance and Accounting Service (DFAS) erroneously sent federal income tax withholding (FITW) amounts to the Internal Revenue Service (IRS) on the member's behalf. Under 10 U.S.C. § 2774, waiver of the debt is not appropriate since the member is able to request refund of the excess withholding from the IRS and restitution therefore is not against equity and good conscience.

**DECISION**

A former member of the U.S. Air Force requests reconsideration of the appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2022-WV-091303, dated January 18, 2023.

**Background**

On October 28, 2019, the member separated from the Air Force. During the period October 1, 2019, through October 28, 2019, the member was due pay and allowances in the total amount of \$5,865.09. The member incurred a debt for excess leave in the amount of \$6,279.11. As a result, the member became indebted at separation in the amount of \$414.02 (\$6,279.11 - \$5,865.09). The member was entitled to receive disability severance pay (DSP) in the amount of \$80,440.80, but only received \$79,119.97. Therefore, he was underpaid DSP in the amount of \$1,320.83 (\$80,440.80 - \$79,119.97), which was properly applied to his debt leaving him due \$906.81 (\$1,320.83 - \$414.02).

In addition, the member's DSP was not subject to federal income tax withholding. However, due to an administrative error, the Defense Finance and Accounting Office erroneously paid \$16,340.81 in FITW on the member's behalf. DFAS was not able to recover this amount from the taxing authorities prior to the end of tax year 2019. Therefore, the member became indebted for \$16,340.81 in FITW erroneously paid on his behalf. Since the member was owed \$906.81, DFAS properly applied this amount to the debt reducing it to \$15,434.00 (\$16,340.81 - \$906.81).

On April 21, 2022, the member requested waiver of the debt. He stated that he became aware of the debt when he was notified by his private credit monitoring service on February 23, 2022. He requested waiver on the basis that he had no way of knowing that FITW was being paid on his behalf and received no notice from DFAS of the error until he contacted his finance office and DFAS about the matter. DFAS originally denied waiver of the indebtedness by finding that the debt was ineligible for waiver consideration under 10 U.S.C. § 2774 because it did not result from the erroneous payment of pay and allowances. However, based on further review of the case file, DFAS determined that the member's FITW debt could be considered for waiver but that his waiver request should be denied. In the appeal decision, the DOHA adjudicator sustained DFAS's denial of waiver finding that collection of the claim was not against equity and good conscience since the member could obtain a tax refund for the \$15,434.00, and either retain it or use it to pay taxes on other income.

In the member's reconsideration request, he states that his leave was approved and taken in accordance with Air Force regulations, with his commander's approval of an additional 20 days for job and residential searching purposes. Therefore, he suggests that he should not have accrued a debt for excess leave. As for the FITW erroneously paid on his behalf, the member states that he was diligent about contacting both DFAS and his finance office to ensure that taxes were not paid on his DSP. The member states that the debt did not result from any fault on his part, and he did all he could do with the information that was provided to him. He states that he received his 2019 corrected W-2 (W-2 C) from DFAS and used it to file his amended tax return in 2020.

### **Discussion**

Our authority in this case is restricted to a consideration of whether the member's debt may be waived under 10 U.S.C. § 2774. Preliminarily, we must stress that DOHA has no authority over the establishment of a debt against a member. Under the *Debt Collection Act*, 5 U.S.C. § 5514, DFAS has the authority over the establishment of debts, including the calculation and amount of a debt, notifying the member of the debt, conducting due process hearings on the validity of the debt, and any resulting repayment plan established, and recoupment and collection actions. By requesting waiver of his debt, the member has acknowledged its validity for the purposes of consideration under 10 U.S.C. § 2774. Waiver consideration at the appellate level at DOHA does not include an adjudication of the validity of a debt. The validity of the debt is an issue separate from waiver consideration because payments that are valid when made may not be considered for waiver under 10 U.S.C. § 2774.

Under 10 U.S.C. § 2774, we have the authority to waive erroneous payments of military pay and allowances, if there is no indication of fraud, fault, misrepresentation or lack of good faith and if collection would be against equity and good conscience and not in the best interest of the United States. This statute is implemented within the Department of Defense under Department of Defense Instruction 1340.23 (February 14, 2006) (hereinafter Instruction), which is codified at 32 C.F.R. Part 284. Generally, persons who receive a payment erroneously from the Government acquire no right to the money; and are bound in equity and good conscience to make restitution, even if the benefit is bestowed by mistake, no matter how careless the Government may have been. 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. Tax withholding amounts are paid to the IRS on a member's behalf, and the member can request refund from the IRS of any such amount in excess of the member's tax liability. Our office and our predecessor, the Comptroller General, have consistently held that a member's tax liability is a matter between the member and the IRS. *See* DOHA Claims Case No. 03121101R (March 31, 2004); DOHA Claims Case No. 00073101 (August 21, 2000), *aff'd* by Deputy General Counsel (Fiscal) on December 21, 2001; and B-261699, Oct. 25, 1996.<sup>1</sup> If a member knows or reasonably should know of erroneous payments made to or for the member, the member does not acquire title to the payments and should be prepared to return them. *See* DOHA Claims Case No. 01070905 (December 31, 2001).

Waiver decisions concerning erroneous income tax withholding, including DOHA Claims Case No. 00073101, *supra*, and B-261699, *supra*, generally involve an erroneous overpayment of pay and allowances to a member or employee (waiver applicant), from which a portion is withheld for taxes and sent to the IRS on the waiver applicant's behalf. In those cases, the waiver statute is applied to the gross amount of the erroneous payment. Waiver of the gross amount is denied if the waiver applicant does not meet the waiver standards, *e.g.*, if the waiver applicant was aware that the payment received was erroneous. In that case, the waiver applicant is indebted for both the amount paid to the waiver applicant and any amount paid to the taxing authorities on the waiver applicant's behalf.

The case before us is factually different because there was no erroneous payment of DSP, only the erroneous payment of FITW paid to the IRS on the member's behalf. In fact, the member was actually underpaid DSP in the amount of \$1,320.83, when he was entitled to receive DSP in the amount of \$80,440.80, but only received \$79,119.97. We recognize the member's frustration that this debt was not caused by any fault on his part, that he actively sought to ensure that his DSP was not subject to FITW, and it took over three years to discover the administrative error. However, waiver is available only when the collection of the claim would be against equity and good conscience and not in the best interest of the United States. In this case, the member has been issued a 2019 W-2 C, as he enclosed in his reconsideration request. Therefore, waiver of the det is not appropriate, since he is able to request a refund of the erroneous FITW from the IRS and thus restitution is not against equity and good conscience.

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<sup>1</sup>DOHA Claims Case No. 00073101, *supra*, and B-261699, *supra*, were decided under 5 U.S.C. § 5584 because the applicants for waiver were civilian employees. However, the standards for waiver under 10 U.S.C. § 2774 and 5 U.S.C. § 5584 are the same.

We wish to emphasize that the conclusions reached in this decision relate solely to our consideration of waiver of the member's debt under 10 U.S.C. § 2774. Authoritative revenue rulings concerning FITW, as well as rulings concerning the income tax liabilities and withholding credits of individual taxpayers, are reserved by statute for determination by the Department of the Treasury, and the IRS, and are not within our jurisdiction. *See* 52 Comp. Gen. 420 (1973). However, as previously stated, the member has received a W-2 C for the 2019 tax year.

As for the member's concerns about being charged for excess leave that resulted in an overpayment of pay, he should contact his finance office and DFAS regarding his concerns. If the member wishes to contest the validity of this portion of his debt or any other amount being collected from him by disputing it and proving his entitlement, he may do so by filing a military pay and allowance claim with his finance office under 31 U.S.C. § 3702. Any appeal of the denial of his claim would be directed to DOHA under Department of Defense Instruction 1340.21 (May 12, 2004).

### **Conclusion**

The member's request for reconsideration is denied, and we affirm the appeal decision, dated January 18, 2023. In accordance with Department of Defense Instruction 1340.23 ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

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Catherine M. Engstrom  
Chairperson, Claims Appeals Board

SIGNED: Richard C. Ourand, Jr

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Richard C. Ourand, Jr  
Member, Claims Appeals Board

SIGNED: Jennifer I. Goldstein

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Jennifer I. Goldstein  
Member, Claims Appeals Board