

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

November 27, 2006

GSBCA 16966-DBT

In the Matter of [REDACTED] K. LEE

John Roscoe, Washington, DC, appearing for Petitioner.

James H. Anderson, Office of the Legal Adviser, Department of State, Charleston, SC, appearing for Department of State.

DANIELS, Board Judge (Chairman).

“When the head of a government agency or his designee determines that an employee . . . is indebted to the United States for debts to which the United States is entitled to be repaid, . . . the amount of indebtedness may be collected . . . by deduction from the current pay account of the individual.” 5 U.S.C. § 5514(a)(1) (2000). Before making such a collection, however, an agency must give the employee an opportunity for a hearing concerning the existence or amount of the debt or the terms of a repayment schedule. *Id.* § 5514(a)(2)(D). The hearing “may not be conducted by an individual under the supervision or control of the head of the agency.” *Id.*

The Department of State (State) has determined that one of its former employees, [REDACTED] K. Lee, is indebted to the United States in the amount of \$13,878.74. Ms. Lee has exercised her right to a hearing as to the existence of the debt, and the department has asked the General Services Board of Contract Appeals to designate one of its judges to conduct the hearing. The Board designated the undersigned judge to conduct the hearing and issue a decision on the matter.

State provided the Board with a compilation of documents relevant to this matter, some of which were generated by Ms. Lee or her attorney. The judge convened a telephonic conference to discuss the documents provided by State, to ask whether Ms. Lee or State wished to supplement the record, and to receive oral argument from Ms. Lee and the department's representative.¹ At the conference, each side explained its position. State then supplemented the record with an additional document and Ms. Lee submitted two short statements in support of her position. The decision which follows is based on both the written record, as supplemented, and the oral arguments made by the parties.

Background

Pursuant to 5 U.S.C. § 5379(b), in order to recruit or retain highly qualified personnel, a federal agency may agree to repay (by direct payments on behalf of an employee) any student loan previously taken out by an employee. Under this authority, State repaid \$14,100 in student loans previously taken out by ██████████ K. Lee. Of this amount, State repaid \$4700 in each of the years 2002, 2003, and 2004.

As a condition of receiving these benefits, Ms. Lee signed service agreements which committed her to remain with State for specific periods of time. She signed the first service agreement on August 1, 2002. This agreement contains the following statements:

In consideration of the student loan repayment benefit for which I qualify under 5 U.S.C. 5379 as implemented by the regulations of the U.S. Office of Personnel Management (5 CFR Part 537) and the policies of the Department of State, I hereby agree: . . .

3. The amount of the student loan repayment in FY-02 is \$4,700.00.

....

9. In the event I voluntarily leave the Department, or in the event I am involuntarily separated for misconduct or performance before completing the agreed upon period of service, I will be indebted to the Federal Government and must reimburse the Department for the full

¹ Although Ms. Lee is represented by counsel in this case, at her request, she rather than her attorney participated in the conference.

amount of any student loan repayment incentives received under this service agreement.

Effective date of my . . . service commitment is Nov. 17, 2002 through Nov. 16, 2005.

An addendum to this agreement, dated July 11, 2003, increased the amount of the student loan repayment to \$9400.

On April 13, 2004, Ms. Lee signed a service agreement which is identical to the one dated August 1, 2002, except that it specified a student loan repayment of \$4700 for fiscal year 2004 and extended her service commitment to November 16, 2006.

Ms. Lee resigned from State on February 4 or 5, 2005 (documents in the record vary as to the precise date) and began work for the Department of Defense (DoD) on February 6.

On February 10, 2005, State sent a letter to Ms. Lee asking her to repay to the department the entire amount of student loan repayments it had made on her behalf, less adjustments for Old Age, Survivors, and Disability Insurance and Medicare payments. The net amount sought by the agency was \$13,021.35. State explained, with reference to the service agreements described above, "In accordance with paragraph 9, since you voluntarily resigned from the Department without fulfilling the required service commitment, you must reimburse the Department." Ms. Lee has informed us that this was the department's first demand for repayment, and State's representative has not contested her assertion.

Ms. Lee asked State for a waiver of the requirement to repay the amount sought. The department denied her request.

On May 4, 2005, State sent Ms. Lee a first notice of indebtedness in the amount of \$13,021.35. On November 14, 2005, the department sent her a second notice of indebtedness. This was also in the amount of \$13,021.35, but it cautioned, "With assessed interest, amount due will be \$13,030.03 plus further interest, if payment is not received by 12/14/2005."

Ms. Lee's attorney contested State's determination that his client owed a debt to the agency. He maintained, "[REDACTED] Lee is **exempt from reimbursing** [State] because she did not leave for 'employment outside the Federal service,' rather, Ms. Lee left to '**enter into the service of any other agency**,' in this case, the Department of Defense."

On August 28, 2006, State told Ms. Lee's attorney that "Ms. Lee is obligated to repay \$13,021.35 in student loan repayments the Department made on her behalf. Accrued interest, penalties and administrative costs have been applied to the debt in the amount of \$1,270.97, for a total debt of \$13,878.74."² State further said that this letter "constitutes notice that State will proceed with offset from Ms. Lee's federal salary from her current federal employer, the Department of Homeland Security."

Discussion

Whether Ms. Lee must repay the student loan repayments State made on her behalf is an issue governed by the first three paragraphs of 5 U.S.C. § 5379(c). These paragraphs read:

(1) An employee selected to receive benefits under this section must agree in writing, before receiving any such benefit, that the employee will --

(A) remain in the service of the agency for a period specified in the agreement (not less than 3 years), unless involuntarily separated; and

(B) if separated involuntarily on account of misconduct, or voluntarily, before the end of the period specified in the agreement, repay to the Government the amount of any benefits received by such employee from that agency under this section.

(2) The payment agreed to under paragraph (1)(B) of this subsection may not be required of an employee who leaves the service of such employee's agency voluntarily to enter into the service of any other agency unless the head of the agency that authorized the benefits notifies the employee before the effective date of such employee's entrance into the service of the other agency that payment will be required under this subsection.

(3) If an employee who is involuntarily separated on account of misconduct or who (excluding any employee relieved of liability under paragraph (2) of this subsection) is voluntarily separated before completing the required period of service fails to repay the amount agreed to under paragraph

² The amount sought is less than the sum of the amounts stated as principal, interest, penalties, and administrative costs. State has not explained this discrepancy.

(1)(B) of this subsection, a sum equal to the amount outstanding is recoverable by the Government from the employee.

It is clear that Ms. Lee agreed to remain in the service of State until November 16, 2006, and that she did not fulfill that agreement. State appears to believe that these facts make Ms. Lee responsible for reimbursing the department for the money that it spent in repaying her student loans.

State's analysis fails to take into account portions of the statute in question. The law provides that if an employee for whom the agency which made repayments of his student loans leaves that agency within the period of time specified in his service agreement, the agency may recoup the funds only under certain circumstances:

- the employee was separated involuntarily on account of misconduct;
- the employee was separated voluntarily and did not immediately enter into the service of another agency; or
- the employee was separated voluntarily and immediately entered into the service of another agency, and before the employee began that service, the agency which made loan repayments on his behalf notified him that payment will be required.

To be able to recover the money it spent to repay Ms. Lee's student loans, State must show that Ms. Lee left the department under one of the three circumstances listed above.

In our conference with Ms. Lee and the department's representative, Ms. Lee asserted that she was separated involuntarily. Neither she nor the department has alleged, however,

that the separation was on account of her misconduct.³ Consequently, the first of the three circumstances under which State might recover the money at issue did not occur.

Ms. Lee believes that she was forced to resign due to the misconduct of *others* within the department. She has asked the Equal Employment Opportunity Commission (EEOC) to review many aspects of the department's treatment of her, including what she termed her "constructive discharge" from service. An EEOC administrative judge has ruled on her claims. In his decision, the judge explained:

A constructive discharge occurs when the employer creates working conditions that are so difficult, unpleasant, or intolerable that a reasonable person in the Complainant's position would feel compelled to resign. In other words, the employee is essentially forced to resign under circumstances where the resignation is tantamount to the employer's termination or discharge of the employee.

Lee v. Rice, EEOC 100-2005-00287X, slip op. at 17 (June 29, 2006). The judge examined State's treatment of Ms. Lee in great detail. He found that the conditions under which Ms. Lee left the department "were not so unbearable that a reasonable person would feel compelled to resign." He then determined "that Complainant has failed to meet her burden in proving that she was constructively discharged from the Department of State." *Id.* at 18.

If the EEOC administrative judge was correct, then, Ms. Lee was not involuntarily separated from State. Instead, for our purposes, the import of his decision is that she left the department voluntarily.

When Ms. Lee separated from State, she entered into the service of another agency -- the Department of Defense. If the EEOC judge was correct, and Ms. Lee's separation was voluntary, State may recoup its money only if it notified Ms. Lee before the effective date

³ We note that various provisions of title 5, United States Code, treat disparately involuntary separations due to actions or inactions of an employee and involuntary separations for other reasons. *Compare, e.g.*, 5 U.S.C. §§ 3304(c)(2)(A), 8336(e), 8344(a)(2), 8345(b)(2)(A) (misconduct or delinquency); *id.* §§ 3381(c), 5595(b)(2), 5757(c)(3) (misconduct, delinquency, or inefficiency); *id.* §§ 3521(2)(B)(iii), 8336(d)(2)(C), 8414(b)(1)(B)(iii), 9902(i)(3)(C) (misconduct or unacceptable performance); and *id.* § 8905a(b)(1)(A) (gross misconduct); *with id.* § 3502(f)(2) (reduction in force); *id.* § 6302(g) (reduction in force or transfer of function); and *id.* § 5597(b) (reduction in force, base closure, reorganization, transfer of function, workforce restructuring, or other similar action).

of her entrance into the service of DoD that it would require her to make the repayment. State made its first notification on February 10, 2006. Ms. Lee entered into the service of DoD on February 6, 2006. Because the notification was made *after* Ms. Lee began her service with DoD, not before, if Ms. Lee's separation was voluntary, State may not require her to repay the money which the department spent to repay her student loans.

Ms. Lee has appealed the judge's decision to the EEOC itself. If the EEOC reverses the determination of the judge and agrees with Ms. Lee that she was constructively discharged from her service with State, it would effectively conclude that her separation was involuntary, but not on account of her misconduct. Under the governing statute, if an employee is separated involuntarily, but not on account of his or her misconduct, the agency may not recoup the money it spent to repay his student loans.

Whether Ms. Lee or the EEOC administrative judge is correct as to the reason why she left State, the circumstances surrounding her departure do not fall into any of the three for which agency recovery of student loan repayments is permissible.

Decision

█ Lee is not indebted to the Department of State in the amount the department previously spent in repayment of student loans which she had incurred. The department may not require Ms. Lee to repay this amount.



STEPHEN M. DANIELS
Board Judge