



UNITED STATES DEPARTMENT OF EDUCATION

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

In the Matter of

MARY JANE,

Docket No. 06-82-WA
Waiver Proceeding

Respondent.

DECISION GRANTING WAIVER

Respondent, a U.S. Department of Education (Department) employee, requested waiver of a \$500.96 salary overpayment debt arising from an adjustment that changed 18 hours of regular paid time to annual leave, which, in turn, resulted in 18 hours of leave without pay for a subsequent pay period. 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 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 request for waiver and attached documentation, and documents compiled by the Department's Human Resources (HRS) office. This decision constitutes a final agency decision.

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, note 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.

Procedural History

According to the May 13, 1999 Notice of Debt Letter and attached Bill of Collection (BoC), the \$500.96 overpayment arises from a shortfall of 18 hours of annual leave that surfaced during Pay Period 9 of 1996. The shortfall was created by the Department's correction of a time and attendance report for Pay Period 14 of 1995 which changed 18 hours of regular paid time to annual leave. As a result, Respondent's 18 hours of annual leave for Pay Period 9 of 1996 ostensibly should have been converted to leave without pay (LWOP).

Respondent filed her request for waiver and attachments on June 3, 1999.³ In a November 30, 2006 Order Governing Proceedings, Respondent's request for a waiver was deemed timely and Respondent was afforded an opportunity to supplement the record. On December 12, 2006, Respondent filed a supplemental statement and attachments with the tribunal.

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. There is no dispute that this case involves an erroneous payment of pay.⁵ The Department's error stems from its failure to properly account for Respondent's time and attendance for one pay period which resulted in a subsequent shortfall of 18 hours of annual leave.

Fault Standard

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

³ Respondent's pending waiver request was transferred to OHA on November 29, 2006.

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).

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

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

⁸ See *id.* at 5.

According to Respondent, the Department's payroll office made a number of errors regarding her leave usage. Respondent asserts that the Department waited almost five months until September 1995 to process an amendment of 18 hours of annual leave for Pay Period 14 of 1995. Respondent also maintains that the Department did not deduct 18 hours of annual leave as the Bill of Collection indicates. Instead, Respondent claims that the Department deducted 2.5 hours of annual leave and 15.5 hours of sick leave to correct its previous error.

Respondent raises several arguments in support of her waiver request. First, she argues that she was retroactively eligible to use donated leave under her enrollment in the Department's leave share program for the pay period in which the overpayment occurred (Pay Period 9 of 1996). Consequently, Respondent claims that had she known of the overpayment before her participation in the leave share program ended, she could have substituted donated leave for the 18 hours of LWOP because a balance of donated leave remained at the end of her participation in this program. Second, Respondent asserts that she did not recognize that an overpayment occurred because of her medical condition's negative impact on her ability to review her payroll documents as well as her acuity and recollection of the circumstances surrounding the overpayment. Third, Respondent argues that delay in reviewing her waiver request has placed her at a significant disadvantage because records related to her leave share balance and copies of her leave and earnings statements from ten years ago have been destroyed or are not retrievable. Finally, Respondent argues that the Department should restore the 15.5 hours of sick leave it used to cover her absence during Pay Period 14 of 1995.⁹

In accordance with the Federal Employees Leave Sharing Act of 1988, the Department adopted a Voluntary Leave Transfer Program in 1989.¹⁰ Under this program, Department employees may transfer part of their unused accrued annual leave to other federal employees having medical or family medical emergency situations. Generally, a recipient may use transferred annual leave in the same manner and for the same purpose as if he or she had earned and received approval to use the leave with the exception that during each pay period a leave recipient is affected by the medical emergency, he or she shall use any accrued annual and/or sick leave before using transferred leave.¹¹ Transferred annual leave may be retroactively substituted for periods of LWOP or used to liquidate a debt for advanced annual or sick leave granted on or after the date fixed by the Department as the beginning of the period of medical emergency for which LWOP or advanced leave was granted.¹² A recipient's leave share account is closed when the basis for the employee's eligibility is no longer present.¹³ Any unused transferred leave remaining in the recipient's leave share account must be restored to the original leave donors.¹⁴

⁹ Respondent's request that 15.5 hours of sick leave be restored to her leave account is outside the scope of this waiver proceeding; thus, the tribunal is without authority to review this request.

¹⁰ See Federal Employees Leave Act, Pub. L. 100-566, 5 C.F.R. Part 630 and U.S. Dep't of Educ. Personnel Manual Instruction, Voluntary Leave Transfer Program – Administrative Procedures, PMI 630-10 (October 2, 1989).

¹¹ See 5 C.F.R. §§ 630.909 and 630.907.

¹² See 5 C.F.R. § 630.906(e).

¹³ See 5 C.F.R. § 630.909.

¹⁴ See 5 C.F.R. § 630.910.

In applying the fault standard to this case, the tribunal concludes that Respondent is not at fault. Respondent was absent due to the aforementioned medical emergency for significant periods of time including some days in the pay period in which her leave was adjusted and the overpayment occurred. Moreover, the adjustment was made due to a previous error that occurred five months earlier – not one that occurred in close proximity to the adjustment. Consequently, although Respondent’s own leave may have been exhausted, she likely was not aware that her leave was exhausted. According to the Department, Respondent also had no way to determine how much leave had been donated as the Department’s leave and earnings statements did not contain this information.¹⁵ Finally, Respondent was correct in her assertion that the Department recorded the 18 hours of what turned out to be LWOP as 15.5 hours of sick leave and 2.5 hours of annual leave not the 18 hours of annual leave identified in the May 13, 1999 Bill of Collection.¹⁶ This error added to Respondent’s confusion on how her leave balance was impacted by the Department’s adjustment.¹⁷ Thus, after the overpayment occurred, Respondent’s review of her leave and earning statements also may not have alerted her to a leave shortfall at or around the time of the overpayment.

The tribunal’s ruling in the *Veronce* case is instructive.¹⁸ In *Veronce*, the employee was unable to check her leave and earnings statements or other documents during a medical crisis. The tribunal found that the employee did not check these documents because she was not able to do so because of her ongoing illness. In view of these circumstances, the tribunal concluded that the employee’s failure to recognize that an overpayment occurred was reasonable. Here, not only did Respondent not have documentation regarding the amount of leave donated to her under the leave share program, her significant absences and her medical condition impacted her ability to otherwise determine her leave balance. Therefore, the tribunal finds that Respondent’s failure to recognize that an overpayment occurred is 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.¹⁹ 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.²⁰ To this end, the tribunal may consider whether recovery of the claim would be unconscionable including whether collecting the debt goes beyond what is customary and reasonable. An agency’s failure to respond to a debtor’s waiver request and/or its gross negligence in handling an overpayment case may go beyond what is customary and reasonable.²¹ Other factors weighed by the tribunal include the following: whether the debtor has relinquished a valuable right or changed his or her position

¹⁵ See Human Resources July 19, 1999 Report of Investigation, which also contained a non-binding recommendation that Respondent’s waiver request be granted.

¹⁶ See Respondent’s Leave and Earnings Statement for Pay Period 9 of 1996.

¹⁷ Respondent’s confusion seems evidenced by her belief that based on the May 13, 1999 Bill of Collection, the Department should restore 15.5 hours of sick leave to her account.

¹⁸ See *In re Veronce supra*.

¹⁹ See 5 U.S.C. § 5584 and *In re Veronce supra* at 5.

²⁰ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep’t of Educ. (December 14, 2005).

²¹ See *id.*

based on the overpayment; whether recovery of the claim would impose an undue financial burden on the debtor; whether the time elapsed between the erroneous payment and the agency's discovery of the error and subsequent employee notification is excessive; and whether the cost of collection equals or exceeds the amount of the claim.²²

Seven and one-half years have elapsed since Respondent filed her June 3, 1999 waiver request. Typically, a waiver request should be resolved within 60 days of when the request is filed although this period of time may be extended as circumstances warrant. The tribunal, however, does not consider it likely that a delay of seven and one-half years would be warranted by the circumstances or not harmful to the debtor.²³ As a result, the tribunal finds that the over seven-year delay is excessive and goes beyond what is customary and reasonable.²⁴

The record also reflects that Respondent was absent for significant periods of time due to a medical emergency that qualified her for enrollment in the Department's leave share program. Significantly, Respondent was enrolled in the leave share program soon after the overpayment occurred. The tribunal accepts Respondent's assertions that the overpayment relates to 18 hours of leave taken in connection with her medical emergency and that she had a balance of donated leave at the end of her participation in the leave share program that she could have retroactively substituted for 18 hours of LWOP. Therefore, the tribunal finds that Respondent was disadvantaged because she was unable to use transferred leave to retroactively substitute for the period of LWOP generated during Pay Period 9 of 1996. Based on the aforementioned factors, the tribunal finds that recovery of the debt would go against equity and good conscience.

²² See *id.*

²³ See *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (June 2005), available at www.ed-oha.org/overpayments/handbook.pdf.

²⁴ See *In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006) (The tribunal found that [i]n the balance of equities, it must be regarded that a seven-year delay in adjudicating a waiver request doubtlessly is detrimental to a debtor's interest.")

ORDER

Respondent requested waiver of the entire debt. Having found that the circumstances of this case conform to the threshold factors warranting waiver, Respondent's request for waiver of the entire debt is **GRANTED**.

So ordered, this 15th of December 2006.

A handwritten signature in black ink that reads "Greer Hoffman". The signature is written in a cursive style with a large, sweeping initial "G".

Greer Hoffman
Waiver Official