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

In the Matter of

PEDRO,

Respondent.

Docket No. 06-78-WA

Waiver Proceeding

DECISION GRANTING WAIVER

Respondent, a U.S. Department of Education (Department) employee, requested waiver of a $5,748.17 salary overpayment debt arising from the Department's failure to place him in the correct pay grade and step upon his promotion. Based on the reasons articulated in this decision, I find that waiver of this debt is warranted. Accordingly, Respondent's request for a waiver is granted.

Jurisdiction

Respondent's waiver request arises under the Waiver Statute, which authorizes the waiver of claims of the United States against debtors as a result of an erroneous salary overpayment 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)[2], specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).[3]

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 Respondent's initial

[1] *See* 5 U.S.C § 5584 and the General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828 (Waiver Statute); s*ee also In re Tanya*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 18, 2006) at 1, n.1.
[2] The Handbook, ACS-OM-04, was revised and reissued by the Department on March 30, 2007.
[3] 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, Respondent's supplemental statements 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 October 25, 2006 Notice of Debt Letter and attached Bill of Collection (BoC), the $5,748.17 overpayment arises from the Department's placement of Respondent in an incorrect step upon his promotion. Respondent was promoted from a GS-13, step 4 position to a GS-14 position. The Department erroneously determined that Respondent should be paid at the GS-14, step 5 level instead of the GS-14, step 2 level. Respondent's pay remained at this higher incorrect pay level for 24 pay periods (Pay Period 22 of 2005 through Pay Period 19 of 2006).

By letter dated October 31, 2006, Respondent filed a request for waiver. In a November 15, 2006 Order Governing Proceedings, Respondent's request for a waiver was deemed timely. On November 29, 2006, Respondent filed a statement and documentation in support of his waiver request. On April 11, 2007, at the tribunal's request, Respondent filed a supplemental statement clarifying his previous statement.

Discussion

A salary overpayment is created by an administrative error in the pay of an employee in regard to the employee's salary. [4] The fact that an administrative error created an overpayment does not relieve the overpaid employee from liability.[5] Instead, an employee who does not contest the validity of the debt may request that the debt be waived or forgiven.

Waiver is an equitable remedy available only when there is no indication of fraud, misrepresentation, fault, or lack of good faith by the debtor.[6] 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 proceeding is whether Respondent's arguments and submissions support a request that a portion or the entire overpayment be waived in accordance with standards prescribed by statute and consistent with the case law and regulations promulgated by the Department.

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. For the most part, if a debtor is aware of an error, he or she cannot reasonably expect to retain the overpayment.[7] Fault also 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.[8] An employee who neither knows nor has reason to know that he or she was erroneously compensated lacks fault under the application of this

---

[4] *See* 34 C.F.R. Part 32 (2004).
[5] *See In re Robert*, Dkt No. 05-07-WA, U.S. Dep't of Educ. (July 8, 2005), n. 12.
[6] *See In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).
[7] *See In re Danielle*, Dkt. No. 05-18-WA, U.S. Dep't of Educ. (October 11, 2005).
[8] *See In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

standard.[9] 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 reviewed, would indicate a salary overpayment.[10] Thus, every waiver case must be examined in light of its particular facts and circumstances.[11]

According to Respondent, several new positions were created as a result of his office's reorganization. In October 2005, Respondent was selected and promoted to one of these new positions. As a result of his selection, Respondent was promoted to the GS-14 grade and he was placed in the step 5 pay level for this grade. Upon receiving his first paycheck in his new GS-14 position, Respondent was unsure about whether he was placed in the correct step level for his new grade. Respondent states that he contacted the Department's human resources office to inquire about the accuracy of his salary. He avers that he was told that he was placed in the proper step for his new grade.[12] Respondent argues that in inquiring about the accuracy of his salary payment, he performed his due diligence. He also argues that he relied upon the human resources office's expertise in these matters. Finally, he notes that the human resources office also made the same error for two other employees in his office that were promoted.

To determine an employee's basic rate of pay upon a promotion from one grade to the next higher grade, an agency must use one of two methods, standard or alternate, to calculate the employee's proper step level in the higher grade.[13] More commonly used and applicable in this case, the standard method is utilized when an employee is covered by the same pay schedule (i.e. general schedule (GS)) before and after the promotion.

The standard method follows a complicated four step process labeled step A through step D. Step A determines whether a geographic conversion rule applies (i.e. employee's area work location changes), and whether a within-grade or quality step increase was due in the employee's lower grade. In step B, the employee's existing grade and step level is identified and two within-grade increases are added for that grade. Step C determines the highest rate of basic pay for the step or rate determined in step B by applying any locality payment or special rate supplement applicable to the given grade, based on the employee's position of record before promotion and official worksite after promotion. If the rate determined in step B is above the range maximum, the same locality payment or special rate supplement that applies to rates within the rate range is used. Lastly, step D determines the highest applicable rate range for the employee's position of record after promotion and finds the lowest step rate in that range that equals or exceeds the rate determined in step C. To add an additional level of complexity, the standard method may be modified when the agency determines that the standard method produces a higher rate than the alternate method.[14]

---

[9] *See In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).
[10] *See id.*
[11] *See id.*
[12] Respondent filed a statement affirming the truth of his inquiry to the Department's human resources office. The tribunal accepts the veracity of Respondent's statement.
[13] *See* 5 C.F.R. § 531.214, implementing 5 U.S.C. § 5334(b).
[14] As the alternate method of calculation is not applicable in this case, the tribunal will not elaborate on this method's five step process.

In applying the fault standard to this case, the tribunal concludes that Respondent lacks fault. This salary overpayment was the result of an administrative error that does not reflect any fraud, misrepresentation, or lack of good faith by Respondent. Additionally, this is not the type of case where an employee reasonably should know that an erroneous overpayment has occurred. Respondent inquired about his step placement and was told that it was correct.

Where an employee is promoted to a higher grade but his or her step level for the new grade is miscalculated, an employee typically is not expected to be aware of and understand the rules regarding the determination of his or her step level upon a promotion.[15] The tribunal has held that an employee generally should be aware of the waiting periods between step increases and should make an inquiry about any increase not in accord with those waiting periods.[16] It is not reasonable, however, to expect an employee not involved in personnel matters to be aware of the complicated rules regarding the establishment of his or her step level (i.e. pay rate) upon a promotion, especially when the employee's pay has reached an interior step level in his or her existing grade. [17]

The complexity of the personnel rules regarding the setting of pay upon a promotion does not obviate an employee who fails to question an unexplained increase in pay that would cause a reasonable person to make an inquiry. The tribunal notes that a general inquiry to the Department's human resources office without mentioning a specific problem of which the employee is aware is insufficient.[18] However, where the Department has affirmed an employee's pay after an inquiry or incorrectly advised the employee and he or she has no reason to doubt the agency's response, the employee is without fault.[19]

In this case, Respondent questioned the setting of his pay level because he was unsure if the first salary payment he received upon his promotion was correct. In response to his inquiry,

---

[15] *See Collection from Current and Former Employees for Indebtedness to the United States*, U.S. Dep't of Energy Order 533.1 (2003), available at http://www.directives.doe.gov/pdfs/doe/doetext/neword/533/o5331.html and *Guidelines for Determining Requests*, U.S. Dep't of the Treasury Directive 34-01 (2000), available at http://www.treasury.gov/regs/td34-01.htm

[16] *See In re Jeanette*, Dkt. No. 06-11-WA, 06-12-WA, and 06-13-WA, U.S. Dep't of Educ. (Sep. 20, 2006). This rule is not absolute. In some circumstances, mitigation of the rule is warranted. *See In re Carolyn*, Dkt. No. 06-04-WA, U.S. Dep't of Educ. (June 28, 2006); and *In re Jay*, Dkt. No. 06-01-WA, U.S. Dep't of Educ. (June 23, 2006).

[17] *But see, Kenneth E. Sullivan*, 1989 U.S. Comp. Gen. LEXIS 949, B-232454 (Sep. 1, 1989) (An employee was placed in an incorrect step upon his promotion. The employee, however, was furnished with a personnel record that revealed the existence of the error leading to his incorrect step placement. Consequently, the tribunal held that the employee was partially at fault for the overpayment.)

[18] *See In re Cathy A. Clark*, 1998 U.S. Comp. Gen. LEXIS 1505, B-230464 (Dec. 12, 1988) (An employee's general inquiries into the status of her account was not sufficient to meet her obligation to inquire about her agency's failure to deduct health insurance premiums from her pay.)

[19] *See In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (December 14, 2005), holding that an employee is not at fault when personnel documentation confirms the erroneous advice the employee receives from the Department's human resources office. ("It is consistent with basic logic that, without more, an employee is not on notice that an error in pay occurred, if the employee has received a document that on its face corroborates the information provided by a human resources official, and is otherwise consistent with all information readily available to the employee."). *See also, Joanne B. Fuesel*, 1988 U.S. Comp. Gen. LEXIS 152, B-229394 (Feb. 2, 1988) (A former employee was informed that an additional payment she received after leaving her agency represented an additional lump-sum payment for leave not taken.); *Garnette F. Miller*, 1986 U.S. Comp. Gen. LEXIS 353, B-221672 (Oct. 16, 1986) (A reemployed annuitant was told his monthly annuity payment was properly calculated); and *Linda L. Hale*, 1991 U.S. comp. Gen. LEXIS 160, B-240393 (Jan. 31, 1991) (Employee told that the special allowance pay included in her salary for her promotion was correct.)

the Department's human resources office advised him that his step placement was correct. Respondent had no reason to question the information he received from human resources and there is no evidence that he otherwise knew or should have known that he had been placed in the wrong step. For example, there is no evidence in the record indicating that the grade and step level Respondent was placed in conflicted with the personnel action form (SF-50) effecting his promotion. Further, Respondent was not an expert in regard to pay and personnel matters. Respondent reasonably relied on the human resources office's expertise in interpreting the personnel rules governing his step placement. Even after his specific inquiry, the human resources office did not discover its error and apparently made the same miscalculation for other similarly situated employees in Respondent's office. In light of the above, the tribunal finds that Respondent's failure to recognize that he was placed in an incorrect step after he was promoted was reasonable.

Equity and Good Conscience

To secure equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.[20] Beyond this framework, 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 light of the particular facts of the case.[21] Factors weighed by the tribunal include the following: whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment; whether recovery of the claim would impose an undue financial burden on the debtor; and whether the cost collection the claim equals or exceeds the amount of the claim.[22] The tribunal also may consider whether recovery of the claim would be unconscionable under the circumstances. In assessing whether collection of the debt would be unconscionable, the tribunal examines whether collecting a debt is beyond what is customary or reasonable. Such unconscionable circumstances include an agency's failure to respond in a reasonable amount of time to a debtor's challenge of an overpayment and an agency's gross negligence in handling an overpayment case.[23]

Respondent argues that repayment of this debt would create an undue financial hardship. He explains that he currently provides financial assistance to an elderly relative for living and medical expenses, has personal debt, and is paying for his graduate school tuition and expenses. Based on these financial expenditures, Respondent asserts that his expenses meet or exceed the salary payment he receives each pay period. In support of his financial hardship claim, Respondent attached documentation relating to his graduate school tuition and expenses, his support payments to his elderly relative, and his monthly living expenses (i.e. rent, utilities, food, etc.).

The record in this case reflects that Respondent acted in good faith, without any indication of misrepresentation or malfeasance. In fact, Respondent conscientiously contacted the Department's human resources office to inquire about his pay level once he received his promotion and, to his detriment, relied on their personnel expertise. The tribunal also is persuaded

---

[20] *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).
[21] *See In re Carolyn*, Dkt. No. 06-04-WA, U.S. Dep't of Educ. (June 28, 2006); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (September 14, 2005).
[22] *See In re Shelley*, Dkt. No. 06-25-WA, U.S. Dep't of Educ. (November 28, 2006).
[23] *See id; In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006).

that collection of this debt would create an undue financial hardship for Respondent. Therefore, the tribunal finds that collection of this debt would go against equity and good conscience.

ORDER

Having found that Respondent has met the threshold factors warranting waiver of this debt, Respondent's entire $5,748.17 debt is **HEREBY WAIVED**.

So ordered, this 13th day of April 2007.

Greer Hoffman
Waiver Official