



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202-4616

In the Matter of

JEANETTE,

**Docket Nos. 06-11-WA
06-12-WA
06-13-WA**

Waiver Proceeding

Respondent.

DECISION DENYING WAIVER

Respondent, a U.S. Department of Education (Department) employee, requested waiver of three salary overpayment debts arising from the Department's premature award of Respondent's within-grade salary increase. Based on the reasons articulated in this decision, I find that waiver of this debt is not warranted. Accordingly, Respondent's request for a waiver is denied.

Jurisdiction

Respondent's waiver request arises under 5 U.S.C. § 5584, authorizing the waiver of claims of the United States against debtors as a result of an erroneous payment of pay to a federal employee.¹ The Department promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 *seq.*) and its *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (June 2005), specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).²

The undersigned is the authorized waiver official who has been assigned this matter by OHA. Resolution of this case is based on the matters accepted as argument, evidence, and/or documentation in this proceeding when considered as a whole, including the Respondent's initial

¹ See General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828; see also *In re Tanya*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 18, 2006) at 1, n.1.

² Information regarding the Department's salary overpayment process including the Handbook, ACS-OM-04, is available on OHA's website at: www.ed-oha.org/overpayments.

request for waiver and attached documentation, Respondent's June 29, 2006 statement and attached documentation, and documents compiled by the Department's Human Resources office. This decision constitutes a final agency decision.

Procedural History

According to the April 20, 2006 Notice of Debt Letters and attached Bills of Collection, the three overpayments (\$81.72, \$43.07, and \$531.23) arise from the Department's premature award of Respondent's within-grade increase which is also commonly referred to as a "step increase" in a federal employee's salary. Respondent's within-grade increase was processed 16 pay periods early during Pay Period 14 of 2005. Respondent's within-grade increase was cancelled by Human Resources on June 12, 2005 – the same day it was awarded – although the error was not corrected in Respondent's pay until Pay Period 4 of 2006.³

By letter dated April 25, 2006, Respondent filed a timely request for waiver. In a May 17, 2006 Order Governing Proceedings, Respondent was afforded an opportunity to file a statement and any supporting documentation. Respondent did not file a response. After a conference call with the tribunal, Respondent was granted an extension of time to file a response. On June 30, 2006, Respondent filed a brief statement and attached documentation.

Discussion

Waiver of an erroneous salary payment is an equitable remedy available only when there is no indication of fraud, misrepresentation, fault, or lack of good faith by the debtor.⁴ The debtor also must demonstrate that collection of the debt would be against equity and good conscience, and not in the best interests of the United States. At issue in this instant proceeding is whether Respondent's arguments and submissions support a request that a portion or the entire erroneous salary overpayment be waived.⁵

Fault Standard

In waiver cases, the fault standard is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. Fault is determined by assessing whether a reasonable person should have known or suspected that he or she was receiving more than his or her entitled salary.⁶ In assessing the reasonableness of a debtor's failure to recognize an overpayment, the tribunal may consider the employee's position and grade level, newness to federal employment, and whether an employee has records at his or her disposal, which, if

³ On June 12, 2005, Human Resources processed both the award of Respondent's within-grade increase and its cancellation in separate Notification of Personnel Action forms (SF-50s).

⁴ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

⁵ An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to his or her salary. See 34 C.F.R. Part 32 (2005). It is apparent that the overpayments constitute erroneous payments of pay. The Department's error stems from its premature award of Respondent's within-grade salary increase.

⁶ See *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

reviewed, would indicate a salary overpayment.⁷ Thus, every waiver case must be examined in light of its particular facts and circumstances.⁸

Respondent asserts that she was unaware that the timing of her within-grade increase was in error. Respondent argues that the Department had ample opportunities to review her within-grade increase before it was approved and discover its error. Respondent also states that the Department notified her on April 24, 2006 of another within-grade increase stemming from its previous error(s) and that she reported immediately to the Department's Human Resources office.⁹ Respondent also argues that repayment of the salary overpayment debt would be financially burdensome.

Within-grade increases are periodic increases in an employee's basic rate of pay from one step of the grade of his or her position to the next higher step of that grade.¹⁰ For advancements between each of the first four steps, an employee must wait one year or 52 weeks.¹¹ Advancements between steps five through seven require a waiting period of two years or 104 weeks of service and steps eight through ten require three years or 156 weeks of service.¹² A within-grade increase is effective on the first day of the pay period beginning on or after the completion of the required waiting period.¹³ For most within-grade increases, the waiting period begins upon the date of the employee's last equivalent increase.¹⁴ There are several bases for determining when an employee's last equivalent increase has occurred, including the one pertinent to this matter - the date an employee was promoted to a new career ladder position.¹⁵

Prior waiver decisions have established the general rule that an employee is expected to know the required waiting periods between within-grade increases and to inquire about increases that do not conform to those waiting periods.¹⁶ On the other hand, if an employee is new to federal service, does not have specialized knowledge about the federal pay structure, has no prior experience with an erroneous within-grade increase, and has no specific knowledge or reason to know a particular within-grade increase was erroneous, the applicability of this general rule may not be appropriate.¹⁷ Thus, there may be mitigating circumstances which warrant an exception to

⁷ See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

⁸ See *In re Veronce* at 5.

⁹ The Department processed Respondent's first within-grade increase in her new position on February 19, 2006. According to Respondent, the Department notified her about that she was receiving another within-grade increase. Respondent states that the Department's Human Resources office told her it was an error and would be corrected. The Department's error and any possible overpayment stemming from this error are not at issue in this proceeding.

¹⁰ See 5 C.F.R. § 531.405(a).

¹¹ See *id.*

¹² See *id.*

¹³ See 5 C.F.R. § 531.412. See also, *Office of Personnel Management's Q & A on General Schedule Within-Grade Increases*, available at <http://www.opm.gov/oca/pay/HTML/wgiqa.asp>.

¹⁴ See 5 C.F.R. § 531.405(b).

¹⁵ See 5 C.F.R. § 531.407.

¹⁶ See *In re Jay*, Dkt. No. 06-01-WA, U.S. Dep't of Educ. (June 23, 2006) at 4, n.20.

¹⁷ See *id.* at 4, n.21.

this general rule. Notably, the newness of an employee's federal service has been used as the primary consideration in mitigating the general rule.¹⁸

From the record, the tribunal is able to infer that Respondent has been a federal employee for about six years.¹⁹ Respondent was employed in a lower-graded non-career ladder position when she was promoted to a GS-7, step 1 career ladder position on February 20, 2005.²⁰ The record further demonstrates that Respondent's one-year waiting period for both her within-grade increase and her ladder promotion ended on or about February 19, 2006. Respondent was promoted to a GS-9, step 1 effective February 20, 2006 (Pay Period 6 of 2006).

In applying the fault standard to this case, the tribunal concludes that Respondent is at fault. Respondent was employed in her new position for less than four months when she received the erroneous within-grade increase. Given Respondent's lengthy tenure as a federal employee, Respondent should have recognized that the within-grade increase she received well shy of one year was in error. Respondent also should have been specifically alerted to this error by the June 12, 2005 Notification of Personnel Action cancelling her within-grade increase on the same day it was erroneously awarded. Although the Department failed to correct Respondent's pay, Respondent was notified that the erroneous within-grade increase was cancelled. Unlike the tribunal's previous decisions finding mitigating circumstances when the employee was relatively new to federal service and/or complex personnel rules impacted the required waiting period for a within-grade increase, such circumstances do not exist here.²¹ Respondent did not cause the Department's error nor is there any evidence that Respondent lacked good faith. However, the Department's error should have been readily apparent to a long-term employee such as Respondent. Therefore, the tribunal concludes there are insufficient mitigating factors to warrant an exception to the general rule holding an employee accountable for recognizing an erroneous within-grade increase.

Equity and Good Conscience

To secure equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.²² There are no rigid rules governing the application of the equity and good conscience standard. The tribunal must balance equity and/or appraise good conscience in

¹⁸ See *In re Carolyn*, Dkt. No. 06-04-WA, U.S. Dep't of Educ. (June 28, 2006) (The employee had only one year of federal service when she received a premature within-grade increase. The tribunal concluded that the employee's short tenure was a key factor in warranting an exception to the general rule holding employees accountable for recognizing erroneous within-grade increases.)

¹⁹ Respondent's service computation date, which is used to determine an employee's level for accruing annual leave, is August 28, 2000.

²⁰ The full performance level for Respondent's new position is GS-12.

²¹ See *In re Carolyn* (The tribunal found mitigating circumstances given the employee had only been employed at the Department for one year and her within-grade increase was premature by only one pay period.) and *In re Jay*, Dkt. No. 06-01-WA, U.S. Dep't of Educ. (June 23, 2006) (The tribunal found mitigating circumstances given the complex personnel rules governing when the time served during a temporary promotion may be counted as part of the required waiting period when the employee is later promoted to that same higher grade.)

²² See 5 U.S.C. § 5584 and *In re Anh-Chau*, Dkt. No. 05-01-WA, U.S. Dep't of Educ. (June 17, 2005) and 5 U.S.C. § 5584.

light of the particular facts of the case.²³ Factors weighed by the tribunal include the following: whether recovery of the claim would be unconscionable under the circumstances; whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment; and whether collection of the debt would impose an undue financial burden.²⁴

Although Respondent has failed to meet the fault standard and thus is unable to secure a waiver, the tribunal recognizes Respondent's repayment may be financially difficult due to her husband's military deployment to Iraq, Respondent may wish to avail herself of the various repayment options offered by the Department.

ORDER

Respondent requested waiver of the entire debt. Having found that the circumstances of this case do not conform to the threshold factors warranting waiver, Respondent's request for waiver of the entire debt is **DENIED**.

So ordered, this 20th day of September 2006.



Greer Hoffman
Waiver Official

²³ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (December 14, 2005); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (September 14, 2005).

²⁴ See *id.*