

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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September 8, 2004

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GSBCA 16452-RELO

In the Matter of EDDIE G. HOKLOTUBBE

Eddie G. Hoklotubbe, Tahlequah, OK, Claimant.

Barbara Eaton, Chief Accounting Operations, National Business Center, Department of the Interior, Denver, CO, appearing for Department of the Interior.

**DeGRAFF**, Board Judge.

When Eddie G. Hoklotubbe was employed by the Department of the Interior, he transferred from one permanent duty station to another and soon thereafter made a second transfer to another permanent duty station. In connection with the transfers, Interior reimbursed Mr. Hoklotubbe for some of his moving expenses. Also, Interior paid Mr. Hoklotubbe withholding tax allowances for 2000 and 2001, to compensate for the increased tax liability he incurred due to his receipt of the moving expense reimbursements. Later, Interior decided it had overpaid Mr. Hoklotubbe by a total of \$2101.02 for his withholding tax allowances, and asked him to repay that amount. Mr. Hoklotubbe asks us to review Interior's decision.

When Interior calculated the amount of Mr. Hoklotubbe's two allowances, it did not include in his earned income the amount he received in retirement benefits from his service as an Oklahoma City police officer, because that income was reported on an Internal Revenue Service (IRS) Form 1099. Interior based its calculations of earned income upon the amount shown in Box 1 of Mr. Hoklotubbe's IRS Forms W-2. Mr. Hoklotubbe claims if Interior had included his retirement benefits as part of his earned income and had also based its calculations upon the amount shown in Box 5 of his IRS Forms W-2, he would have been entitled to larger allowances and would not owe anything to Interior.

By law, the allowances paid to Mr. Hoklotubbe are intended to cover "substantially all" of the additional taxes that result from the reimbursement of his moving expenses. 5 U.S.C. § 5724b(a) (2000). The regulation that implements the statute establishes specific procedures for calculating the allowances, and "earned income" is one factor the regulation uses in order to make the required calculations. 41 CFR pt. 302-11(2000). The regulation defines "earned income" as including only the gross compensation reported on IRS Form

W-2 and, if applicable, self-employment income shown on Schedule SE of IRS Form 1040. 41 CFR 302-11.5(h). The regulation as it reads today is nearly identical to the way it read when it was first promulgated in 1985. Federal Property Management Regulation 101-7, General Services Administration Bulletin A-40, Supp. 14 (Apr. 1, 1985).

The Comptroller General decided military retired pay could be included as part of an employee's earned income even though it was reported on IRS Form 1099, not IRS Form W-2. The Comptroller General reached this conclusion because when the regulation was written, military retired pay was required to be reported on IRS Form W-2 and military retired pay is ordinarily considered taxable pay for services. To the extent a military member's retired pay was taxable, the Comptroller General decided to permit the member to include the retired pay as part of earned income. James P. Lenahan, B-256731 (Nov. 8, 1994). We followed the Comptroller General's decision in Marion D. Taylor, GSBCA 15500-RELO, 01-2 BCA ¶ 31,607.

Although Mr. Hoklotubbe asserts his retirement benefits should be treated the same as military retired pay and included in his earned income, he has not established his retirement benefits were required to be reported on IRS Form W-2 when the regulation was written in April 1985. In addition, he has not established his retirement benefits are considered taxable pay for services. We do not know the extent to which Mr. Hoklotubbe's retirement benefits are taxable, and his IRS Forms 1099 show the taxable amount as "not determined." Because Mr. Hoklotubbe has not shown his circumstances are similar to those of an individual receiving military retired pay, the agency correctly decided not to include his retirement benefits as part of his earned income for the purposes of making the calculations required by the regulation.

Turning to Mr. Hoklotubbe's contention regarding the boxes contained on his IRS Forms W-2, Interior used the amount shown in Box 1 of the forms to calculate his allowances. Mr. Hoklotubbe says Interior should have used the amount shown in Box 5, instead of Box 1. The amount shown in Box 5 includes Mr. Hoklotubbe's contributions to the thrift savings plan, and the amount shown in Box 1 excludes these contributions. Thrift savings plan contributions are deducted from an employee's pay before taxes are withheld, and are excluded from an employee's taxable income for federal (and almost all states) income tax purposes in the year the contributions are made. Because Mr. Hoklotubbe did not pay income tax based upon the amount shown in Box 5, Interior correctly decided to use the amount shown in Box 1 of his IRS Forms W-2 when it calculated his allowances.

We deny the claim.

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MARTHA H. DeGRAFF  
Board Judge