



UNITED STATES DEPARTMENT OF EDUCATION

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

In the Matter of

Docket No. 12-52-WA

Waiver Proceeding

NORMAN,

Respondent.

DECISION PARTIALLY GRANTING WAIVER

Respondent, a U.S. Department of Education (Department) employee, requested waiver of a \$332.92 salary overpayment debt arising from the Department's payment of holiday pay during a pay period when Respondent was in a non-pay status (leave without pay). Based on the reasons articulated in this decision, I find that waiver of this debt is warranted, in part. Accordingly, Respondent's request for a waiver is partially 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) (January 2012), 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 March 8, 2011 Notice of Debt Letter and Bill of Collection,³ Respondent's September 14, 2012 initial request for waiver,⁴ and Respondent's October 5, 2012 statement and attached documentation..

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 The Handbook initially was issued in 2005 and has been revised twice. Information regarding the Department's salary overpayment process including the latest edition of the Handbook is available on OHA's website at: www.ed-oha.org/overpayments.

³ Respondent apparently did not receive this initial Notice of Debt Letter and Bill of Collection. On September 5, 2012, the Department's payroll contractor reprinted these documents and sent them to Respondent. Thus, Respondent's September 14, 2012 waiver request was deemed timely.

⁴ Respondent's request was not received until June 15, 2012.

According to the March 8, 2011 Notice of Debt Letter and attached Bill of Collection, the \$332.92⁵ overpayment concerns Pay Period 3 of 2011. The overpayment arises from the Department's payment of holiday pay for the Martin Luther King holiday (January 17, 2011) while the employee was in a non-pay status (leave without pay).

Respondent states that he was injured on the job on October 14, 2010. On January 13, 2011, the Office of Workers' Compensation Programs (OWCP) made its determination accepting Respondent's claim retroactive to the injury date. According to Respondent, OWCP informed him that the Department needed to place him in a non-pay status (LWOP) for the 80 hours of Pay Period 3 of 2011 before it could put him on workmen's compensation. Although he apparently informed the Department that he should be placed in a non-pay status for the entirety of Pay Period 3 of 2011, his supervisor placed him in pay status for eight hours on Martin Luther Kings' birthday on January 17, 2011. Respondent states that he found out on February 8, 2011 that the Department had deposited his net salary, \$68.43, into his bank account.⁶ Respondent states that this payment of salary delayed OWCP from being able to compensate him for Pay Period 3. Respondent states that he contacted his supervisor immediately and his pay was adjusted for the relevant pay period to show 80 hours of LWOP, which in turn, allowed OWCP to begin its payments to Respondent at the start of Pay Period 3. Respondent also states that OWCP also paid his health insurance and dental vision plans for this pay period. Thus, according to Respondent, those health insurance and dental vision plans were paid double.

Respondent states that at the time the overpayment, he offered to repay the \$68.43 that was deposited in his account. Respondent also claims that there was no authority to garnish his wages to pay alimony as was done during the pay period at issue. Respondent's injury and rehabilitation was such that he did not return to work until August 13, 2012. Soon after his return to work, the \$332.92 debt was deducted from Respondent's pay effective September 4, 2012 (Pay Period 18 of 2012).⁷ According to Respondent, he did not receive the Notice of Debt Letter and Bill of Collection at the time it was issued. Respondent maintains that he was only made aware of the debt once it was deducted from his pay.

⁵ The gross amount of the overpayment is \$405.92. ED reduced the amount owed to \$332.92 based on its recovery of some of the funds: \$5.89 for Medicare, \$28.41 for retirement, \$16.20 for FEGLI regular and \$22.50 for FEGLI family.

⁶ Respondent's pay primarily went to cover his health insurance premiums and dental vision coverage as well as a deduction for alimony.

⁷ While out on workmen's compensation under OWCP's authority, Respondent was only compensated at 75% of his salary. OWCP also did not attempt to collect the overpayment; thus resulting, in a delay of over 18 months before the Department collected the debt.

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 (fault standard).⁸ 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.

In waiver cases, the fault standard has specialized and particular meaning. "...[f]ault is examined in light of the following considerations: (a) whether there is an indication of fraud; (b) whether the erroneous payment resulted from an employee's incorrect, but not fraudulent, statement that the employee under the circumstances should have known was incorrect; (c) whether the erroneous payment resulted from an employee's failure to disclose to a supervisor or official material facts in the employee's possession that the employee should have known to be material; or (d) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous."⁹

An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to his or her salary.¹⁰ Typically, the administrative error is caused by the agency. However, the mere fact that the government caused the error does not negate an employee's duty to seek correction of the erroneous payment.¹¹ Moreover, notwithstanding the government's mistake, the error cannot itself entitle an employee to a waiver because no employee has an entitlement to pay that he or she obtains as a result of an overpayment.¹²

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 an overpayment of salary.¹³ An employee who neither knows nor has reason to know that he or she was erroneously compensated lacks fault under the application of this standard.¹⁴ If an employee has records at his or her disposal, which, if reviewed, would indicate a salary overpayment, and the employee fails to review those documents, the employee is not without fault.¹⁵ Thus, every waiver case must be examined in light of its particular facts and circumstances.¹⁶

In addition to Respondent's circumstances that he should have been placed in a non-pay status for the holiday due to his retroactive placement on workmen's compensation, the Office of Personnel Management (OPM) has established that Federal employees who are in a non-pay

⁸ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

⁹ See *In re Robert (Robert)*, Dkt. No. 09-10-WA, U.S. Dep't of Educ. (November 19, 2009) at 2.

¹⁰ See 34 C.F.R. Part 32 (2011).

¹¹ See *Robert* at 3.

¹² See *id.*

¹³ See *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

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

¹⁵ See *In re Cynthia*, Dkt. No. 05-16-WA, U.S. Dep't of Educ. (October 31, 2005).

¹⁶ See *In re Veronce* at 5.

status for the workdays immediately before and after a holiday may not receive compensation for that holiday.¹⁷ According to OPM, because “employees normally are paid on a holiday on which they do not work under the assumption that, but for the holiday, they would have worked and received pay.”¹⁸ Conversely, it is assumed that employees who are in a nonpay status before and after a holiday would not have worked on the holiday itself and are, therefore, not entitled to compensation for the holiday.¹⁹ Thus, Respondent was not entitled to receive holiday pay.

In view of the aforementioned facts, this case comes within the clear ruling of *Veronce*, which held that in certain circumstances where there is no otherwise indication of fault, an employee who neither knows nor has reason to know that he or she erroneously was compensated lacks fault. In *Veronce*, after the employee’s sick leave was exhausted, she was placed in a leave without pay status while she was hospitalized. As a result, the tribunal determined that the employee was unable to check her leave and earnings statements or other documents to know that her paid leave was exhausted. The tribunal concluded that the employee’s failure to recognize the overpayment was reasonable.

Although this case concerns markedly different circumstances, the facts compel the same result. The Department waited over 18 months to inform the debtor that it had not recovered the sums paid out for his various deductions, including health insurance, and supplemental dental and vision coverage. Moreover, Respondent’s deductions for these items was also paid out of his workmen’s compensation pay that he received, making his failure to know that the Department had not recovered these sums even more understandable.

The tribunal finds in certain limited circumstances where an employee otherwise is not at fault, an employee’s conduct in timely and conscientiously reporting an erroneous salary overpayment does not disqualify him from meeting the fault standard. In the tribunal’s decision, in *Robert*,²⁰ an employee was paid his full civilian pay despite an absence from work due to a military deployment. The employee recognized the salary overpayment and reported the error to the Department. In granting the waiver, the tribunal found that the erroneous overpayments did not stem from a failure to disclose material facts in the employee’s possession. The tribunal further noted that the employee’s conduct was consistent with his duty to resolve an erroneous salary overpayment.

In another decision, *In re Edward (Edward)*,²¹ an employee’s locality pay was erroneously set for a different locality, which resulted in the employee being compensated at a higher pay rate. The employee noticed the error and immediately reported it to the Department. As in *Robert*, the tribunal noted that the error did not stem from the employee’s failure to disclose material facts in his possession; in fact, the employee reported that his official duty station was incorrectly identified and requested that the Department determine if this resulted in an erroneous calculation

¹⁷ See U.S. Office of Personnel Management, FEDERAL HOLIDAYS, WORK SCHEDULES AND PAY, available at <http://www.opm.gov/oca/worksch/html/holiday.asp>

¹⁸ See *In re Megan*, Dkt. No. 11-89-WA, U.S. Dep’t of Educ. (April 24, 2012), quoting 70 Fed. Reg. 1070 (2005). See also, OPM Compensation Policy Memorandum 99-4.

¹⁹ See *id.*

²⁰ Dkt. No. 09-10-WA, U.S. Dep’t of Educ. (November 19, 2009).

²¹ See *In re Edward*, Dkt. Nos. 10-05-WA, 11-15-WA, U.S. Dep’t of Educ. (March 17, 2011).

of his locality pay. In granting the waiver, the tribunal found that the employee did not accept erroneous locality payments that he knew or should have known to be erroneous. The tribunal also found that the employee's actions were consistent with his duty to alert the Department of an erroneous salary overpayment as soon as he knew that the payment was erroneous. Consequently, in both *Robert* and *Edward*, the employees' actions in reporting salary overpayment errors did not vitiate their ability to otherwise meet the fault standard.

In applying the fault standard to this case, the tribunal concludes that Respondent partially lacks fault. As an initial matter, the tribunal recognizes that 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, the delay in processing the overpayment led Respondent to believe that this debt would not be collected. Although Respondent reported the error soon after it occurred, the tribunal finds that his actions in attempting to correct the overpayment demonstrate his good faith in attempting to resolve this matter. The tribunal notes that Respondent received only a small portion of his salary due to various deductions made from his pay. The tribunal notes that some of these deductions were also taken from his OWCP compensation for this same pay period. Respondent was unaware that the portion of the debt related to these various deductions was not recovered. Thus, Respondent did not know that this portion of the debt was not recovered from the appropriate sources. However, Respondent's willingness to repay the portion of the debt that was deposited in his account also is noted. Respondent was aware that he should not have received these funds. As such, Respondent remains liable for the \$68.43 he received. Respondent also was aware that the portion of the debt attributable to his alimony payment was not recovered at the time of the overpayment.²² Thus, Respondent also remains liable for the \$90.93 paid out in alimony.

To secure equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.²³ 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.²⁴ 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.²⁵

The tribunal notes that Respondent acted fairly and in good faith in reporting the error once he became aware of it. The tribunal further notes Respondent was charged twice for his health insurance and dental and vision premiums. Finally, the tribunal also notes Respondent's statements that he received reduced pay while on workmen's compensation and that collection of the debt in its entirety would be financially burdensome. Consequently, the tribunal finds that collection of the full amount of the debt would go against equity and good conscience.

²² Respondent raises many issues regarding the validity of the garnishment of his wages to pay alimony. However, the legitimacy of whether or not this payment should have been made is beyond the scope of the tribunal's authority.

²³ 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.

²⁴ 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).

²⁵ See *id.*

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 debt is partially granted. Respondent remains liable for \$159.36. Consequently, a waiver of the balance, \$173.56, is hereby granted. As Respondent already paid the entirety of the \$332.92, the amount of \$173.56 should be refunded.

So ordered, this 26th day of October 2012.



Greer Hoffman
Waiver Official