

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

December 19, 2003

GSBCA 16236-RELO

In the Matter of STEPHEN V. YATES

Stephen V. Yates, Edmond, OK, Claimant.

John W. Garbarino, Acting Deputy Comptroller, Oklahoma City Air Logistics Center, Department of the Air Force, Tinker Air Force Base, OK, appearing for Department of the Air Force.

NEILL, Board Judge.

Claimant in this case, Mr. Stephen V. Yates, has asked that we review his agency's denial of a request from him that the agency waive collection of a claim it has asserted against him. The agency's claim is for refund of that portion of a withholding tax allowance (WTA) mistakenly paid to Mr. Yates in connection with a permanent change of station (PCS) move. In justifying its denial of the requested waiver, the agency states that its position is supported by specific decisions of this Board. Although we find the agency's reliance on our decisions to be clearly misplaced, we nonetheless dismiss this case as being beyond the purview of this Board's review function.

Background

During the late summer of 2001, the Office of the Comptroller at Tinker Air Force Base (AFB) determined that the WTA paid to a large number of employees in connection with PCS moves had been improperly calculated. Claimant was among those notified that an error had been made.

The error made in calculating the WTA appears to have been in the tax rate used to estimate the employee's tax liability on the relocation benefits received. In claimant's case, this resulted in his receiving a greater WTA payment than what he would have received if

the WTA had been calculated in accordance with provisions of the applicable regulations.¹

In the course of rectifying the errors made in calculating the WTA for relocated employees, officials in the Base financial office personally met with the individuals affected in order to explain in detail what had occurred. Notwithstanding the explanations offered, many employees objected to the agency's demand that they refund the excess WTA which had been paid in error. Arguing that the belated collection of the overpayments would be against equity and good conscience and not in the country's best interest, the employees asked that the agency waive its claims for repayment pursuant to 5 U.S.C. § 5584(a)(2)(A) (2000). The agency's adjudicating authority for waiver requests declined to act on the requests. Instead, it returned them to the comptroller at Tinker AFB with the explanation that excess WTA paid to an employee is not an "erroneous payment" as that term is understood under 5 U.S.C. § 5584(a)(2)(A). The letter rejecting the waiver requests went on to state that excess WTA paid to an employee, like an unused travel advance, is not an erroneous payment but simply represents funds advanced to the employee which should be returned once the determination is made that the advance is in excess of the amount to which the employee is ultimately found to be entitled.

Mr. Yates' waiver request was returned to him, therefore, by the Base comptroller with the same explanation as provided by the adjudicatory authority. In support of the proposition that WTA debts are advances and not erroneous payments subject to waiver, the comptroller referred Mr. Yates in general to decisions of this Board. Mr. Yates now asks the Board to review the agency's rejection of his request for waiver.

In the agency report filed for this case, the comptroller's office has identified for us two specific decisions said to support the conclusion that WTA debts are always advances and cannot be considered erroneous payments subject to agency waiver. The two decisions are: Curtis J. Lypek, GSBCA 15931-RELO, 03-1 BCA ¶ 32,085 (2002), and Stephen Barber, GSBCA 15825-RELO, 03-1 BCA ¶ 32,063 (2002).

Discussion

We have previously described in detail the statutory and regulatory framework applicable to the computation and payment of allowances to relocated employees to offset increased taxes incurred as a result of the reimbursement of certain moving expenses. E.g., William A. Lewis, GSBCA 14367-RELO, 98-1 BCA ¶ 29,532; Robert J. Dusek, GSBCA 14325-RELO, 98-1 BCA ¶ 29,440 (1997). We see no need to describe that complex process again here. Suffice it to say, as we have already stated in the past:

¹ In this case, in view of claimant's status as a civilian employee of the Department of Defense (DoD), the provisions in question are found in chapter 16 of DoD's Joint Travel Regulations. These provisions closely track with and supplement, to some degree, similar provisions in the Federal Travel Regulation (FTR). At the time Mr. Yates' WTA was calculated, the applicable provisions of the FTR were found in part 302-11. 41 CFR 302-11 (2001) (FTR 302-11). As of February 19, 2002, the provisions of part 302-11 were redesignated as part 302-17. 66 Fed. Reg. 56,194 (Nov. 20, 2001).

The regulation establishes a two-step process for accomplishing this goal. In the year in which the agency pays the employee relocation benefits and allowances, it also pays a withholding tax allowance (WTA), which is intended to cover the increase in the employee's Federal income tax withholding liability that results from receipt of the benefits and allowances. 41 CFR 302-[17.5](e), (n), -[17.7](a). The WTA is calculated at a flat rate, regardless of the employee's tax bracket. Id. 302-[17.5](g). In the following year, the agency calculates a relocation income tax (RIT) allowance, which makes further adjustments in payment, to reimburse the employee for any added tax liability that was not reimbursed by payment of the WTA, or to cause the employee to repay any excessive amount of WTA, based on the employee's actual tax situation. Id. 302-[17.5](f)(2), (m), -[17.7](e), -[17.9](b).

Lewis, 98-1 BCA at 146,420-21.² Lewis recognizes, as do many of our decisions, that it is not uncommon for the agency to determine, once an employee's actual tax situation is ascertained, that an overpayment of WTA has occurred. When this happens, the agency will ask the employee to repay the excess WTA.

When a transferred employee challenges an agency's claim for repayment of a portion of the WTA previously paid to the employee, the Board will review the claim to determine if the applicable regulations were properly followed in computing the allowable WTA and RIT allowance. The two decisions cited by the Air Force, Lypek and Barber, as well as many other Board decisions, simply follow the general rule that once the data needed to determine an employee's actual tax situation in the relevant years is available, if the formulas set forth in the regulations are properly applied by the agency, and the resultant calculation establishes an excess payment of WTA, then the agency is entitled to seek a refund from the employee. E.g., Lypek, 03-1 BCA at 158,609; Barber, 03-1 BCA at 158,470.

Mr. Yates has not challenged the agency's application of the regulations. He seeks only a waiver of the resulting debt he has been asked to repay. Since the agency has declined to consider waiver of the debt, he seeks our review of that decision. We cannot do this, however. The Board has consistently acknowledged that the power to exercise the waiver authority provided under 5 U.S.C. § 5584(a) rests solely with the head of an agency or a duly delegated adjudicatory authority within that agency. The exercise of this authority is a matter beyond the purview of the Board's review function. See, e.g., Andrew J. Duff, GSBCA 15721-RELO, 02-2 BCA ¶ 32,033; Jennings W. Bunn, Jr., GSBCA 15656-TRAV, 02-2 BCA ¶ 31,930; Gerald A. Sherman, GSBCA 13791-TRAV, 97-2 BCA 29,299. For that reason, we must reject Mr. Yates' request that we review the agency's rejection of his request for a waiver. This is a matter which is left entirely to the discretion of the agency.

Having said this, we must admit to some concern with the Air Force's assertion that the Barber and Lypek cases support its conclusion that the circumstances presented by Mr.

² The text of the provisions cited in this excerpt from the Board's Lewis decision remain unchanged. As already noted, however, effective February 19, 2002, the provisions found in part 302-11 of the FTR were moved to part 302-17. We have taken the liberty, therefore, of changing the citations within the quoted excerpt to reflect this change.

Yates are not proper for the exercise of waiver. The agency position is premised on its conclusion that WTA debts are, in effect, travel advances and thus cannot be considered erroneous payments subject to agency waiver. Although the Board's decisions have consistently upheld an agency's right to a refund of any excess WTA paid to an employee when the calculations giving rise to the debt are correct under applicable regulations, these decisions neither consider nor address whether these payments are in the nature of an advance or would constitute an "erroneous payment" as that term is used in 5 U.S.C. § 5584(a). Our decisions are not intended to, and do not, speak to what types of debt are appropriate for an agency's exercise of its authority to waive repayment. No Board decision should be relied upon, therefore, as support for the conclusion that these claims cannot be considered subject to an agency's waiver authority under that statute.

This claim is dismissed.

EDWIN B. NEILL
Board Judge