



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Victor Crichton - Waiver of Net Indebtedness
File: B-223588
Date: July 17, 1987

DIGEST

1. Employee received lump-sum leave payment upon separation because of reduction in force (RIF), which was later found to be improper by court. When employee was reinstated gross amount of backpay was set off against gross amount of lump-sum leave payment, and additional amounts were deducted from employee's salary up to total of original lump-sum leave payment. Employee sought waiver of repayment of entire lump-sum leave payment. Waiver under 5 U.S.C. § 5584 is granted only to the extent of the net indebtedness; therefore, our Claims Group's partial waiver applied the proper legal standard. The waiver is, however, modified in amount to reflect corrected computation of backpay.

2. Following grant of waiver, agency deducted income taxes and medicare when refunding repayments to employee. Record showed that amounts refunded originally had been collected from employee's after-tax salary. While this Office does not rule on tax questions, which should be resolved between the individual and the Internal Revenue Service, this issue also involves the administration of the Comptroller General's waiver authority. Where, as it was here, amount being refunded had been collected from employee's after-tax salary, it was improper to deduct taxes when the monies were refunded following waiver. Agency should furnish revised W-2 form and any other necessary documentation so that employee can file amended tax returns or claims for refund of taxes that were improperly collected from waiver refund.

DECISION

The primary issue in this case is whether our Claims Group, by Settlement Certificate Z-2850977, properly disposed of the request for waiver submitted by Mr. Victor Crichton under 5 U.S.C. § 5584 (1982). For the reasons stated below, we hold that our Claims Group's action with respect to the

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request for waiver was legally correct. However, due to an accounting error, Mr. Crichton's waiver was improperly calculated and should be recalculated, as discussed below, on the basis of revised data.

BACKGROUND

On September 30, 1981, the Community Services Administration (CSA) was abolished. This action resulted in the separation from service of approximately 750 federal employees. Mr. Crichton was one of these employees. Many of the programs administered by the CSA were transferred to the Department of Health and Human Services (HHS). The National Council of CSA Locals, American Federation of Government Employees, filed suit in the United States District Court for the District of Columbia challenging the separations.^{1/} The union argued that the functions of CSA had been transferred to HHS and that employees of CSA should be given preference in HHS' selection of employees to administer the transferred programs. Ultimately, some 150 former CSA employees were hired by HHS. Mr. Crichton was among those hired. The appointments by HHS were treated as reinstatements after unwarranted or unjustified personnel actions under the Back Pay Act of 1966, as amended, 5 U.S.C. § 5596 (1982). Consequently, all of the rehired employees were granted backpay from the date of their separation from CSA to the date of their reinstatement by HHS.

Mr. Crichton was initially awarded backpay in the gross amount of \$6,412. However, in accordance with the requirements of the Back Pay Act and 5 C.F.R. § 550.805 (1986), a lump-sum leave payment in the amount of \$8,306.98, which had been paid to Mr. Crichton upon his separation from CSA, was set off against this backpay award. This resulted in a net indebtedness of \$1,894.98 owed to the government by Mr. Crichton. It was later determined that his backpay entitlement had been erroneously calculated, and that instead of being entitled to \$6,412 in backpay, Mr. Crichton was entitled to only \$5,496 in backpay. In addition, Mr. Crichton was required to pay 7 percent of his gross backpay, \$384.72, to the Civil Service Retirement Fund, and he elected to continue his health insurance benefits at a cost of \$44.52. Thus, in the final analysis HHS determined that Mr. Crichton was indebted to the government in the amount of \$3,240.22. Deductions for this amount were taken from his pay until this debt had been satisfied.

^{1/} For a comprehensive discussion of this litigation see our decision Angel Rivera, 64 Comp. Gen. 86 (1984).

ANALYSIS

Correction of Waiver Amount

At the time our Claims Group acted on Mr. Crichton's case, the information available to them had not been corrected. Thus, their waiver letter of November 8, 1985, was based on backpay of \$6,412 and a lump-sum leave payment of \$8,306.98, leaving a net indebtedness of \$1,894.98. This amount was waived and, since Mr. Crichton had already repaid it, he was entitled to a refund in that amount.

Subsequent to the Claims Group's action, information was received from HHS that Mr. Crichton's backpay was only \$5,496 so that the correct net indebtedness was \$2,810.98. Since this amount plus the deductions from backpay for retirement and health benefits were collected by offset against Mr. Crichton's salary, the total so collected was, as stated above, \$3,240.22.

The amounts paid to the Civil Service Retirement Fund and for health insurance benefits may not be waived since no erroneous payment was made. 55 Comp. Gen. 48 (1975). Thus, the amount that should have been considered for waiver under 5 U.S.C. § 5584 was \$2,810.98 instead of the \$1,894.98 which was waived. Accordingly, our Claims Group's waiver action is revised to grant waiver in the total amount of \$2,810.98, and Mr. Crichton is entitled to an additional refund of \$916.

Partial Versus Full Waiver of Lump-Sum Leave Payment

Mr. Crichton has objected to the substance of the basic waiver decision. It is his position that the entire amount of his lump-sum leave payment should be waived.^{2/} He

^{2/} Mr. Crichton argues that this amount is either \$6,692.29 or \$6,611.77. He arrives at this figure by taking the amount deducted from his salary, \$3,240.22, and adds to that the net amount of backpay he would have received if he had not been indebted for the lump-sum leave payment, that is, gross backpay less normal payroll deductions for taxes and insurance. The calculation of this amount is in the record as \$3,371.55, so we will consider Mr. Crichton's claim to be for \$6,611.77. In making offsets and collecting debts as was done here, the gross amounts available are used. That was done here, and is explained earlier in this decision. The net amounts chosen by Mr. Crichton would be relevant only if there were no debts that were being collected.

contends that our decision Angel F. Rivera, 64 Comp. Gen. 86 (1984), is controlling when it holds that collection of the entire amount of Mr. Rivera's lump-sum leave payment was waived.

We agree that the Rivera decision is controlling, but we do not agree with Mr. Crichton's interpretation of that decision. Mr. Rivera had many debts to the government to be set off against his backpay award so that the entire award was exhausted before the lump-sum leave payment and severance pay were reached by following the order of precedence prescribed by FPM Letter 550-76, July 15, 1982, for deductions from backpay. The only amount waived in Rivera was the net indebtedness when all debts, in the order of precedence in FPM Letter 550-76, were subtracted from Mr. Rivera's backpay award. Exactly the same procedure was applied to Mr. Crichton's situation. The only known debt to be set off against his backpay award was his lump-sum leave payment. The net indebtedness resulting from that setoff has been waived.

To summarize, the fact that Mr. Rivera in effect obtained waiver of his entire lump-sum leave payment while only a portion of Mr. Crichton's lump-sum leave payment was waived is simply a consequence of Mr. Rivera's greater indebtedness. It does not represent a departure from the legal principles of the Rivera decision. Thus, the principles stated in the Rivera decision apply to Mr. Crichton's situation and those principles have been properly applied.

Improper Deduction of Taxes

When HHS refunded the originally waived amount to Mr. Crichton, the following deductions were made:

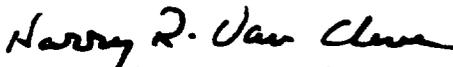
amount waived by GAO	\$1,894.98
less federal income tax	379.00
less state income tax	152.94
less Medicare	25.58
net received by Mr. Crichton	<u>\$1,337.46</u>

We contacted officials at HHS in order to ascertain the basis for these deductions. We were informally advised that the HHS payroll office treats refunds like this as "other pay" and routinely deducts federal, state and local income taxes as well as payroll taxes like Medicare. However, we were also advised that when the deductions were originally made from Mr. Crichton's salary they came from after-tax income not pre-tax income.

As a general matter we do not rule on tax questions; those issues are for resolution by the individual concerned and the Internal Revenue Service. Patricia J. Engevik, B-202201, December 23, 1981. However, the issue here is not purely taxation; it also involves the administration of the Comptroller General's authority to waive erroneous payments under 5 U.S.C. § 5584.

When individuals have repaid all or part of an erroneous payment which is subsequently waived, they are entitled, upon application, to receive a refund of those repayments to the extent of the waiver. The money they receive as a refund is a return of payments they have made. When, as here, it was collected through salary offset and was taxed when paid, it is not proper to again deduct taxes when the refund is made. Thus, when the additional \$916 waived by this decision is refunded to Mr. Crichton, there should be no deductions; that entire amount should be refunded to him.

Mr. Crichton has requested that the amount deducted as taxes from his earlier refund be returned to him by HHS. That is not possible because the money deducted was paid over to the various taxing authorities. To obtain the refund of the federal and state income taxes paid, HHS should issue a revised W-2 to show that the refund was not income. This documentation will enable Mr. Crichton to file amended income tax returns to obtain the money. The deduction for Medicare was taken under the authority of the Federal Insurance Contributions Act (FICA), 26 U.S.C. § 3101(b). To obtain a refund of this tax, Mr. Crichton should file for a refund under 26 C.F.R. § 31.6402(a)-2, and HHS should provide him with whatever documentation is necessary to obtain that refund.

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