DATE: January 12, 1998

In Re:

[REDACTED]

Claimant

Claims Case No. 97111206

CLAIMS APPEALS BOARD DECISION

DIGEST

1. Federal employment is a matter of legal status pursuant to statutes and regulations, rather than a matter of contract.

2. Employee appropriately received voluntary separation incentive pay (VSIP) upon his resignation from federal employment. His debt arose two years later when he accepted a non-appropriated fund (NAF) position, which was restricted employment for employees who received VSIP under a DoD policy memorandum implementing Public Law 103-226. Waiver is denied because the payment of VSIP was proper when made.

DECISION

This is in response to an appeal of our June 18, 1997, Settlement Certificate, DOHA Claim No. 97030615, which amended a previous determination of the Comptroller General and denied a DoD employee's request for waiver of a debt to the government. The debt arose when the employee accepted a non-appropriated fund (NAF) position after having received voluntary separation incentive pay (VSIP) in the amount of $8,455. Pursuant to Public Law No. 104-316, October 19, 1996, the authority of the Comptroller General to waive a claim of the United States against a person arising out of an erroneous payment of pay (salary) or allowances, including travel, transportation, or relocation expenses and allowances was transferred to the Director, Office of anagement and Budget (OMB). The Director of OMB delegated his waiver authority involving all uniformed service members and civilian employees of the Department of Defense to the Secretary of Defense. The Defense Office of Hearing and Appeals exercises the authority of the Secretary.

Background

The record shows that the employee was employed with the Navy until he resigned on July 31, 1994. At that time, the employee received VSIP. Public Law 103-226[(1)] restricted employees who resigned or retired with incentive pay on or after March 30, 1994, from re-employment with the United States government for five years unless the incentive was repaid. The employee signed a statement indicating that he understood these requirements.

On June 7, 1994, the Chief, NAF Personnel Policy Branch in the Department of Defense issued a memorandum which applied the re-employment provision to civil service employees seeking NAF positions and to NAF employees seeking civil service positions. In light of this change, the employees who separated on March 30, 1994, or after were to be notified of the change in the law and given the opportunity to decline the incentive offer and return to work. The notification and employee's response were to be in writing and retained in the employee's file. The employee in this case was never notified of the change. On February 1, 1996, he accepted a NAF position, and as a result, was required to repay the VSIP.

In March 1997, the Defense Finance and Accounting Service (DFAS) recommended and the Comptroller General agreed to waive the employee's claim. The decision was based on an administrative report which stated that there was no documentation to show the employee was notified of the change in law[(2)] and, therefore, the payment was not legal and proper when made, and the employee accepted the money in good faith. Upon further review, DFAS recommended

that the Comptroller General reconsider the waiver application under 5 U.S.C. § 5584.[(3)] The Settlement Certificate issued by our Office concluded that because the VSIP payment was legal and proper when made and not "erroneous" at the time it was paid, it cannot be considered for waiver. The fact that his agency failed to notify him of the policy change to include NAF positions does not change the valid nature of the VSIP payment he received at the time of his resignation.

On appeal, the employee, through a new legal assistance attorney, contends that the analysis in the Settlement Certificate is in error under at least two basic principles of contract law. First, he contends that the VSIP could be construed as an "erroneous payment" because it was paid under an invalid contract to which both parties had not agreed. Because the term "Government employment" was a material term in the contract and the government failed to communicate its change in policy to the employee, he contends that this misrepresentation or omission fraudulently induced him to sign the contract. His second contention is that if both parties agreed to the terms of the contract, the term "Government employment" was an undefined and patently or latently ambiguous term placed in the contract by the government and should therefore be construed against the government as the drafter. The employee states that he would never have signed the VSIP contract had he not believed that he could still accept a NAF position without violating the prohibition on accepting government employment contained in the contract.

Discussion

The contention that contract law principles apply to federal employment is misguided. Federal employment is a matter of legal status pursuant to statutes and regulations, rather than a matter of contract. See Hedman v. U.S., 15 Cl. Ct. 304 (1988), aff'd 915 F.2d 1552 and cases cited therein.

Title 5 of the United States Code, Section 5584 provides for waiver of a claim of the United States against a person which arises out of the erroneous payment to an employee of pay and allowances, including travel, transportation and relocation expenses and allowances when the collection of the claim would be against equity and good conscience, and not be in the best interests of the United States. By definition, a payment must be erroneous when made if it is to be considered for waiver. See 61 Comp. Gen. 555 (1982).

In the present case, the employee was entitled to receive the VSIP upon his resignation. The payment was not erroneous at the time. As we stated in the Settlement Certificate, the fact that the agency failed to notify him of the June 1994 policy memorandum which included NAF positions in the re-employment restriction of Public Law 103-226 does not change the valid nature of the VSIP payment he received at the time of his resignation. There was no erroneous payment, thus there is no overpayment that is subject to waiver. Compare DOHA Claims Case No. 97060228 (August 18, 1997). Since the VSIP was proper when made, and the overpayment only arose because the employee accepted a NAF position, we have no authority to consider the claim for waiver under the provisions of 5 U.S.C. § 5584.

We note that the employee's request of August 19, 1996, submitted by his first legal assistance attorney to the Department of the Army, NAF Financial Services, was for a waiver from the DoD policy which included NAF positions in the re-employment restrictions of Public Law 103-226. In response to this policy waiver request, the Office of General Counsel, DFAS-Indianapolis, mistakenly informed NAF Financial Services that the issue should be resolved through the Waivers and Remission Office, DFAS-Denver. It was this action which eventually brought the waiver request to our Office.

It appears that the more appropriate response to the employee's August 19, 1996, request for waiver from the DoD policy would be to have him contact the Chief, NAF Personnel Policy Branch with his request. In the alternative, under Public Law 103-226, the Secretary of Defense, as the head of the agency under 5 U.S.C. § 105, may request that the Director of the Office of Personnel anagement waive the repayment of VSIP if the individual involved possesses unique abilities and is the only qualified applicant available for the position.

Conclusion

We affirm the Settlement Certificate as to our having no authority to consider the claim for waiver under the provisions of 5 U.S.C. § 5584, but remand the issue of policy waiver to the appropriate officials.

__/s/_____

Michael D. Hipple

Chairman, Claims Appeals Board

__/s/_____

Christine M. Kopocis

Member, Claims Appeals Board

__/s/_____

Jean E. Smallin

Member, Claims Appeals Board

1. Federal Workforce Restructuring Act of 1994, Pub. L. No. 103-226, § 8, 108 Stat. 111, 113-114 (1994).

2. This is a reference to the June 7, 1994, DoD policy memorandum.

3. The case was pending on the effective date of the transfer of waiver authority to the Secretary of Defense. The case was transferred to DOHA on January 2, 1997.