

KEYWORDS: waiver of indebtedness; VSIP

DIGEST: Waiver under 5 U.S.C. § 5584 is not available to relieve an employee of the obligation to repay voluntary separation incentive pay (VSIP) when he accepted a new position in the Federal civilian service within 5 years of the separation upon which his incentive pay was based. Waiver under 5 U.S.C. § 5584 requires an erroneous payment, but the payment of VSIP in this case was proper when made.

CASENO: 09060202

DATE: 6/9/2009

DATE: June 9, 2009

In Re:)
) [REDACTED]) Claims Case No. 09060202
))
Claimant)

**CLAIMS APPEALS BOARD
RECONSIDERATION DECISION**

DIGEST

Waiver under 5 U.S.C. § 5584 is not available to relieve an employee of the obligation to repay voluntary separation incentive pay (VSIP) when he accepted a new position in the Federal civilian service within 5 years of the separation upon which his incentive pay was based. Waiver under 5 U.S.C. § 5584 requires an erroneous payment, but the payment of VSIP in this case was proper when made.

DECISION

An employee of the Department of the Navy requests reconsideration of the May 8, 2009, appeal decision of the Defense Office of Hearings and Appeals (DOHA) in DOHA Claim No.

09020905. In that decision, DOHA concluded that the Defense Finance and Accounting Service (DFAS) properly determined that the waiver authority in 5 U.S.C. § 5584 did not apply to the employee's request that the government waive repayment of a voluntary separation incentive payment (VSIP) that he received because payment of the VSIP was not erroneous at the time it was made.

Discussion

The record shows that a *Notification of Personnel Action*, Standard Form 50, effecting the employee's retirement indicated that he voluntarily retired effective September 1, 2006, and that he was entitled to receive a separation payment in the amount of \$25,000 (with payments in the amount of \$12,500 each on March 1, 2007, and September 1, 2007). On September 19, 2007, the employee was re-employed with the Navy as a GS-12 under a term appointment, not to exceed September 30, 2010, and for reasons explained below, he was required to repay the VSIP.

It is the employee's position that he did not request re-employment, but that he was asked to return to duty by the commanding officer of the naval station where he is employed. The employee insists that the commanding officer "clearly informed" him that his "retirement, including VSIP, would not be negatively impacted due to BRAC," and that the commanding officer had also stated that he had received such assurances in writing from another official. This is supported by the commanding officer's February 28, 2008, memorandum to DFAS. The employee insists he must use the waiver process under 5 U.S.C. § 5584 because it is the only process available to him considering that his VSIP is being 'erroneously retrieved.'

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. 08072403 (July 31, 2008); DOHA Claims Case No. 05062101 (July 14, 2005); and DOHA Claims Case No. 97111206 (January 12, 1998), all involving waiver requests against VSIP recoupments. *See generally* 61 Comp. Gen. 555 (1982).

As explained by DFAS and in the appeal decision, the VSIP payments were proper when paid to the employee, and the overpayment did not come into existence until the employee accepted the temporary appointment on September 19, 2007. The employee's acceptance of that appointment within five years of the date of separation on which payment of the VSIP payments were based required repayment by operation of law. *See* 5 U.S.C. § 9902(g)(6)(B), the current codification of this requirement. Even if the concept of erroneous payment could include some type of erroneous recoupment, which it does not, there is nothing erroneous about recoupment of

the VSIP in this situation, unless, or until, the Secretary of Defense (or his designee) exercises his discretion under 5 U.S.C. § 9002(g)(6)(B) to waive repayment.¹

Conclusion

The employee's request for relief is denied, and we affirm the May 8, 2009, appeal decision. In accordance with DoD Instruction 1340.23, ¶ E8.15, this is the final administrative action of the Department of Defense concerning waiver under 5 U.S.C. § 5584.

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

¹The record indicates that the Commander of the Navy Region did forward a request to the Office of the Secretary of Defense dated January 8, 2008, asking the Secretary to waive repayment of the employee's VSIP because the employee is the only qualified applicant for the position that he occupies. The Secretary may grant waiver on that basis under 5 U.S.C. § 9902(g)(6)(B). *See also* DoD Civilian Personnel Manual, DoD 1400.25-M, SC1702.3.5. Our Office cannot exercise this authority.