

DISCHARGE AND SEPARATION

Recoupment of Voluntary Separation Pay (VSP)

You requested our opinion concerning the recoupment of Voluntary Separation Pay (VSP) from disability compensation awarded to former Air Force members who executed an erroneous Individual Ready Reserve (IRR) Agreement. We have reviewed the facts presented and conclude the government is not legally prevented from recouping VSP payments. However, determinations as to whether recoupment is against equity and good conscience or contrary to the best interests of the United States, should include consideration of the impact of the erroneous IRR Agreement on an individual, case-by-case basis.

Background

On 17 October 2007, the Secretary of the Air Force (SecAF) issued a blanket waiver of VSP recoupment for Air Force members that subsequently became eligible for disability compensation benefits. Specifically, the memorandum stated, “[t]he requirement to repay VSP from any disability compensation awarded by the Department of Veterans Affairs (VA) is waived.” The Air Force Airmen and Family Readiness website posted the following message:

SecAF recently signed a waiver of repayment of Voluntary Separation Pay (VSP) when a separated member later receives VA disability compensation. This is very good news for our veterans who, up until now, were denied payment of their VA disability compensation until an amount equal to their VSP was withheld, sometimes taking years to recoup. This waiver was effective 17 Oct 07, and is not retroactive.

Although the Department of Veterans Affairs has been apprised of this action, and understands the impact of the waiver, each separating member who receives VSP should be provided a copy of the SecAF Memo, dated 17 Oct 07 (attached). In the event VA disability compensation is withheld erroneously, they should use the letter to reconfirm that repayment has been waived and no funds should be withheld.

A copy of the Memo is located in the Download Center under Transition and Employment

On 30 April 2008, the Office of the Secretary of Defense issued a memorandum concluding that the Service Secretaries’ authority to waive VSP recoupment was limited to case-by-case analysis.

On 22 November 2008, SecAF revoked the above 17 October 2007 policy memorandum and instituted schedules and formulas to calculate repayment of VSP when, among other things, an Airman is awarded disability compensation benefits.

On 23 January 2014, HQ AFPC issued Personal Services Delivery Memoranda (PDSM) 14-07 and 14-08, for all FSS/CCs and MPS personnel, which contained a correct VSP recoupment statement. However, amended PDSM 14-07 and 14-08 were published, providing, “[g]uidance regarding recoupment obligations.” Attachment 3 of the PDSMs was “adjusted to modify the provision regarding recoupment of voluntary separation pay from disability compensation.” Attachment 3, entitled “Individual Ready Reserve Agreement/Statement of Understanding for officer Voluntary Separation Pay (VSP),” provided:

Reference: 10 U.S.C. 1174 and 1175a

I agree to serve in the Ready Reserve for a period of not less than 3 years following my separation from active duty. I understand that:

a. If I have not completed my military service obligation (MSO) at the time of my separation from active duty, the 3-year period to which I am agreeing, will not begin until the day after I have completed my MSO.

d. If I later become eligible for retired or retainer pay under United States Code, Title 10 or Title 14, based on active duty service for which I received separation pay or voluntary separation pay (VSP), I will have an amount deducted from each payment of that retired or retainer pay until the amount deducted equals the total amount of separation pay.

e. If I later become eligible (as a result of the service upon which my separation pay or VSP amount is based) for disability compensation administered by the Department of Veterans Affairs (DVA), the DVA will withhold such payments until the amount withheld equals the gross amount of separation pay. **(SUSPENDED) Per SecAF memorandum, dated 17 Oct 2007, the requirement to recoup VSP from disability compensation benefits awarded by the Department of Veterans Affairs is waived.** (emphasis in original).

On 11 April 2014, these PDSMs were amended, removing the erroneous VSP statement. There were 4,484 members approved for VSP while the erroneous versions were in effect, but it is unknown how many members signed the erroneous IRR agreements.

Authorities

Statutory

10 U.S.C. § 1175a, *Voluntary separation pay and benefits*, provides, in pertinent part:

(a) In general. Under regulations approved by the Secretary of Defense, the Secretary concerned may provide voluntary separation pay and benefits in accordance with this section to eligible members of the armed forces who are voluntarily separated from active duty in the armed forces.

(h) Coordination with retired or retainer pay and disability compensation.

(2)(A) Except as provided in subparagraphs (B) and (C), a member who is paid voluntary separation pay under this section shall not be deprived, by reason of the member's receipt of such pay, of any disability compensation to which the member is entitled under the laws administered by the Secretary of Veterans Affairs, but there shall be deducted from such disability compensation an amount, in such schedule of monthly installments as the Secretary concerned shall specify, until the total amount deducted from such disability compensation is equal to the total amount of voluntary separation pay so paid[.]

(4) The Secretary concerned may waive the requirement to repay voluntary separation pay under paragraphs (1) and (2) if the Secretary determines that recovery would be against equity and good conscience or would be contrary to the best interests of the United States.

Department of Defense Instruction

DoDI 1332.43, *Voluntary Separation Pay (VSP) Program for Service Members*, which provides in Enclosure 2, paragraphs 9.a. and d., respectively:

A Service member who is paid VSP in accordance with section 1175a of Reference (b) will not be deprived of any disability compensation to which the Service member is entitled pursuant to the laws administered by the Secretary of Veterans Affairs as a result of the Service member's receipt of VSP. However, there must be deducted from such disability compensation a monthly installment amount specified by the Secretary of the Military Department concerned.

The Secretary of the Military Department concerned may waive the requirement to repay VSP if the Secretary determines that recovery would be against equity and good conscience or would be contrary to the best interests of the United States.

Case Law

In *Office of Personnel Management v. Richmond*, 496 U.S. 414, 110 S. Ct. 2465, 110 L. Ed. 2d 387 (1990), a federal statute concerning eligibility for disability annuity payments to retired federal employees expressly provided that persons who earned more than a certain percentage of their pre-disability pay in any calendar year would lose their disability annuity payments for the following year. An employee of the Office of Personnel Management (OPM) incorrectly informed an annuitant that he would keep his payments unless he earned above the percentage in two consecutive years. The annuitant lost his payment for the year following the first year in which he earned above the percentage, and he sued OPM arguing that the Government was estopped from denying his payments. The Supreme Court began its analysis noting, "much

equity subsists in respondent's claim." *Richmond* at 415.¹ However, the Supreme Court held that the annuitant was seeking payment of money that was not authorized by any substantive law and any such payment would violate the Appropriations Clause of the Constitution, noting an award "would be in direct contravention of the federal statute upon which his ultimate claim to the funds must rest." *Richmond* at 424. The Supreme Court addressed the annuitant's argument that the government, based on the misinformation provided, should be equitably estopped (i.e., prevented) from asserting the statutory eligibility requirements. It concluded that the equitable doctrine of estoppel cannot grant payment Congress has not authorized, referring to such as an "extrastatutory payment." *Richmond* at 430. The Supreme Court observed that its decision would be the same whether the erroneous advice frustrates congressional intent to either withhold funds or to pay them. *Richmond* at 429.

Estoppel

The estoppel theory (advanced by the annuitant in *Richmond*) prevents a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation.²

A number of courts have used promissory estoppel to enforce employers' promises of pensions to employees. For example, the doctrine was applied in *Oates v. Teamsters Affiliates Pension Plan*, 482 F. Supp. 481 (D.D.C. 1979).³ In that case, James Hoffa, then president of the Teamsters, approached Oates in 1961 and urged him to switch unions and to bring the members of his current union (Seafarers International Union) with him. At the time of this conversation neither union had a pension plan. Oates joined the Teamsters after Hoffa promised Oates credit for his

¹ Justice Stevens' concurrence in the result, wherein he agreed with the dissent that there were "strong equities favoring respondent's position but...this kind of maladministration must be tolerated." Stevens, J., concurring at 436. He observed that slight changes in the facts would, in his opinion, command a different result by the Court. He provided the following hypothetical:

Assume, first, that the forfeiture involved a permanent and total loss of pension benefits rather than a 6-month hiatus. Suppose also that respondent was a disabled serviceman, totally incapable of productive work, who was promised that his benefits would be unaffected if he enlisted in the reserve forces to show his continuing commitment to his country. Finally, assume that respondent was activated briefly for the sole purpose of enhancing his earnings, thereby depriving him of his pension permanently. Would the Court apply the harsh rule against estoppel that it announces today? I think not. Stevens, J., concurring at 436.

² See Restatement, Second, Agency § 8B. An authoritative statement of promissory estoppel is contained in the Restatement (Second) of Contracts § 90, *Promise Reasonably Inducing Action or Forbearance*. Section (1) describes the doctrine as follows: a promise which the promisor should reasonably expect to induce action or ... on the part of the promisee ... and which does induce such action ... is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

³ See also *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163 (Mo. Ct. App. 1959) (holding plaintiff's retirement in reliance upon defendant's assurance to pay pension created an enforceable agreement under doctrine of promissory estoppel); *Abelson v. Genesco, Inc.*, 58 A.D.2d 774, 396 N.Y.S.2d 394 (1977) (holding plaintiff reasonably relied upon defendant's representation of retirement benefits). In some pension cases, courts enforce promises on the basis of both consideration analysis and promissory estoppel. See *Wickstrom v. Vern E. Alden Co.*, 99 Ill. App. 2d 254, 240 N.E.2d 401 (1968); *Bredemann v. Vaughan Mfg. Co.*, 40 Ill. App. 2d 232, 188 N.W.2d 746 (1963). See also *Kulins v. Malco, A Micro Dot Co.*, 121 Ill. App. 3d 520, 459 N.E.2d 1038 (1984) (enforcing severance pay plan on consideration theory and promissory estoppel).

years of service with his previous union in calculating his Teamsters pension. When Oates retired, the Teamsters denied him pension benefits. The court granted full performance of the promise on a promissory estoppel theory. The Teamsters claimed that promissory estoppel was an inappropriate basis for recovery because Oates did not detrimentally rely on Hoffa's promise because the Seafarers International Union did not have a pension plan at the time Hoffa made the promise. The court rejected the Teamsters' position:

There is no case law supporting Defendants' concept of detrimental reliance. Courts do not compare a party's past options with his action to determine detriment. Rather, when the promise is for future performance (as it was in the instant case) the detriment is suffered when the actions desired are performed. Oates' detrimental reliance became manifest when [the new Teamsters local] was created. *Oates* at 489.

Discussion

Despite the application by various courts of the estoppel doctrine, even in cases involving retirements and pensions, the Supreme Court's opinion in *Richmond* is controlling when appropriated funds are at issue. The respondent in *Richmond* argued the government should be equitably estopped from denying him benefits, based on misinformation provided by government officials (as in the above pension cases). The Supreme Court acknowledged the equities weighing in his favor, and that he was treated unfairly, but ultimately held that he could not succeed on a claim for payment from the Treasury in the absence of a statutory appropriation.

As to your question of recoupment waiver, applying a flat waiver of recoupment policy for claimants who argue reliance on the erroneous PDSMs, would produce a result likely not intended by Congress. 10 U.S.C. § 1175a(h)(2)(A) provides there "shall be deducted" from disability compensation, VSP previously paid to a member, absent Secretarial waiver. *Richmond* made clear that the result is the same whether it involves congressional intent to pay or *withhold* funds. Legislative authority governs, and, on the authority of *Richmond*, there is no legal obligation to pay claims based on estoppel because of erroneous IRR Agreements.

That said, 10 U.S.C. § 1175a(4) does authorize SecAF to waive the requirement to repay VSP if she determines recovery would be against equity and good conscience, or would be contrary to the best interests of the United States. While not legally bound to waive recoupment for all claimants based on the misinformation contained in IRR Agreements, there may be individual applicants who could reasonably demonstrate recoupment should be waived, based on equity and good conscience, due to reasonable reliance on the IRR Agreements. Such requests should be supported by factors, including: evidence the member in fact relied upon the erroneous IRR information; their reliance was reasonable; evidence of financial impact or hardship; the extent of their disability; and any other pertinent surrounding circumstances.

Conclusion and Recommendation

We recommend VSP waiver requests, premised on erroneous IRR Agreements, be neither granted nor denied *solely* because of this fact. Although SecAF is not legally obligated under prevailing law to waive such requests to waive VSP recoupment, determinations under the equity

and good conscience standard may include consideration of the impact of the IRR Agreement on an individual, case-by-case basis.

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