

KEYWORDS: waiver of indebtedness

DIGEST: Under 5 U.S.C. § 5584, absent an indication of fraud, misrepresentation, fault or lack of good faith on the part of an employee receiving an erroneous payment, waiver may be granted if, after considering the totality of the circumstances, collection would be against equity and good conscience and not in the best interests of the United States.

CASENO: 2018-WV-040603.2

DATE: 09/20/2018

DATE: September 20, 2018

In Re:)	
[REDACTED])	
Claimant)	Claims Case No. 2018-WV-040603.2
)	

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Under 5 U.S.C. § 5584, absent an indication of fraud, misrepresentation, fault or lack of good faith on the part of an employee receiving an erroneous payment, waiver may be granted if, after considering the totality of the circumstances, collection would be against equity and good conscience and not in the best interests of the United States.

DECISION

An employee of the U.S. Navy requests reconsideration of the June 27, 2018, decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 2018-WV-040603. In that decision, DOHA waived in part the collection of a debt owed by the employee. The employee seeks waiver of the remaining indebtedness.

Background

The record shows that the employee was employed by a naval hospital overseas as a Supervisory General Engineer. The employee was offered a position with another federal agency in late 2012. This offer of employment came during a time when the hospital where he

worked was transferring from an older facility to a newer facility. The Commanding Officer and the Director of Administration recognized the need to retain the employee during this period because as a Supervisory General Engineer, he was an integral member of their Facilities Management Department and management heavily relied on his engineering expertise not only during normal hospital operations, but also, his skills were critically necessary during the move and transition from the old to the new facility. This prompted the Commanding Officer and Director, with the support and approval of both the Navy's Human Resources Operations Center (OCHR) in San Diego and the hospital's Human Resources Office, to offer the employee a retention incentive (RI) pursuant to a *Retention Incentive Service Agreement (RISA)* under the statutory authority of 5 U.S.C. § 5753. The employee accepted the offer by signing the RISA. The RISA became effective March 1, 2013, and stated that the RI would be paid to the employee at 25 percent of his basic pay at the same time and in the same manner as his basic pay. Although the RISA did not state a period of termination, it did state that the RI had to be revalidated and renewed on an annual basis. Pursuant to the RISA, the employee agreed to remain in the employment of the hospital for at least 12 months and should he leave his position, the RI would cease. He also agreed that if he failed to fulfill the terms of the RISA or was removed for cause before the expiration of 12 months, he would repay the Government a *pro rata* amount of the RI based on his time served. Finally, under the RISA, the employee authorized the hospital to withhold from his final pay due him any amount of indebtedness arising from his failure to fulfill the agreement.

On March 1, 2013, a *Notification of Personnel Action*, SF-50, was issued granting the employee the RI to be paid effective March 1, 2013. Under the remarks section, the SF-50 stated the following:

Retention Agreements is [sic] signed for a period of 12 months beginning with the date of your appointment. In the event that you do not fulfill this agreement, you will be required to refund the full onus amount paid.

Biweekly payments of 25% of Basic Pay to begin on 01-MAR-2013 ending 28-FEB-2014.

Biweekly is 25% of Earned Basic Pay to be paid from 01-MAR-2013.

The employee received RI as part of his biweekly pay during the period March 1, 2013, through November 29, 2014, in the total amount of \$32,409.12. The employee's entitlement to RI ended on November 29, 2014, when an SF-50, issued and effective that same date, terminated it because he had accepted another position within the Department of Defense.

The record reflects that beginning in December 2015 the OCHR underwent a regulatory compliance review of their various programs and associated personnel actions. One of the programs evaluated was the use of recruitment, relocation and retention incentives. The employee's RI offered to him in March 2013 was randomly selected for review. During the review, the audit team found that the RI offered to the employee did not meet the regulatory criteria set forth under 5 C.F.R. § 575.305(a), which states that an agency may pay RI to an employee when the agency determines that the unusually high or unique qualifications of the employee or the special need of the agency for the employee's services makes it essential to

retain the employee; and the employee would be likely to leave the federal service in the absence of the RI. Since the RI Justification Memorandum provided by the Commanding Officer for the employee to receive the RI stated that the employee was offered a lateral move within the federal government, the employee was found not eligible for the RI. Therefore, the OCHR was required to cancel the personnel action granting the employee the RI and notify the Defense Finance and Accounting Service (DFAS) of the error. The OCHR advised the employee of the error by email on January 21, 2016, and explained that he would receive a notification of indebtedness from DFAS. The OCHR also advised the employee that in DFAS's letter, DFAS would explain his right to request waiver of the indebtedness. The OCHR further advised the employee that the error was through no fault of his own and their office would provide him with assistance in preparing his waiver request. On February 11, 2016, DFAS notified the employee of the debt in the amount of \$32,409.12, for the erroneous payment of RI paid to him for the period March 1, 2013, through November 29, 2014.

The employee then requested a hearing to contest the validity of his debt, which is a separate process from the right to request waiver under 5 U.S.C. § 5584. On March 30, 2016, DFAS completed a reconsideration (informal hearing) on the employee's indebtedness for the period March 1, 2013, through November 29, 2014. After an audit and review of the employee's debt, DFAS found the debt to be valid. DFAS detailed its findings in a letter to the employee, explaining pay period by pay period what amounts the employee was originally entitled to receive in RI prior to his agency's discovery of their error in awarding it and paying it to him. DFAS explained that the employee was originally entitled to the RI payments totaling \$32,409.12 from the beginning of the RISA through November 29, 2014, when he left his position with the hospital. However, the debt was valid because the employee was not eligible to contract for the RI in the first place.

The employee submitted his waiver request to DFAS on May 2, 2016, explaining to DFAS that he was unaware of his ineligibility for the RI until he was notified by OCHR on January 21, 2016, of the error. The employee stated that he remained in his position for more than the required 12 months under the RISA in order to receive the RI. He attached letters from his supervisor, the Director of Administration, and the Supervisory Human Resources (HR) Specialist at OCHR, supporting his position that the erroneous payment of RI was not his fault and was an administrative error on the part of OCHR. The Director stated that the employee served approximately 18 months after the RI was awarded and there was no fault on the employee's part in the erroneous payments made to him. The Supervisory HR Specialist also stated that the employee was without fault in the matter. Specifically, she stated that the employee had no knowledge of not being entitled to the RI and had no control over the incentive being approved or processed.

On March 30, 2018, DFAS forwarded the employee's request for waiver to DOHA with the recommendation that DOHA waive the portion of the overpayment the employee received for the period March 1, 2013, through February 28, 2014. The DOHA adjudicator agreed with DFAS's recommendation and waived \$18,376.92, the portion of the erroneous RI payments made to the employee for the period March 1, 2013, through February 28, 2014. The adjudicator denied waiver of the remaining \$14,032.20, the erroneous RI payments the employee received for the period March 1, 2014, through November 29, 2014. The adjudicator found that the employee should have at least questioned his continued receipt of RI, given the remarks on his

SF-50, issued on March 1, 2013, stated “Biweekly payments of 25% of Basic Pay to begin on 01-MAR-2013 ending 28-FEB-2014.” The adjudicator found that there was no supporting official documentation reflecting any inquiry by the employee concerning his continued receipt of RI after February 28, 2014.

In his reconsideration request, the employee states that he did contact a named HR Specialist in December 2013 about his RI, and exchanged emails with her concerning his entitlement to it. He states that she told him that all RI are reviewed annually and internally by HR and automatically continue when approved with no action required on his part. He followed up the email communications with a face-to-face meeting in the HR Specialist’s office in March 2014. He states that she told him that his RI would continue until he left his position or until he was placed on the Priority Placement Program. However, the employee states that he began the waiver process in February 2016, submitted all documentation he was asked to provide in support of his request and the first time he was advised that he needed to submit further documentation from his HR Office documenting that he questioned his continued receipt of RI beyond February 28, 2014, was in the DOHA adjudicator’s appeal decision issued on June 27, 2018. He immediately requested a 30-day extension to file his reconsideration request so that he could contact his former HR Office for the needed documentation. Unfortunately, the HR Specialist no longer works for the agency and the HR Office did not provide him with any further documentation. He submitted a Freedom of Information Act (FOIA) Request but was not given any information. He attaches his efforts to obtain the information and the responses to his reconsideration request. However, he states that he believes the record already supports his version of events, especially since the Commanding Officer, the Director and the OCHR submitted statements reflecting that he should be granted a complete waiver for the period March 1, 2013, through November 29, 2014. He points to other evidence in the record that corroborates his version of events.

Discussion

There is no dispute in the present case that an administrative error caused the employee to receive RI, and the record contains no indication of fraud, misrepresentation or lack of good faith on the part of the employee. Rather, given the fact that the employee was on notice that the RI would end on February 28, 2014, by virtue of an SF-50, and there was no record evidence that the employee questioned his continued receipt of the RI, the adjudicator essentially found the employee partially at fault for the portion of the overpayment occurring during the period March 1, 2014, through November 29, 2014.

Our office has held that fault exists within the meaning of 5 U.S.C. § 5584 if the employee reasonably could have been expected to know that an error had been made but failed to take corrective action. Thus, we have held that if an employee is given an SF-50 that reflects when a specific entitlement will end, but he continues to receive such pay, the employee has

notice of an error and is ordinarily considered to be at least partially at fault if he fails to pursue corrective action.

However, considering the circumstances in the present case, we do not believe the SF-50, standing alone, is sufficient to hold the employee at fault for the continued payment of RI after February 28, 2014. The employee's conduct has been consistent with his contention that he questioned his continued receipt of the RI and was told by a named Human Resources Specialist that he was entitled to receive it until he left his position. Both the employee's supervisor and the OCHR report that the employee received the erroneous RI payments from March 1, 2013, through November 29, 2014, without any fault or misrepresentation on his part. DFAS confirmed that the employee "originally was entitled" to the RI during this period but for the fact that the employee's agency later discovered that he was not eligible to enter into the RISA in the first place. In addition, the RISA stated that the RI payments would be reviewed on an annual basis. We note that the record contains only one other SF-50 issued after March 1, 2013, up until the SF-50 terminating the employee's entitlement to the RI on November 29, 2014, because of his acceptance of another position. That SF-50 was issued on January 12, 2014, granting the employee a General Adjustment, and under the remarks section, it notes that the employee is in receipt of special pay in the form of RI. This further supports the fact that the employee's management and Human Resources knew of the employee's continued receipt of RI in the calendar year 2014.¹

Upon review of the record before us, we are of the opinion that there are sufficient grounds for concluding that the employee did believe he was entitled to RI after February 28, 2014, because his version of events is supported by the written record and there is insufficient evidence of fault or lack of good faith on his part to deny waiver of the indebtedness. Accordingly, considering the totality of circumstances in the present case, we conclude that total waiver of the erroneous payments should be granted. Under the circumstances, we find that collection of the remainder of the debt in the amount of \$14,032.20 would be against equity and good conscience and not in the best interests of the United States. *See* DOHA Claims Case No. 2014-WV-060405.2 (July 30, 2015); DOHA Claims Case No. 2013-WV-020601.2 (May 2, 2013); and Comptroller General decisions B-203037, Aug. 4, 1981; and B-198263, Mar. 30, 1981.

¹The letter recommending waiver of the overpayment from the employee's supervisor warrants additional discussion because not only does it support the employee's version of events, it also raises the issue of the consideration of the employee in a *de facto* status. Prior to the enactment of 5 U.S.C. § 5584, employees improperly promoted or improperly given special pay for performing duties of higher positions were considered *de facto* employees. However, since the passage of the waiver statute, employees in that situation are covered and the resulting overpayments received are treated as erroneous payments subject to waiver consideration. We note that under the old *de facto* case law, since the employee continued to perform the duties he agreed to under the RISA, forgoing an offer of employment in another agency, and the agency exacted a benefit from his continued employment and expertise during a period of time in which he was essential, the employee most likely would have been granted relief from the overpayment by virtue of the Comptroller General considering him under a *de facto* employee status. The employee's supervisor's statement justifies the fact the employee remained in the position for what he contracted for under the RISA, performing the essential duties through November 2014 when he left. Although it would not be proper for us to consider him a *de facto* employee, we have the authority to award him relief under the waiver statute. *See* Comptroller General decision B-199457.OM, Dec. 8, 1981.

Conclusion

For the reasons stated above, we hereby waive \$14,032.20. In accordance with the Department of Defense Instruction 1340.23 (February 14, 2006) ¶ E8.15, this is the final administrative action of the Department of Defense in this matter.

SIGNED: Catherine M. Engstrom

Catherine M. Engstrom
Chairman, Claims Appeals Board

SIGNED: Charles C. Hale

Charles C. Hale
Member, Claims Appeals Board

SIGNED: Ray T. Blank, Jr.

Ray T. Blank, Jr.
Member, Claims Appeals Board