

KEYWORDS: General; waiver of indebtedness

DIGEST: Waiver decisions are rendered on a case-by-case basis, giving consideration to the totality of circumstances in each case. If a member meets all the requirements of the waiver statute, 10 U.S.C. § 2774, the debt is to be waived, without regard to any benefit which may accrue to the member on account of the waiver.

CASENO: 04112214

DATE: 1/11/2005

January 11, 2005

In Re:

[Redacted]

Claimant

Claims Case No. 04112214

CLAIMS APPEALS BOARD DECISION

DIGEST

Waiver decisions are rendered on a case-by-case basis, giving consideration to the totality of circumstances in each case. If a member meets all the requirements of the waiver statute, 10 U.S.C. § 2774, the debt is to be waived, without regard to any benefit which may accrue to the member on account of the waiver.

DECISION

This is in response to an appeal of Defense Office of Hearings and Appeals (DOHA) Settlement Certificate 04080501, dated August 24, 2004, which denied in part the waiver request of a former Navy member. The portion of the debt still at issue arose when the Defense Finance and Accounting Service (DFAS) continued to send income tax withholding amounts to the Internal Revenue Service (IRS) on her behalf after she separated from the Navy.

Background

The former member separated from the United States Navy on June 30, 2003. Her final separation pay was

miscalculated, and DOHA waived the resulting overpayment of \$1,615.16. That amount is not at issue here. Between July 2003 and December 2003, DFAS sent five erroneous payments of income tax withholding to the IRS on the member's behalf even though she earned no pay during those five months.⁽¹⁾ The erroneous withholding totaled \$3,970.62. DFAS issued a W-2 form to the former member early in 2004, but later issued two corrected

W-2s, the last on July 7, 2004. DOHA denied waiver of the \$3,970.62 erroneously paid to the IRS on the grounds that the member could obtain a refund from the IRS or use the withholding to pay taxes on other income. The former member appeals, arguing that her tax liability has been increased by the second corrected W-2 and that she will have to spend \$300 to hire a tax professional to straighten out her tax situation. She also objects to paying interest on her debt to the government since the error was caused by the government.⁽²⁾

Discussion

Under 10 U.S.C. § 2774, we have the authority to waive repayment of erroneous payments of pay and allowances to members of the uniformed services 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 member. Those who request waiver must meet all the requirements of the waiver statute. Waiver decisions are made on a case-by-case basis, with consideration given to the particular circumstances of each case. *See Standards for Waiver*, 4 C.F.R. § 91.5 (1996).

It has long been the position of the Comptroller General that a member's tax liability is a matter for the member to settle with the IRS. Therefore, the Comptroller General generally did not grant waiver of tax withholding amounts, even if the individual would not be able to obtain a refund. *See B-272278*, Dec. 2, 1996; and *B-261699*, Oct. 25, 1996.⁽³⁾ In the past, we have followed the Comptroller General's decisions in the area of tax withholding. *See DOHA Claims Case No. 00073101* (August 21, 2000), *aff'd* by the Deputy General Counsel (Fiscal), December 31, 2001. When "withholding" amounts unrelated to any pay and allowances are sent to the IRS, we have said that a member would receive a "windfall" if repayment of the tax "withholding" amounts to DFAS were waived, because the member is generally able to obtain a refund of those amounts from the IRS. *See DOHA Claims Case No. 03121101R* (March 31, 2004). While that is true, it is also true that waiver of repayment of any erroneous payment necessarily results in some additional benefit to the member. Therefore, a waiver decision should be based on whether the member meets the requirements of the waiver statute, 10 U.S.C. § 2774, rather than on any benefit which would accrue to the member due to the waiver. *See B-190076*, Sept. 7, 1977.

In the case before us, the former member meets the requirements of the waiver statute. She was without fault in the accrual of the debt because she was unaware of the fact that DFAS was sending tax "withholding" to the IRS. She was not receiving Leave and Earnings Statements (LESs) as the "withholding" payments were being paid to the IRS, and she had no reason to request LESs, because she had separated from the Navy in June 2003. Therefore, waiver is appropriate, whether or not the member is able to obtain a refund of the excess "withholding" amounts from the IRS.

In all cases involving tax withholding payments, we continue to adhere to the principle that a member's tax situation is for her to settle with the IRS. Cases in which a member receives erroneous payments of pay and allowances, with a portion of those payments being sent to the IRS as income tax withholding, are distinguishable from the present case. In those cases, we will continue to consider whether the member meets the requirements of the waiver statute as to the gross amount of the debt. Waiver of the tax withholding portion of the debt in those cases would only be appropriate if the entire debt were waived. *See B-261699*, *supra*. To the extent that this decision represents a change in our consideration of waiver cases involving tax withholding payments, the change is prospective only. *See 63 Comp. Gen. 301* (1984).

Conclusion

The member's debt of \$3,970.62 is hereby waived.

/s/

Michael D. Hipple
Chairman, Claims Appeals Board

/s/

William S. Fields
Member, Claims Appeals Board

/s/

Jean E. Smallin
Member, Claims Appeals Board

1. A sixth payment, in September 2003, was proper because the member's separation payment was issued to her in that month.
2. It has been brought to our attention that the former member's debt is the result of a continuing computer software error at DFAS.
3. The standards for waiver under the civilian waiver statute, 5 U.S.C. § 5584, cited in those decisions, are the same as under the military waiver statute, 10 U.S.C. § 2774.