

December 18, 2003

In Re:

[Redacted]

Claimant

Claims Case No. 03121101

CLAIMS APPEALS BOARD DECISION

DIGEST

A member retired from the Air Force effective August 2002 and ceased to earn active duty pay and allowances as of that date. For the next four months, the Defense Finance and Accounting Service continued to send income tax withholding amounts to the Internal Revenue Service (IRS) on the member's behalf as if he were still earning active duty pay and allowances. Because the member was no longer earning active duty pay and allowances, the amounts sent to the IRS are not erroneous payments of pay and allowances and therefore cannot be considered for waiver.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate 03110303, dated November 21, 2003, in which we determined that a portion of a retired Air Force member's debt could not be considered for waiver. The debt arose when the Defense Finance and Accounting Service (DFAS) continued to send amounts to the Internal Revenue Service (IRS) on the member's behalf, as if he were still on active duty, after he retired and DFAS stopped paying him active duty pay and allowances.

Background

The member retired from the Air Force on August 31, 2002. In his final separation payment, he was overpaid in the amount of \$355.18. In our Settlement Certificate, we waived that amount, and it is no longer at issue. DFAS properly ceased paying the member active duty pay and allowances at that time, but continued sending payments to the IRS on his behalf through December 2002 as if he were still on active duty, even though he was accruing no pay and allowances. The IRS payments totaled \$4,123.14. In our Settlement Certificate, we determined that amount could not be considered for waiver, because it was unrelated to any payment of pay and allowances.

The member states that after he received his final separation payment, he was aware of no further activity in his pay account. Therefore, he does not understand why the debt exists and why he is being held responsible for payments he knew nothing about. He doubts the explanation he has been given about the debt thus far.

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive erroneous payments of pay and allowances to or on behalf of military members if repayment 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 military member. *See Standards for Waiver*, 4 C.F.R. § 91.5 (1996). Under the plain meaning of the statute, the debt must arise from erroneous payments of pay and allowances if it is to be considered for waiver. *See* DOHA Claims Case No. 03092910 (October 20, 2003). *See also* Comptroller General decision B-244596, July 22, 1991.

In the case before us, the debt did not arise from erroneous payments of pay and allowances. The payments DFAS sent to the IRS on the member's behalf appeared to be based on active duty pay and allowances, but the member had already retired and was not receiving active duty pay and allowances between September and December 2002 when the debt arose. Therefore, it cannot be considered for waiver. *See* DOHA Claims Case No. 03092910, *supra* .

We note that the payments in question were paid to the IRS on the member's behalf. The member thus received additional credit, to which he was not entitled, against his total 2002 income tax liability. The IRS would have totally refunded these amounts to the member if he had already overpaid his withholding for 2002, or they were available as a credit if he otherwise owed a balance to the IRS. *Compare* DOHA Claims Case No. 00073101 (August 21, 2000), *affirmed on reconsideration* by the Deputy General Counsel (Fiscal), Department of Defense, December 21, 2002. ⁽¹⁾

DFAS is responsible for the computation of the member's debt. If the member disputes the debt, he should ask for a full audit and explanation if he has not already done so. However, with regard to the member's contention that no extra withholding was paid to the IRS on his behalf after his retirement, we note that the record contains a W-2 form for 2002 which indicates that \$7,809.70 was paid to the IRS. The record also contains a leave and earnings statement for August 2002, the month the member retired, which indicates that as of August 31 the member had paid \$3,352.74 in withholding for the year. According to the record, the difference was sent to the IRS on the member's behalf between September and December. ⁽²⁾

Conclusion

We affirm the Settlement Certificate.

/s/

Michael D. Hipple
Chairman, Claims Appeals Board

/s/

William S. Fields
ember, Claims Appeals Board

/s/

Jean E. Smallin
ember, Claims Appeals Board

1. The standards for waiver under 5 U.S.C. § 5584 are the same as under 10 U.S.C. § 2774.
2. The difference in withholding between \$3,352.74 (as of August 31) and \$7,809.70 (as of December 31) is \$4,456.96, and there are leave and earnings statements in the record which verify that amount of additional withholding. There is no indication as to why DFAS is only holding the member liable for \$4,123.14.