



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

CYNTHIA,

Docket No. 05-6-WA
Waiver Proceeding

Respondent

DECISION ON WAIVER

Respondent filed a timely request for waiver of a debt caused by an erroneous salary overpayment.¹ The legal authorities pertinent to waiver requests include the waiver statute, the Department's implementing regulations at 34 C.F.R. Part 32, and the policy set forth in the Department of Education, Administrative Communications System, *Handbook for Processing Salary Overpayments* (Salary Overpayment Handbook, ACS-OM-04) (June 2005); these authorities prescribe procedures for processing debts, authorizing deductions from salary and wages to pay debts, and setting standards for waiving debts when appropriate.² The Salary Overpayment Handbook, ACS-OM-04, specifically delegates waiver authority involving all former and current employees of the Department to the Office of Hearings and Appeals (OHA), which, thereby, exercises waiver authority on behalf of the Secretary. The undersigned is the

¹ The General Accounting Office Act of 1996 (waiver statute) authorizes the waiver of claims of the United States against debtors as a result of an erroneous payment of pay to federal employees. See, General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (5 U.S.C. § 5584); see also *In re Richard*, Dkt No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at 1 & n. 1 (setting forth the statutory framework governing debt collection by salary and administrative offset). Respondent is an employee of the U.S. Department of Education (Department).

² See also government-wide regulations issued by the Office of Personnel Management (OPM) (5 C.F.R. Part 550, Subpart K) and *In re Richard*, Dkt No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at 1 & n. 2 (more fully explaining that when the Department issues a notice proposing a salary offset to satisfy an overpayment, the employee/debtor has the opportunity to: request a hearing concerning the existence and the correctness of the amount of the overpayment, request a proceeding concerning the waiver of the debt in whole or in part, or request an opportunity to pursue both a waiver proceeding and a hearing). These standards, along with those cited in note 1, *supra*, establish the minimum due process rights that must be afforded to a debtor when an agency seeks to collect a debt by administrative offset.

authorized waiver official who has been assigned this matter by OHA.³ The resolution of this case is based on the matters accepted as argument and evidence in this proceeding, including the written statements of Respondent (and the documents attached therein), the Department's Bill of Collection (BoC), and printed copies of electronic communications between Respondent and the Waiver Official. This decision constitutes a final agency decision. For reasons that follow, Respondent's request for waiver is granted, in part.

PROCEDURAL HISTORY

In the case at bar, on January 24, 2005, the United States Department of Education, Office of Management (OM), Human Resources System Team authorized issuance of an initial notice of salary overpayment identifying that Respondent owed a debt to the Department identified in a December 7, 2004 Bill of Collection in the amount of \$769.69. The notice authorized the Department to initiate an offset of pay from the salary of Respondent as a result of an erroneous salary payment to Respondent. In response to this notice and the tribunal's March 8, 2005 Order Governing Proceedings, Respondent submitted a statement and documents supporting a waiver request on February 23, 2005 and March 24, 2005.

DISCUSSION

Pursuant to 5 U.S.C. § 5543(a) and § 5543(b), agencies may grant compensatory time off instead of paying overtime for time spent in "irregular or occasional overtime work."⁴ Generally, compensatory time off must be used within a specified period after earning it and employees in "exempt" status who fail to use compensatory time within the period of limitation, lose the right to compensatory time off and are prohibited from being paid the dollar value of compensatory time in lieu of time off.⁵

As established by the Department, the agency erroneously paid Respondent 6½ hours of compensatory time for pay period 0410. Respondent's net check for pay period 0410 was \$2131.34. In the following pay period, 0411, the Department recovered 2¾ hours of improperly paid compensatory time; however, in doing so, Respondent received a net check of only \$646.69 for the pay period.

The agency again erroneously paid Respondent 27½ hours of compensatory time; this time it did so for pay period 0420, and in the following pay period, 0421, recovered those exact 27½ hours of pay, leaving Respondent with a net pay of \$658.58. For each recovery,

³ See, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

⁴ In this regard, compensatory time off in lieu of overtime pay is authorized for employees who are in "exempt" status or otherwise exempt from the provisions of Fair Labor Standards Act (FLSA) governing minimum wage and overtime pay. In the Federal sector, there are two general categories of exemptions: (1) employees who are in executive, administrative, and professional positions; and (2) employees who are permanently stationed in a foreign country or a territory not within the jurisdiction of the United States. United States Department of Education, Personnel Manual Instruction, PMI § 550-3 (1984).

⁵ United States Department of Education, Personnel Manual Instruction, PMI § 550-3 (1984). Generally, employees are otherwise entitled to "overtime pay for overtime work in excess of 8 hours a day or 40 hours a week." See 5 U.S.C. § 5544 (2000); see, also., 37 Comp.Gen. 362 (1957) & 26 Comp. Gen. 750 (1947).

Respondent was not provided written notice of the nature of the debt or a point of contact for contesting the recovery of the debt before or after the debt was recovered. Since the initial erroneous payment in pay period 0410 still exceeded the amount of funds the Department had already recovered, the December 7, 2004 Bill of Collection was issued for \$833.44.⁶

I. Fault Standard

In a waiver proceeding, the debtor acknowledges the validity of the debt or urges that there is an absence of any reason to recognize the overpayment as an erroneous payment. The standard for determining whether waiver is appropriate requires consideration of two threshold matters: first, whether the overpayment to Respondent constitutes an *erroneous payment of pay*⁷ and, secondly, whether Respondent lacks fault.⁸

In cases that have addressed compensatory time, a salary payment of excess compensatory time off have consistently constituted a claim of the United States against a debtor arising out of an erroneous payment of pay, which must be recovered.⁹ Moreover, since these debts are the result of an *erroneous payment of pay*, such debts are also subject to waiver under 5 U.S.C. § 5584.¹⁰

Regarding the second threshold issue, the pertinent considerations of whether Respondent is at fault, include: (a) whether the erroneous payment resulted from an employee's incorrect, but not fraudulent, statement that the debtor under the circumstances should have known was incorrect; (b) 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 (c) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.¹¹

As is true in other salary payment matters, it is similarly the responsibility of each employee to maintain an individual record of compensatory time worked or performed during each pay period. Section 550-3 of the Department's PMI provides that employees "are responsible for applying in advance for approval of use of earned compensatory leave in order to permit orderly scheduling of such leave and to avoid earned compensatory leave forfeitures,

⁶ In addition to what was recovered in pay periods 0411 and 0421, the Department recovered 4 hours of compensatory time in pay period 0419.

⁷ An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to the employee's salary. See also, SALARY OFFSET TO RECOVER OVERPAYMENTS OF PAY OR ALLOWANCES FROM DEPARTMENT OF EDUCATION EMPLOYEES, 34 C.F.R. Part 32 (2004) (notwithstanding the caption for Part 32, the agency regulations apply with equal force to former and current employees).

⁸ The fact that the Agency may have erred in making the overpayment does not relieve the overpaid person from liability, since an overpayment is presumptively in excess of the amount of authorized salary. See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) and *In re Robert*, Dkt. No. 05-07-WA, U.S. Dep't of Educ. (July 8, 2005).

⁹ See, e.g., *In the Matter of Edward W. Dorcheus*, 1979 WL 14976 (Comp.Gen.), B- 192,811 (1979), 58 Comp. Gen. 571.

¹⁰ *Id.*

¹¹ See generally, *Guidelines for Determining Requests* U.S. Department of the Treasury Directive 34-01 (2000), available at <http://www.treasury.gov/regts/td34-01.htm>; Standards for Waiver, 4 C.F.R. § 91.5 (2000).

which might otherwise result.” The aforementioned notwithstanding, the erroneous payments in this case did not result from any specific act of Respondent; the Department attributes the erroneous payment to a computer error that failed to capture Respondent’s correct FLSA status. More to the point, the Department, in two instances, implemented a correction of its error in the immediately following pay period. In doing so, the Department was clearly aware that an overpayment occurred and, therefore, Respondent’s obligation to inform the Department of the error is carries little relevance to the circumstances of this case. In this regard, I find that Respondent is without fault for the overpayment.

II. Equity and Good Conscience

Typically, to justify granting waiver of a debt owed to the United States by a current or former employee of the Federal Government, there must be both a finding of lack of fault as well as a finding that the collection of the debt would be “against equity and good conscience and not in the best interests of the United States.”¹² In this respect, Respondent raises arguments concerning the procedures relied upon by the Department to collect Respondent’s debt before the December 7, 2004 Bill of Collection was issued. The Department concedes that after erroneously paying Respondent compensatory time on two occasions during 2004, the Department recovered portions of the improper payments from Respondent’s salary without prior or subsequent notice. In addition, there is no dispute that Respondent sought assistance from a number of Department officials regarding why her pay had been reduced for the respective pay periods. Moreover, Respondent submits copies of email messages from her supervisor addressed to payroll officials who process payroll for the Department in Denver, Colorado requesting an explanation of the deductions and pointedly noting that the deductions had occurred without issuance of a prior or subsequent notice of debt. Further, Respondent argues that since the deductions occurred without notice or explanation and were not insignificant deductions, her timely payment of a mortgage and other living expenses was not met, which, ultimately, left Respondent with an additional obligation to pay late fees and interest penalties.

Pursuant to 5 U.S.C. § 5514(a)(3), an agency may deduct debts it is owed from the current pay of an employee, if the clerical or administrative error resulting in the debt occurs within the four pay periods preceding the deduction. Similarly, an agency may make deductions from the current pay of employees for debts that amount to \$50 or less. Ostensibly, section 5514(a)(3) allows agencies without delay to recover erroneous payments when the recovery is close in time (within four pay periods) to the erroneous payment or of a *de minis* amount (\$50 or less). In authorizing agencies to collect debts under an expedited procedure, Congress replaced the agency’s usual obligation to provide employees with notice of the debt and an opportunity to challenge the existence or accuracy of the debt *prior* to collection of the debt with an obligation that such notice be provided *subsequent* to collection of the debt or, in the words of the statute, “as soon thereafter as practical.”¹³

¹² See n.1 above & General Accounting Office Act of 1996, 5 U.S.C. § 5584(a).

¹³ 5 U.S.C. § 5514(a)(3).

Since it is undisputed that the Department failed to comply with the explicit requirements of 5 U.S.C. § 5514(a)(3), at issue is whether the Department's failure warrants waiver of the debt. As an initial matter, to secure the benefits of equity and good conscience, Respondent must have acted fairly and without fraud or deceit as to the controversy at issue. In balancing equities under similar circumstances, tribunals have drawn upon the concept of fairness by exercising judgment in light of the particular facts of the case. In this regard, a number of factors have been found pertinent to determining whether collection of a claim against an employee is against equity and good conscience or otherwise not in the best interests of the United States, the factors include: (a) whether recovery of the claim would be unconscionable under the circumstances; (b) whether, because of the erroneous payment, the employee either has relinquished a valuable right or changed positions for the worse, regardless of the employee's financial circumstances;¹⁴ (c) whether recovery of the claim would impose an undue financial burden upon the debtor under the circumstances,¹⁵ and (d) whether the time elapsed between the erroneous payment and discovery of the error and notification of the employee is excessive.¹⁶ These factors are neither exhaustive, nor mutually exclusive; a debtor depending upon the circumstances may raise other factors pertinent to equity and good conscience.

In prior cases, the tribunal has carefully refrained from defining the particular instances of equity and good conscience in such a manner that future cases might be excluded; hence, the tribunal has never established all of the grounds or circumstances out of which equity and good conscience may arise.¹⁷ This follows from applying broad concepts of fairness and fair dealing to the review equity and good conscience, including permitting a consideration of the totality of the circumstances of a given waiver request.

Under the circumstances of this case, Respondent maintains that she was provided deficient or inadequate notice of her statutory right to request a waiver or even be informed about the nature of the debt for which the Department had authorized immediate collection. As a result, Respondent did not request a waiver or otherwise challenge the accuracy or existence of the debt until the Department issued a notice of the outstanding debt on January 25, 2005. As noted, *supra*, Respondent's net pay for pay periods 0411 and 0419, and 0421 was reduced to \$646.69, \$1080.68, and \$658.58, respectively. Respondent's net pay reveals that in each instance the Department exceeded the statutory limit precluding the amount deducted for any

¹⁴ To establish that a valuable right has been relinquished, it must be shown that the right was, in fact, valuable; that it cannot be regained; and that the action was based chiefly or solely on reliance on the overpayment. To establish that the employee's position has changed for the worse, it must be shown that the decision would not have been made but for the overpayment, and that the decision resulted in a loss. An example of a "detrimental reliance" would be a decision to sign a lease for a more expensive apartment based chiefly or solely upon reliance on an erroneous calculation of salary, and the funds spent for rent cannot be recovered. *See generally, Guidelines for Determining Requests* U.S. Department of the Treasury Directive 34-01 (2000), available at <http://www.treasury.gov/regs/td34-01.htm>.

¹⁵ *See, e.g., In the Matter of Mrs. Kathryn H. Vandegrift*, 55 Comp. Gen. 1238, B-182, 704 (July 2, 1976).

¹⁶ *See, e.g., the generally similar "Guidelines for Determining Requests [For Waiver]"* U.S. Department of the Treasury Directive 34-01 (2000), available at <http://www.treasury.gov/regs/td34-01.htm> With regard to the latter factor, it is important to note, that the passage of time may not always lead to successful invocations of the doctrine of equity and good conscience since equity may refuse its aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time.

¹⁷ Some courts have found the phrase "against equity and good conscience" to be a phrase of uncommon generality, not at all amenable to efforts to channel a meaning into rigid rules. *See, e.g., Gilles v. Department of Human Resources Development*, 521 P.2d 110, 117 (Cal. 1974).

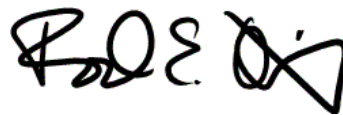
given pay period from exceeding 15 percent of disposable pay.¹⁸ Consequently, Respondent was subjected to both a lack of timely notice and the collection of the debt at a rate per pay period that violated the Debt Collection Improvement Act of 1996 the 5 U.S.C. § 5514(a)(1). Notwithstanding that, generally, the collection of a debt at a rate that exceeds a statutory limitation may be subject to a range of remedies, the remedy available in this proceeding is restricted to an equitable waiver of the entire or a portion of the amount collected.¹⁹ Although there is rhetorical force in the argument that the current proceeding substantially, if not entirely, actually resolves the failure of the Department to provide Respondent with a timely notice of debt, that argument really is no answer to the undeniable financial discomfort or adverse impact of not one, but two, substantial unexpected reductions in pay.

Respondent paid a substantial portion of her debt as a result of the aforementioned excessive deductions. Clearly, in the interests of equity and good conscience Respondent should be granted waiver of all or a portion of her outstanding debt.²⁰ Unfortunately, Respondent provided no evidence supporting her precise claims of how she was harmed by the excessive deductions from her pay. As such, there is no nuanced or precise manner for calculating an exact amount of Respondent's waiver. Since the circumstances of this case make it appropriate to conclude that Respondent was presumptively adversely affected by two excessive deductions for which neither prior nor subsequent notice was provided, I find that waiver of half of the entire outstanding debt is unwarranted. Accordingly, Respondent's debt shall be reduced as a result of waiver of 50% of the debt.

ORDER

Respondent's request for waiver is **GRANTED**, in part. Respondent owed a debt to the Department in the amount of \$769.69, which is **HEREBY WAIVED** in the amount of **\$384.85**.

So ordered this 14th day of September 2005.



Rod Dixon
Waiver Official

¹⁸ 5 U.S.C. § 5514(a)(1).

¹⁹ See, e.g., *Green v. Kentucky Higher Education Assistance Authority*, 78 F.Supp.2d 1259 (S.D. Ala. 1999) (the court required government-employer to return amounts to repay a debt collected from employee's disposable pay where the amounts exceeded the statutory limit on the amount that could be deducted for any pay period).

²⁰ See, 5 U.S.C. 5584(a). Generally, a debtor is entitled to "receive the minimum standard of honor, decency and reliability" that any citizen is entitled to expect from Government. *New York Institute of Dietetics, Inc., v. Riley*, 966 F.Supp. 1300 (S.D.N.Y. 1997).