

UNITED STATES DEPARTMENT OF EDUCATION

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

TELEPHONE (202) 619-9700

FACSIMILE (202) 619-9726

In the Matter of

JACQUELINE,

Docket No. 05-12-WA
Waiver Proceeding

Respondent

DECISION ON WAIVER

This case emerges out of a request arising under a statute—the General Accounting Office Act of 1996 – authorizing the waiver of claims of the United States against debtors as a result of erroneous payment of pay to a federal employee.¹ The legal authorities pertinent to this waiver request draw from the aforementioned statute, the Department’s implementing regulations at 34 C.F.R. Part 32 (§ 32.1 *et seq.*), and the policy set forth in the U.S. Department of Education (Department) *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (June 2005).² Together, these legal authorities prescribe procedures for handling debts, authorizing deductions from wages of federal employees to pay debts to the United States for such things as salary overpayments, and setting standards for waiving those debts when appropriate.³

¹ 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.)

² See also government-wide regulations issued by the Office of Personnel Management (OPM) (5 C.F.R. Part 550, Subpart K) (OPM’s Subpart K regulations provide the standard followed by federal agencies when promulgating agency-specific regulations implementing 5 U.S.C. § 5514).

³ 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 correct 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. In addition to regulations promulgated by the Department, standards prescribed by the Department of Justice and the Department of Treasury govern administrative debt collection efforts those standards are widely known as the Federal Claims Collection Standards (FCCS). See 31 U.S.C. § 3711 (2000) and 31 C.F.R. ch. IX, Parts 900—904 (2000). Agencies are required to : (1) adopt the FCCS; or (2) prescribe agency regulations for collecting such debts by administrative offset, which are consistent with the FCCS, 31 U.S.C. § 3716. Respondent is a former

The Handbook, ACS-OM-04, specifically delegated 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 authorized waiver official who has been assigned this matter by OHA.⁴ The 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 written statement and attached submissions of Respondent, the Department's Bill of Collection (BoC), and narrative supplement by Darlene Bentley, the BoC preparer and Denver payroll representative, with attachments,⁵ and the Federal Personnel Payroll System (FPPS) forms and Standard Form (SF)-71s covering Respondent's requests for accrued sick leave between November 2 - 24, 2004, supplied by Respondent's former office.⁶ Respondent identifies December 3, 2004, as her retirement date and last date of employment. Denver payroll confirms Respondent's retirement Action per FPPS Trac Status History screen showing Respondent's retirement action initiated on Dec. 1, 2004 and completed December 16, 2004.⁷ This decision constitutes a final agency decision.

For reasons that follow, the circumstances of this case do conform to the threshold factors warranting partial waiver of 2.15 hours of salary overpayment, but waiver is denied for the additional 40 hours of overpayment.

Procedural History

In the case at bar, on February 25, 2005, the United States Department of Education, Office of Management (OM), Human Resources Systems Team authorized the issuance of an initial notice of salary overpayment identifying that Respondent owed a debt to the Department in the amount of \$1043.98.⁸

The Bill of Collection (BoC) issued to Respondent states the basis of the overpayment as: "Employee retired 12-03-04 (Pay Period 0426). Employee was paid 80 hours but was only entitled to 37.45 hours pay. Employee overpaid 42.15 hours. Payroll substituted employees annual leave for advanced sick leave granted in Pay Period 0424 which caused the employee to be over paid the additional 2.15 hours. See attached leave audit."

In response to the Department's notice of overpayment, Respondent filed a timely waiver request. Respondent's initial filing with OHA was received on March 17, 2005 and included a copy of the BoC.⁹ Linda Barnes, the Department's Office of Human

employee of the Department; however, the rules regarding debt collection of former Federal employees are applicable.

⁴ See, 5 U.S.C. 5584(b) (designating the exercise of authority held by the authorized official in waiver cases).

⁵ Pursuant to a telephonic contact on July 14, 2005, Ms. Bentley generated an explanatory BoC narrative, with supporting attachments, identified as Documents 1- 9.

⁶ Federal Student Aid, Atlanta Service Center.

⁷ FPPS History is identified as Denver payroll Attachment #8, shows the retirement action steps.

⁸ This overpayment is identified as File No. 05LCBEL5 in the February 23, 2005 notice to Respondent.

⁹ Prepared by Denver Payroll Operations Group, Darlene Bentley, who prepared and attached a 1-page hand-written leave audit.

Resources representative was contacted by me for a copy of the Department's overpayment notification letter (February 25, 2005) with the BoC and a one-page handwritten attachment (the attached leave audit referenced in the BoC). Receipt of the February 25, 2005 letter did establish timeliness of the waiver request as Respondent had not included it with her March 17, 2005 filing.

An Order Governing Proceedings (OGP) was issued on April 7, 2005, allowing Respondent the opportunity to, among other things, fully identify and explain any facts and submit any documents which support her position by April 22, 2005. Following receipt of the OGP, Respondent submitted written submissions, dated March 17, 2005, and April 18, 2005, more fully described below.

Respondent argues that waiver is warranted because she did not request advance leave and would not have done so knowing that she was retiring with her last day of work ending on December 3, 2004. Respondent's March 17, 2005 submission, states, "I retired on December 3, 2004, from U.S. Department of Education (Region 4) after thirty (30) years. I was out of the office from November 29-30, 2004 and December 1-2, 2004. I did not request any advance sick leave from the U.S. Department of Education. Knowing that my income would be limited. When I received my paycheck I through (sic) they were paying me for my annual leave(s)." Moreover, Respondent submits that she did not know she was receiving overpayments because she thought upon her retirement, and as part of her retirement, she was being paid out her annual leave.

Respondent supplies the following details in her April 18, 2005 letter: "According to Employee Express my information was last updated on November 27, 2004, with a 47.5 hours Sick balance and 50.15 hours of Annual leave. December 3, 2004, was my last date of employment with the Department. And my leave balance was 64.45 sick and 25.15 annual.¹⁰ I acknowledge the validity of the debt, according to the calculations, but the debt should be waived because I did not request any advance sick leave knowing that I would be retiring on the 3rd of December 2004. I did work for the Federal Government for 30 years and have never requested any advance leave. No one has been able to give me copies of my request for advance leave. I feel that I should not be penalized for someone else's mistake; when I received my last paycheck I though(t) it that was for annual leave."

Pursuant to Respondent's insistence that she had never requested any advance leave, and with a BoC which relied on a cryptic leave attachment, unnamed for both the employee and the preparer, a conference call was held on July 14, 2005 with the BoC preparer, Darlene Bentley, who then submitted a two-page narrative with attachments to clarify the overpayment by redescribing it in terms of two issues.¹¹ In explaining the handwritten leave audit to the BoC, Ms. Bentley shows a clear designation of 80 hours earned for PP#26 with notation of "No acc (account) of 40 hours, listed next

¹⁰ Respondent included attachments for these leave balances.

¹¹ This supplemental information is described as Darlene Bentley's reconstruction, accepted into the record, and copy supplied to Respondent. Materials reviewed with Respondent on July 18, 2005.

to the 80. This is hours earned in that specific pay period, separate from leave balance notations.

FAULT

At issue in this case is whether Respondent's arguments and submissions warrant granting waiver of a portion or the entire overpayment in accordance with standards prescribed by statute and consistent with the case law and regulations of the Department. In a waiver proceeding, the debtor acknowledges the validity of the debt or urges there is an absence of any reason to recognize the overpayment as an erroneous payment.

A waiver of a claim of the United States against a debtor arising out of an erroneous payment of pay is possible only when the collection of the erroneous payment would be against equity and good conscience and not in the best interest 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 person having an interest in obtaining waiver, may waiver be granted in a salary overpayment case. Thus, 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*¹² and, secondly, whether Respondent lacks fault.¹³

Respondent does not dispute the validity of the debt. There is no dispute that this case involves an "erroneous payment of pay." The nature of the debt in this case involves an "error in time and attendance records," which is identified in the Department's regulatory designation of salary overpayment as a type of payment of pay subject to both waiver and administrative offset proceedings.

In this case the BoC identifies two overpayment issues: 1) 2.15 hours of advanced leave and 2) 40 hours of pay (unearned salary). We will review the issues, as separately set forth.

Concerning the 2.15 hours of advanced leave, showing as a negative balance for PP#26, Denver payroll's handwritten attachment to the BoC shows a negative 2.15 under heading of LWOP, and Denver provides a cumulative leave tally with 2.15 hours as negative leave in PP#26. (Bentley's Attachment # 7) While Respondent may technically owe 2.15 hours, all of Respondent's SF-71 forms, submitted consecutively for dates from November 2—December 2, 2004, show requests and approvals for accrued sick leave. None show requests or approvals for advance sick leave, signed by Respondent, and

¹² 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).

¹³ The fact the Agency may have erred in making the overpayment does not relieve the overpaid person from liability. More precisely, since an overpayment is presumptively in excess of the amount of authorized salary, the issuance of a BoC initiates the government's right to recover an excess amount. *See In re Richard, Dkt. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005)*.

properly certified by a supervisor. Furthermore, in Darlene Bentley's reconstruction of the BoC, she traces the existence of a negative 2.15 hours through Pay period 26, but confirms that the Department does not have documentation to support an advance of leave for the 2.15 hours. As such, Respondent cannot be found to be at fault for obtaining 2.15 advanced leave hours when there are no such advance leave requests supporting it. The Department's confirmed lack of documentation on this supports Respondent's claim that she never requested advance leave, knowing she was retiring.

In applying the threshold factors to this case, the tribunal cannot conclude that Respondent knew or should have known of the error in salary payment and, therefore, the circumstances of overpayment warrant granting waiver of this portion of the debt, for 2.15 hours. Respondent is entitled to waiver of this amount which is calculated roughly at \$61.00 (at hourly rate of \$26.99, with exact amount to be re-determined by payroll, with appropriate deductions made).¹⁴

Moving now to the 40 hours of pay (unearned salary), Respondent's overpayment resulted during PP#26 when she was paid for 80 hours, instead of 40 for working just the first week of a two week pay period. Denver payroll (Ms. Bentley) reconstructs that Respondent received this salary for the week of December 6—10, 2004, which was after her last day of work, and Respondent's chosen retirement date of December 3, 2004. Respondent's retirement date fell mid-pay period, at the end of the first of the two-week pay period and she did not work the second week of that pay period. Pay Period 26 covers November 28—Dec. 11, 2004. Respondent's Leave and Earnings Statement (LES) for PP#26 shows she received payment for 80 hours under the subsection showing "Earnings/Other Pay" HRS,¹⁵ and the net pay amount shown corresponds to 80 hours of pay for Respondent.

In determining whether or not the Respondent is at fault, pertinent circumstances such as position, grade level, education, and training may be taken into consideration. Notably, fault can derive from an act or a failure to act. Unlike fraud, fault does not require a deliberate intent to deceive.¹⁶ Considerations in finding whether a debtor should have known about an error in pay include: (a) whether the erroneous payment resulted from the employee's incorrect, but not fraudulent, statement that the debtor 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.

In applying the threshold factors to this case, the tribunal concludes that Respondent knew or should have known of the error in salary payment by inspecting the LES for pay period 26 and seeing the credit for 80 hours worked through PP#26 ending

¹⁴ Gross calculation /estimate here reflecting Respondent's hourly rate, with need for Denver payroll to finalize and deduct from any final overpayment amount.

¹⁵ Ms. Bentley's Attachment #4 (Respondent's Leave and Earnings Statement/ Reissued) for PP#26.

¹⁶ See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

date of December 11, 2004. Respondent did not submit a copy of the LES for PP#26 to the tribunal. An employee has a duty to inspect and verify his/her leave and earnings statements. Arguably an employee has perhaps a heightened duty to do so when he/she is retiring, and it is not just a normal business cycle. Respondent failed to meet this duty and must be held to be at fault.¹⁷ If Respondent inspected this LES, she would have clearly seen the overpayment, and could have set aside the improperly paid 40 hours for those days she never worked.

While Respondent claims she was being paid for her leave balances, and she submits a partial copy of the Employee Express summary page to show she had annual leave of 64.45 hours; sick leave of 25.15 hours as of December 3, 2004, this is not persuasive, nor does it actually address the 80 hours listed as those current (worked) hours. Respondent submitted an Employee Express statement dated November 27, 2004, and an LES for PP#24, ending November 13, 2004 to show those leave balances. Respondent also submitted LES for PP#04 and 05 without any explanation for her non-inclusion of the LES for PP# 26. Clearly, Respondent continued to monitor her leave and earnings statements into PP#05, ending February 19, 2005.

For the 40 hours of pay (unearned salary), a starting premise in this case is that the Respondent has a duty to check salary payment records, particularly her leave and earnings (LES) statements to ensure her pay is accurate. Respondent fails to show she met this duty. As such, Respondent does not lack fault.

In any event, a clear instruction appears at the bottom of each LES, advising employees if they have any pay/leave questions to call payroll at a (long distance) hotline number and, if calling from home, to use the listed toll free number. Upon receipt of the LES for PP#26, if Respondent had any questions to clear up about the 80-hour payment,¹⁸ she could have had direct access to help and clarification on this. Thus, Respondent's explanation, without more, is insufficient.

Equity and Good Conscience

Notwithstanding the aforementioned determination that the threshold factors for waiver are not met in this case for the 40 hours of unearned salary payment due to the tribunal's fault finding, the tribunal will briefly consider Respondent's argument's regarding equity. It is worth noting, however, in cases where it is determined that an employee does not lack fault, Respondent's further arguments establishing whether the

¹⁷ See, e.g., *In the Matter of Ray E. Lundquist*, Dkt. No. D2003-105 (U.S. Department of Interior) (June 21, 2004) (holding that when an employee fails to review documentary records, including leave and earnings statements, which, if examined, would have shown the overpayment, the employee is not free from "fault" as that term is used in the statute."); See also, DOHA Claims Case No. 00111319 (July 19, 2001) (waiver of debt under 5 U.S.C. § 5584 denied because the employee should have reviewed his leave and earnings statements in sufficient detail to detect the error and is therefore partially at fault in the accrual of the debt.)

¹⁸ Testing the theory Respondent could think PP#26's 80-hour payment was final salary of 40 hours and annual leave, Payroll points out inherent contradictions of the numbers since if Respondent had 50.15 or 58.15 annual hours at that time, the addition of 40 plus either annual number, gives more than 80 hours of pay. Yet 80 hours is the total earned on the LES. See, Bentley narrative, July 14, 2005.

collection of the debt would be “against equity and good conscience” have no bearing on the decision to deny waiver.

To secure equity and good conscience, Respondent must have acted fairly and without fraud or deceit as to the controversy at issue. Beyond that framework, however, there is actually little guidance on the balance of equities or the appraisal of good conscience.¹⁹ In balancing the equities under similar circumstances, tribunals have drawn upon the concept of fairness by exercising judgment in light of the particular facts of the case. A number of factors have been found pertinent to determining whether collection of a claim against an employee is against equity and good conscience, including – whether recovery of the claim would impose an undue financial burden upon the debtor under the circumstances.²⁰

Respondent submits that a waiver should be granted since repayment would be a financial hardship due to her income dropping from \$2500 per month to \$1600.²¹ She goes on to assert that paying the overpayment amount will exceed her income and affect her ability to support her family. Although these arguments show unfortunate circumstances, the fact that Respondent is on a reduced income due to retirement is not by itself controlling. Respondent has not supported with evidence or explained the costs of supporting a family, or other budgetary problems. Covering cost of living expenses is always a concern whether one is retired or not. Notwithstanding the tribunal’s, April 7, 2005 Order Governing Proceedings urging Respondent to obtain and submit any “documents, affidavits, or otherwise supporting evidence,” to support her appeal, Respondent did not do so. Consequently, Respondent’s decision not to substantiate the financial hardship condition, leaves the tribunal unable to weigh these factors favorably in the balance of equity and good conscience. Yet, Respondent’s concern about financial hardship from debt repayment on a reduced income, has merit. In this regard, Respondent may find it appropriate to consider seeking a voluntary repayment schedule when arranging for repayment of a debt.²²

CONCLUSION

The tribunal finds that a partial waiver for 2.15 hours should be granted, because Respondent refuted the Department’s claim that she is at fault for overpayment of this amount due to advance leave requests. Deduction of this amount from the overpayment balance will be necessary.

The tribunal finds that Respondent should have known that an error in salary payment existed for the 40 hours of unearned but paid salary during PP#26, inasmuch as

¹⁹ See , e.g., *Giles v. Department of Human Resources Development*, 521 P.2d 110, 117 (Cal. 1974).

²⁰ See *in re Anh-Chau*, Dkt. No. 05-01-WA, U.S. Dep’t of Educ. (June 17, 2005) for factors generally; See also, *In the Matter of Mrs.Kathryn H. Vandegrift*, 55 Comp. Gen. 1238, B-182 704 (July 2, 1976) on financial burden.

²¹ Respondent’s waiver request letter of March 17, 2005

²² Respondent may seek to set up such a repayment plan through contacting Nancy Hoglund, Supervisor, Debt Management Group, OCFO.

she ended employment at the mid-point of that two-week pay period. Waiver cannot be granted for this amount.

ORDER

Respondent requested waiver of the entire debt. Respondent's request for waiver of the entire debt, 42.15 hours is denied, with the exception of 2.15 hours which must be deducted, as set forth herein.

So ordered this 25th day of July, 2005.

Nancy S. Hurley
Waiver Official