

KEYWORDS: waiver of indebtedness; voluntary separation incentive pay (VSIP)

DIGEST: An employee received voluntary separation incentive pay (VSIP) upon his retirement from the federal service in 1999. His debt arose for the repayment of the VSIP when he accepted a new position in the federal government in May 2003, within five years of receiving VSIP. Because the payment of VSIP was proper when made, it cannot be considered for waiver under 5 U.S.C. § 5584.

CASENO: 08072403

DATE: 7/31/2008

DATE: July 31, 2008

In Re:)
) [REDACTED]) Claims Case No.08072403
))
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

An employee received voluntary separation incentive pay (VSIP) upon his retirement from the federal service in 1999. His debt arose for the repayment of the VSIP when he accepted a new position in the federal government in May 2003, within five years of receiving VSIP. Because the payment of VSIP was proper when made, it cannot be considered for waiver under 5 U.S.C. § 5584.

DECISION

A former civilian employee¹ of the Navy requests reconsideration of the June 26, 2008, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No. 08051606. In that decision, DOHA affirmed the initial determination of the Defense Finance and Accounting Center (DFAS) which held that his request for waiver of the indebtedness could not be considered under 5 U.S.C. § 5584.

Background

The record indicates that the employee retired on December 10, 1999, and at that time he received a voluntary separation incentive payment (VSIP) in the amount of \$25,000 during the pay period ending December 18, 1999. The statute authorizing this separation pay restricted employees who received such payments at the time of their separation from re-employment with the United States government for five years unless the incentive was repaid.² On May 5, 2003, the employee accepted a non-appropriated position with the Defense Commissary Agency. The employee became indebted to the government in the amount of the VSIP paid to him because he returned to government employment prior to the end of the five years and recoupment was required in such circumstances. The employee asked that the government waive collection of that debt under the provisions of 5 U.S.C. § 5584.

In the appeal decision, DOHA's adjudicator explained that this waiver statute only applies where the government's claim arises from an "erroneous payment." *See* 5 U.S.C. § 5584(a). If the payment is correct when made, regardless of subsequent events, we have no authority to relieve the employee of his obligation to repay the government. In this case, the employee acknowledged that he received the VSIP at retirement, and that it was proper when made. The overpayment did not arise until the employee accepted the non-appropriated position in May 2003. Finally, the adjudicator explained and cited applicable authority that financial hardship alone is not a basis for waiver relief.

In his reconsideration request the employee contends that DOHA erred as a matter of law to the extent that it is holding that merely because a separation payment was proper when made, it cannot be considered an "erroneous payment" under the waiver statute. The employee cites the Comptroller General's decision in 59 Comp. Gen. 395 (1980) as authority for how such payment can become erroneous even though it was not originally so. Furthermore, the employee claims that he "never made any money from the position he took and briefly held," leaving employment after about a month. He repeats his contention that he cannot afford to repay the debt, and seeks

¹The employee is represented by an attorney, but the record does not contain a power of attorney or other document in which the employee designated the attorney to represent him as required by DoD Instruction 1340.23, ¶ E5.4. Accordingly, we are issuing this decision directly to the employee.

²Federal Workforce Restructuring Act of 1994, Pub. L. No. 103-226, § 8, 108 Stat. 111, 118 (1994). The separation pay entitlement is codified at 5 U.S.C. § 5597, and the repayment provision is at 5 U.S.C. § 5597 (g).

an oral hearing on his request.

Discussion

Our authority is restricted to a consideration of whether the employee's debt may be waived under 5 U.S.C. § 5584. Under 5 U.S.C. § 5584, we have the authority to waive claims of erroneous overpayments of pay and allowances if collection would be against equity and good conscience and not in the best interest of the United States, provided there is no evidence of fraud, fault, misrepresentation, or lack of good faith on the part of the employee. By definition, a payment must be erroneous when made if it is to be considered for waiver under 5.U.S.C. § 5584. *See* DOHA Claims Case No. 05062101 (July 14, 2005); and DOHA Claims Case No. 97111206 (January 12, 1998), both involving waiver requests against VSIP recoupments. *See generally* 61 Comp. Gen. 555 (1982). As explained in the appeal decision, the VSIP payment was proper when paid to the employee, and the overpayment did not come into existence until the employee accepted the non-appropriated position in violation of the five-year provision.

We are not persuaded by the employee's argument that 59 Comp. Gen. 395, *supra*, is authority that allows us to consider the VSIP payment as an "erroneous payment" under 5 U.S.C. § 5584 even though it was proper when made. The Comptroller's decision involved application of the Back Pay Act, 5 U.S.C. § 5596, where the government erred in removing an employee from the Federal service and was required to restore him to the Federal service in such a way that the effects of the improper removal were mitigated. The Comptroller General recognized waiver of a payment that was proper when made, in such a circumstance, as a narrow exception to the general rule to the extent necessary to avoid placing a blameless employee in a net indebtedness situation at restoration.

By contrast, nothing was erroneous about the current employee's retirement in 1999, and the VSIP payment was proper when made. The indebtedness arose only after the employee accepted re-employment with the government before the end of five years, contrary to statutory provision mandating full repayment if he is re-employed by the government within the five years. Even if waiver had been a proper consideration, it would not have been appropriate because the employee was at fault in incurring the debt.

There is no authority for the Board to hold an oral hearing in this matter.

Conclusion

The employee's request for relief is denied, and we affirm the June 26, 2008, appeal decision. In accordance with DoD Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense concerning waiver.

Signed: Michael D. Hipple

Michael D. Hipple

Chairman, Claims Appeals Board

Signed: Jean E. Smallin

Jean E. Smallin
Member, Claims Appeals Board

Signed: Catherine M. Engstrom

Catherine M. Engstrom
Member, Claims Appeals Board