



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

In the Matter of

ROBERT

**Docket Nos. 05-07-WA
05-08-WA
05-09-WA**

Waiver Proceedings

Respondent.

DECISION GRANTING WAIVER

This proceeding is based on a U.S. Department of Education (Education) employee's request for waiver of three salary overpayments.¹ The salary overpayment amounts are \$647.79, \$2,086.96, and \$2,313.53, for Pay Periods 7, 8, and 9 of 2004, respectively. The 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.² The Department has promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 *et. seq.*), and set forth policy governing the overpayment process in its *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (June 2005). Together, these legal authorities prescribe procedures for handling debts, authorizing deductions from wages of Federal employees and/or former employees to pay debts to the United States for such things as salary overpayments, and setting standards for waiving those debts.³ The Handbook, ACS-OM-04, specifically delegated the Secretary's waiver

¹ Three separate Bills of Collection (BoC) were issued to the Respondent. The three overpayments are identified as File Nos. 05LCB020, 05LCB021, and 05LCB022.

² 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 Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005), footnote # 1.

³ When the Department issues a notice informing the employee/former employee of a salary overpayment, the alleged debtor has the opportunity to request a hearing concerning the

authority for salary overpayments to the Office of Hearings and Appeals (OHA). 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 statements, the Department's Bills of Collection (BoC), signed witness statements, and email communications between Respondent and Department personnel. This decision constitutes a final agency decision.

For reasons that follow, the circumstances of this case conform to the standard factors warranting waiver. Therefore, Respondent's request for waiver is granted.

PROCEDURAL HISTORY

On December 8, 2004, the Department's Office of Management (OM) authorized the issuance of three initial notices of salary overpayment identifying that Respondent owed a debt to the Department. The notices authorized the Department to initiate an offset of pay from Respondent's salary for amounts paid during three pay periods while Respondent was away on military duty. In a March 3, 2005, Order Governing Proceedings, Respondent's request for a waiver was deemed timely. On March 17, 2005, Respondent filed a statement and documents supporting his waiver request in accordance with the March 3, 2005 Order. Respondent's submissions constitute the complete record upon which the decision in this case is based.

DISCUSSION

The pay the Department has asserted authority to collect from Respondent reflects 21 hours of salary for Pay Period 6 of 2004, 80 hours of salary for Pay Period 7 of 2004, and 75 hours of salary for Pay Period 8 of 2004, during which Respondent was paid at the rate of pay for a GS-14, step 1, or \$40.83 per hour.⁴ The number of work hours listed in the BoCs total 176, or 22 eight-hour days. On January 29, 2004, Respondent was recalled to active military duty on very short notice.⁵ According to Respondent, he sat down with his Payroll Coordinator to fill out the timesheets with various forms of leave to cover the period he estimated he would be away. As part of the leave taken, Respondent was given 22 days of leave authorized by the U.S. Government to ameliorate the pressing manpower needs caused by the impact of the war in

existence and correct amount of the overpayment and/or modification of the repayment schedule due to financial hardship, to request a waiver of the debt in whole or in part, or to request an opportunity to pursue both proceedings.

⁴ Pay Period 6 runs from February 22 – March 6, 2004; Pay Period 7 runs from March 7 – March 20, 2004; and Pay Period 8 runs from March 21 – April 3, 2004.

⁵ See Respondent's March 15, 2005, statement, and January 29, 2004, email from Payroll Coordinator stating that Respondent has been called to active duty effective February 2, 2004.

Iraq.⁶ Both Respondent and his Payroll Coordinator believed that he was entitled to these 22 days of leave, and investigated his eligibility for this leave prior to Respondent's departure for Iraq.⁷ Further, Respondent attempted to get clarification and/or additional guidance on the use of military leave but was unable to get such guidance, and relied on what information he could garner prior to his departure.⁸ Respondent notes that he accepted the 22 additional days of military leave in good faith as compensation to assist in the hardship of performing active military duty. Respondent also notes that the U.S. Army also failed to pay him for the month of April 2004.⁹

A waiver proceeding is a narrowly focused proceeding; at issue 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. A waiver of claims of the United States against a debtor arising out of erroneous payments of pay is possible only when the collection of the erroneous payment would be against equity and good conscience, and not in the best interests of the United States. In addition, only when there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the Respondent, or any other persons having an interest in obtaining a waiver may waiver be granted.¹⁰

The standard for determining whether a waiver is appropriate in salary overpayment cases considers, first, two threshold matters; namely, whether the overpayment to Respondent

⁶ Effective November 24, 2003, all Federal employees activated for military service in support of the national emergency declared by the President of the United States are entitled to the 22 days of military leave authorized by 5 U.S.C. § 6323(b). *See* Frequently Asked Questions on Military Leave, available at <http://www.opm.gov/oca/LEAVE/HTML/MILQA.asp>.

⁷ *See* Respondent's March 15, 2005, submission.

⁸ *See* Respondent's March 15, 2005 statement and an attachment of email communications included in his submission.

⁹ *See* Respondent's March 15, 2005, submission (April 29, 2004, letter from J. Patrick Hughes, Ph.D., Command Historian, Department of the Army, 99th Regional Readiness Command).

¹⁰ Stated another way, whenever a party who seeks fairness and equity has violated good conscience or good faith with reference to the matter at issue, the doors of equity will be shut. *See also*, Salary Offset to Recover Overpayments of Pay or Allowances from Department of Education Employees, 34 C.F.R. Part 32 (2004).

constitutes an *erroneous payment of pay*¹¹ and, secondly, whether Respondent lacks fault.¹² As waiver constitutes an equitable remedy, it is not available to a party who is not entirely without fault.¹³

Respondent was paid both his full civilian pay and military pay for 22 days of military leave.¹⁴ Respondent does not dispute the validity of the debt, and that the payment made to Respondent was in error. Consequently, the primary focus of Respondent's arguments is directed toward whether Respondent lacks fault, and whether collection of the debt would be against equity and good conscience.

The standard employed to determine whether Respondent is at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person would have been aware that he or she was receiving more than entitled, or had no reasonable expectation of payment in the amount received.¹⁵ Waiver determinations are based solely on the facts and circumstances giving rise to the erroneous payment and the employee's knowledge or fault in the matter. Where a reasonable person would have made inquiry, but the employee did not, then he is not free from fault.¹⁶ With regard to fault, it is axiomatic that an employee who knows or who should know that he or she is receiving erroneous overpayments cannot acquire title to the erroneous amounts.¹⁷ In assessing fault, the issues raised in this proceeding, are whether Respondent's belief that he was entitled to receive the 22 days of military leave is reasonable, and whether Respondent acted reasonably in inquiring as to how to utilize this additional military leave.

¹¹ An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to the employee's salary. *See* 34 C.F.R. Part 32 (2004)

¹² Although it may seem counterintuitive, the fact that the Department may have erred in making the overpayment does not relieve the overpaid person from liability. More precisely, although erroneous salary overpayments usually arise as a result of mistakes by those with the responsibility for making salary payments, the overpayment, nevertheless, is in excess of the amount authorized; therefore, the government has the right to recover the excess amount.

¹³ *See* DOHA Case No. 02040401 (May 21, 2002).

¹⁴ The tribunal notes Respondent's claim that he did not receive his full military pay for April 2004. Respondent, did not, however, demonstrate that his April 2004 pay is connected with the deployment at issue.

¹⁵ *See In re Troy A. Watlamet*, Dkt. No. D 2001-29 (U.S. Dep't of Int.) (March 14, 2003).

¹⁶ *See In re Vincent L. Brown*, Dkt. No. D 2003-118 (U.S. Dep't of Int.) (August 5, 2004).

¹⁷ *See* DOHA Case No. 98040112 (July 8, 1998).

A Federal civilian employee serving as a reservist or National Guardsman is entitled to 15 days of military leave¹⁸ per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in a subsequent fiscal year until it totals 15 days at the beginning of a fiscal year.¹⁹ For these 15 days of military leave, an employee's military pay shall be credited against his or her civilian pay.²⁰ Federal law provides for an additional 22 days of military leave for Federal civilian employees ordered to perform emergency duty in support of a contingency operation.²¹ A contingency operation is defined as a military operation that is designated by the Secretary of Defense as an operation in which members of the armed forces become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or results in the call to, or retention of, active duty members of the armed forces.²² Under this provision, Federal civilian employees are entitled to the greater of their military or civilian pay. Pay received by a Federal civilian employee for military service for a period for which he or she is granted military leave shall be credited against the civilian pay payable for that same period.²³

A Federal civilian employee may choose not to take military leave and instead take annual leave in order to retain both civilian and military pay.²⁴ If a Federal employee elects to use military leave, an agency may calculate the amount of military pay (less any travel, transportation, and per diem allowances) an employee will receive for the time period that corresponds to the 22 days of military leave, and reduce the employee's civilian pay by that amount during the 22 days of military leave.²⁵ An agency does not need to process personnel actions (SF 50s) for periods of annual leave or military leave because the Federal Personnel

¹⁸ Military leave is credited to a full-time employee on the basis of an eight-hour workday. A full-time employee working a 40-hour workweek will accrue 120 hours (15 days x 8 hours) of military leave in a fiscal year, or the equivalent of three 40-hour workweeks. Military leave under 6323(a) will be prorated for part-time employees and for employees on uncommon tours of duty based proportionally on the number of hours in the employee's regularly scheduled biweekly pay period.

¹⁹ See 5 U.S.C. § 6323(a)(1).

²⁰ See 5 U.S.C. §§ 5519 and 6323(a).

²¹ See 5 U.S.C. § 6323(b).

²² See 10 U.S.C. § 101(a)(13).

²³ See 5 U.S.C. § 5519.

²⁴ See 5 U.S.C. § 6323(b) and (c).

²⁵ See 5 U.S.C. § 5519.

Payroll System (FPPS) documents an employee's use of paid leave.²⁶ Agencies should document an employee's use of leave without pay (LWOP) to perform military duty using the action, LWOP-US. Employees may use annual leave or military leave intermittently with LWOP while performing their military service.²⁷

Respondent asserts that he sat down with his Payroll Coordinator to coordinate his leave usage for the period he was called away to active military duty. Respondent asserts that he proactively sought guidance and counseling on how to utilize the 22 additional days of military leave, noting that he had deployed on active military duty more than once in support of military operations in Iraq. Respondent further argues that he was given inadequate and/or incorrect information on how to utilize the 22 additional days of military leave and was, thus, not able to make an informed decision. Respondent also asserts that he received no guidance from the military personnel staff regarding the impact of military pay on civilian pay.

In applying the fault standard to this case, the tribunal concludes that Respondent lacks fault. Respondent made a diligent attempt to seek guidance on how to utilize the additional 22 days of military leave by meeting with his Payroll Coordinator as well as by engaging in email inquiries with other Department and DOI employees as to how to incorporate this leave. It is clear from this email communication, Respondent was taking different types of leave to cover the period he was away on active military duty. Based on the incomplete guidance he received and the confusion over how to code his military leave (both his standard military leave as well as the additional 22 days), Respondent's belief that he properly utilized the 22 additional days of military leave was reasonable. Respondent's actions in repeatedly seeking guidance on this matter further satisfies his duty to have made an inquiry into how to utilize the additional military leave as well as how it would impact his time away from his civilian position and his civilian pay.²⁸ The tribunal further notes that Respondent was required to deploy on short notice to Iraq, and that while serving, his ability to further pursue inquiry on this matter was either limited or non-existent.

Next, the tribunal must determine whether collection of the debt would be against equity and good conscience. In the instant proceeding, Respondent believed he was entitled to the compensation he received while away on military duty. Respondent also asserts that he accepted the additional leave in good faith based on the hardship imposed by his swift recall to military duty. Additionally, although the fact that Respondent failed to receive his military salary for

²⁶ See Frequently Asked Questions on Military Leave, available at <http://www.opm.gov/oca/LEAVE/HTML/MILQA.asp>.

²⁷ See *Id.*

²⁸ See Respondent's March 15, 2005, submission (Signed Statement from Tammy Connelly, Payroll Coordinator) (Ms. Connelly stated that she repeatedly attempted to get clarification on how the 22 days of additional military leave would impact Respondent as well as how to properly code Respondent's leave on his timesheets.)

April 2004 does not coincide with Pay Periods 6, 7, and 8, it does indicate that waiving the overpayment debt would not constitute a windfall. Consequently, waiver of the aforementioned three overpayments would not be against equity and good conscience. Accordingly, waiver of Respondent's debt is granted.

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 is **GRANTED**.

So ordered, this 8 day of July 2005.

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