

DATE: January 29, 1997

In Re:

[REDACTED]

Claimant

Claims Case No. 96120901

## CLAIMS APPEALS BOARD DECISION

### DIGEST

The Claims Appeals Board declines jurisdiction over a matter where the claimant litigated the issue in dispute before a court of competent jurisdiction, especially where, as here, the Department of Justice represented the government against the claimant.

### DECISION

A retired Air Force officer (service member), appeals the action of the Defense Finance & Accounting Service (DFAS) in garnishing his retired pay to meet an alimony obligation as provided in a garnishment order issued by the Circuit Court in Florida. The appeal concerns the legal sufficiency of garnishing his retired pay to satisfy both arrears of alimony and current spousal maintenance obligations. Also, he appears to appeal the settlement action of the U.S. General Accounting Office (GAO) in denying his application for waiver of a debt created when DFAS overpaid his retired pay without remitting \$2,618, two months of payments under the court order, to his former spouse in 1994.

The service member's correspondence indicates some confusion about the relationship among DFAS, this Office, and the GAO. Pursuant to Public Law No. 104-53, November 19, 1995, the GAO's authority to settle claims for military pay and allowances, including retired pay, was transferred to the Director of the Office of Management and Budget. The Director of OMB delegated his authority to the Secretary of Defense effective June 30, 1996. Under Public Law No. 104-316, October 19, 1996, Congress codified the OMB Director's delegation of claims settlement authority by transferring it directly to the Secretary of Defense. Simultaneously, Public Law No. 104-316 transferred to the Director of OMB the GAO's authority to consider applications from service members for waiver of a debt to the government resulting from the erroneous payment of pay. The OMB Director delegated this authority to the Secretary of Defense effective December 18, 1996. The Defense Office of Hearings and Appeals (DOHA) now exercises all of the authority transferred or delegated to the Secretary of Defense through this Board, which is part of DOHA. The Board can entertain both aspects of the service member's claim. DOHA is part of the Department of Defense (DoD) General Counsel's Office, and DFAS is a separate entity under the DoD. GAO is a legislative branch agency.

### Background

The service member contends that his retired pay cannot be considered for purposes of satisfying the alimony obligation. However, our review of the record indicates that this issue was addressed in an adversary proceeding before the United States Bankruptcy Court for the Northern District of Florida in 1993.<sup>(1)</sup> The record in the Bankruptcy Court indicates that the service member was divorced on February 26, 1986; that he retired from the United States Air Force in 1988 under a disability retirement pursuant to 10 U.S.C. 1201; and that alimony was awarded by the Circuit Court in April 1991, wherein each payment would be composed of part of the arrearage plus the current payment. On July 29, 1988, the service member waived his military retirement pay in an amount equal to any Veterans Affairs compensation to which he was entitled. Since August 1, 1991, the DFAS-Cleveland Center has responded to a garnishment order of the Circuit Court to pay alimony to the service member's former spouse by deducting from his retired pay under the provisions of 42 U.S.C. 659, 662.

In 1994, DFAS discovered that it did not make a deduction from the service member's pay for two months, and it

forwarded the two payments to the former spouse, assessing a debt against the service member. The service member applied to the GAO for a waiver of this debt as a request for a waiver of erroneous payment of retired pay; the GAO denied the application. See Settlement Certificate Z-2944095-025, October 3, 1996. The GAO also advised the service member that it no longer had jurisdiction to consider the legal sufficiency of the garnishment, but it advised him that he can appeal that aspect of his claim to this Board.

In effect, the service member is arguing that the entire amount of his retired pay (the amount waived for VA compensation plus the remainder which is Air Force disability pay) cannot be garnished to satisfy his alimony obligation because, under the Uniformed Services Former Spouses' Protection Act (USFSPA), specifically 10 U.S.C. 1408 (a)(4) (C), disability pay is specifically exempt from the definition of "disposable retired pay." During the adversary proceeding, the government, through the United States Attorney, argued that the entire amount of retired pay was garnishable under 42 U.S.C. 659. The government argued that the service member's action in waiving retired pay to obtain VA compensation was a waiver of all of his retired pay and, in any event, Section 659 applied independently of the USFSPA. The Court found for the service member that his retired pay was not garnishable under the USFSPA<sup>(2)</sup> and disagreed with the government that the VA compensation does not result in a waiver of all retired pay. But the Court also found for the government that the entire amount of the service member's compensation was garnishable under 42 U.S.C. 659, for payment of either current spousal maintenance or arrearages, because both VA compensation and disability retired pay were "renumeration for employment" under the applicable statutes and regulations which control Section 659.

### **Discussion**

We believe that it is inappropriate for this Board to consider the legal issue concerning the propriety of garnishing disability. A court of competent jurisdiction heard the exact issue raised by the service member here and ruled against him. The service member and the government were parties to that proceeding.<sup>(3)</sup>

GAO correctly denied the member's application for a waiver of the debt created by the government's erroneous payment of the service member's retired pay without deducting for the combined arrearage and current alimony payment. As GAO indicates, the service member had the duty to review his Leave and Earnings Statement, and where, as here, there was a sudden increase in the net payment, he had the duty to inquire.

### **Conclusion**

We find no compelling evidence to overrule GAO's settlement of the service member's waiver application, and we decline jurisdiction over the service member's legal claim.

/s/ \_\_\_\_\_

Michael D. Hipple

Chairman, Claims Appeals Board

/s/ \_\_\_\_\_

Christine M. Kopocis

Member, Claims Appeals Board

/s/ \_\_\_\_\_

Jean E. Smallin

Member, Claims Appeals Board

1. Bankruptcy Case No. 92-04046, Adversary Proceeding No. 92-8025.

2. This conclusion is also supported by Mansell v. Mansell, 490 U.S. 581 (1989).

3. While not binding on the Board, GAO's settlement of the service member's waiver application indicates that it would have denied the service member on his legal claim if GAO had considered it on the merits.