



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. 05-14-WA

VERONCE,

Waiver Proceeding

Respondent.

DECISION GRANTING WAIVER

This proceeding is based on a U.S. Department of Education (Department) employee's request for waiver of a salary overpayment of \$390.09.¹ 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

¹ The overpayment is identified as File No. 05LCBVW2 in the March 7, 2005 notice.

² See General Accounting Office Act of 1996, Pub.L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828 (Act); 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 existence and correct amount of the overpayment and/or modification of the repayment schedule

The Handbook, ACS-OM-04, specifically delegated the Secretary's waiver 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 Bill of Collection (BoC), documents generated by the Federal Personnel Payroll System (FPPS), and medical documentation submitted by Respondent. This decision constitutes a final agency decision.

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

PROCEDURAL HISTORY

On March 7, 2005, the Department's Office of Management (OM) authorized the issuance of an initial notice of salary overpayment identifying that Respondent owed a debt to the Department. The Bill of Collection (BoC) stated that a corrected timesheet was submitted changing 10 hours of holiday pay (Pay Code 050) to Leave Without Pay (LWOP) (Pay Code 101) for Pay Period 02 of 2005.⁴ The change resulted in an overpayment of 10 hours, or \$390.09. By letter dated March 21, 2005, Respondent filed a written request for waiver.

In an April 1, 2005, Order Governing Proceedings, Respondent's request for a waiver was deemed timely. On April 19, 2005, Respondent filed a statement and documents supporting her waiver request in accordance with the tribunal's April 1, 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 10 hours of salary for Pay Period 2 of 2005. Respondent was placed on LWOP for this pay period making her ineligible to receive holiday pay. Respondent states that she was seriously ill and unaware of the circumstances surrounding the overpayment. Respondent states that she suffers from end-stage kidney disease and receives hemodialysis treatment at a local hospital three times a week. When the overpayment occurred, Respondent states she was hospitalized during the pay period at issue, and was again hospitalized for additional surgery in February 2005. Respondent states that she tasked her daughter to notify her supervisor of her hospitalization. According to Respondent, on January 3, 2005, her supervisor retired and the new supervisor placed her in an absent without leave (AWOL) status. Upon receiving documentation of Respondent's

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 2 ran from December 26, 2004 until January 8, 2005. The federal holiday at issue in Pay Period 2 occurred on December 31, 2004.

hospitalization, the supervisor changed Respondent's leave status to LWOP.⁵ According to Respondent, she had used up all her leave by the time her leave status was corrected and she states that this is what probably caused the overpayment. Again, Respondent asserts that she was unaware of the details of what was going on due to her serious illness.

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.

The standard for determining whether a waiver is appropriate in salary overpayment cases considers, first, two threshold matters; namely, whether the overpayment to Respondent constitutes an *erroneous payment of pay*⁶ and, secondly, whether Respondent lacks fault.⁷ As waiver constitutes an equitable remedy, it is not available to a party who is not entirely without fault.⁸

LWOP means an absence from duty in a nonpay status.⁹ Nonpay status includes LWOP and AWOL.¹⁰ The general rule is that an employee who is in a nonpay status immediately preceding and immediately following a holiday is not entitled to be paid for the intervening

⁵ The BoC identifies Respondent's leave status as LWOP.

⁶ 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)

⁷ 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.

⁸ *See* DOHA Case No. 02040401 (May 21, 2002).

⁹ 5 C.F.R. § 630.1202.

¹⁰ *See* Effect of Extended Leave Without Pay (LWOP) (or Other Nonpay Status) on Federal Benefits and Programs, available at http://www.opm.gov/oca/leave/HTML/lwop_eff.htm.

holiday.¹¹ This rule is based on a presumption that an employee should not be paid for the holiday based on the assumption that an employee would not have worked on the holiday itself.¹² Conversely, if an employee is in an authorized nonpay status immediately before or immediately after a holiday, he or she will be compensated for said holiday.¹³ The aforementioned rules are articulated in opinions issued by the Comptroller General in 1930 and 1977. Other than the opinions issued by the Comptroller General, there has been no statutory or regulatory authority regarding LWOP or other nonpay status and compensation for a holiday.¹⁴

On January 5, 2005, the Office of Personnel Management (OPM) issued proposed regulations to clarify when an employee is entitled to be paid for a holiday.¹⁵ In the Federal Register notice, OPM states that it is issuing this guidance in response to numerous inquiries it receives from agencies and employees as to an employee's entitlement to pay for a holiday when the employee has been in a nonpay status before and/or after the holiday. OPM further articulates that employees are paid for a holiday on which they do not work under the assumption that, but for the holiday, they would have worked and earned compensation. OPM also states that it is logical to assume 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.

¹¹ See *In re Comptroller General McCarl to the Secretary of the Navy*, 1930 WL 1240 (Com.Gen.), 9 Comp. Gen. 350 (February 10, 1930) and *In re Sharon A. McShane*, 1977 WL 13286 (Comp.Gen.) (February 22, 1977).

¹² See *In the Matter of Non-Pay Status – Pay for Holiday Not Worked March 2, 1977*, 2977 WL 10366 (Comp.Gen.), 56 Comp. Gen. 393.

¹³ See *Id.* (Employee must have worked on the workday immediately preceding or following the holiday.)

¹⁴ See Index of Laws, Regulations, and Other References Related to Leave Administration, available at <http://www.opm.gov/oca/leave/HTML/LEVINDEX.asp#h>. The guidance offered by 5 U.S.C. §§ 6101 and 6103, Executive Order 11582 of February 11, 1971, and 5 C.F.R. § 610.203 did not specifically address this issue. Additionally, the Department does not provide any guidance on this matter. See *Personnel Manual Instruction, Non-Pay: Absence without Leave (AWOL) and Leave without Pay (LWOP)*, PMI 630-8 (May 11, 1981).

¹⁵ See Fed. Reg. Vol. 70, No. 3, page 1070 (January 5, 2005). This is OPM's first articulation of this rule. The proposed regulation will be codified at 5 C.F.R. § 610.204 -- **Employee in nonpay status immediately preceding or following a holiday** -- An employee who is in a nonpay status on his or her entire workday immediately preceding and following a holiday is not entitled to receive pay for that holiday. A full-time employee who is in a pay status for at least 4 hours during any part of his or her workday immediately preceding or following a holiday is entitled to receive pay for that holiday. For a part-time employee or an employee on an uncommon tour of duty, the required number of hours in a pay status immediately preceding or following the holiday must be prorated, based upon the number of hours the employee was scheduled to work on that day in relation to an 8-hour day.

OPM assumes that employees who are in a pay status for a portion of the day before or after a holiday would have been in a pay status on the holiday.

Respondent does not dispute the validity of the debt. There is no dispute that this case involves an “erroneous payment of pay.” The debt in this case involved payment for a holiday when the employee allegedly was in a nonpay status immediately before and after the holiday in question. What is not clear, however, is whether there is a reasonable basis to conclude that Respondent should have recognized the erroneous payment.

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.¹⁶ 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. In assessing fault, an individual’s position, grade level, education and training may be taken into consideration.¹⁷ Where a reasonable person would have made inquiry, but the employee did not, then he or she is not free from fault.¹⁸ Although an employee is expected to review his or her leave and earnings statements, and is considered to be at fault if a debt accrues due to failure to review them, waiver may still be granted to an employee who provides clear and convincing evidence of a medical condition that prevented such a review.¹⁹ Analogously, clear and convincing evidence of a medical condition that prevents an employee from being aware of the circumstances surrounding an overpayment may also serve to alleviate fault. This is not to say that an employee can shirk their obligation to ensure the accuracy of their pay by merely assuming their pay is accurate.²⁰ An employee must make a greater showing that he or she was unable to know the circumstances of their overpayment as well as unable to review their leave and earnings statements (LES) if such a review would have uncovered the error.

In applying the fault standard to this case, the tribunal concludes that Respondent lacks fault. Respondent’s statement that she was unaware of the erroneous payment, and unaware of what leave status she was put on during this absence is persuasive. Respondent had accumulated sick leave for the pay period at issue. Respondent’s absence on December 27 – 29, 2004, was recorded as paid sick leave.²¹ Additionally, Respondent’s supervisor retired at about the same

¹⁶ See *In re Troy A. Watlamet*, Dkt. No. D 2001-29 (U.S. Dep’t of Int.) (March 14, 2003).

¹⁷ See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep’t of Educ. (June 14, 2005).

¹⁸ See *In re Vincent L. Brown*, Dkt. No. D 2003-118 (U.S. Dep’t of Int.) (August 5, 2004).

¹⁹ See DOHA Case No. 00062601 (September 19, 2000).

²⁰ See *In re Ray E. Lundquist*, Dkt. No. D 2003-105 (U.S. Dep’t of Int.) (June 21, 2004).

²¹ Respondent had a compressed work schedule under which she worked four 10-hour days each week of the pay period. Under this schedule, Respondent was not required to work on December 30, 2004, and December 31, 2004, was a federal holiday. According to the FPPS, Respondent’s

time as Respondent was out, which caused further confusion over why Respondent was absent, and it resulted in her new supervisor incorrectly placing her on AWOL status. Further, the tribunal finds that the rule regarding LWOP status and holiday pay was not well known. OPM acknowledges this by its attempt to clarify and publish this rule in its January 5, 2005, Federal Register notice. An employee unable to track down old Comptroller General waiver decisions would be hard pressed to be aware of this rule let alone an employee suffering from a serious illness, and hospitalized during the pay period at issue. Given that Respondent had sick leave and only ran out during her December 2004 hospitalization, it would not be appropriate to hold her at fault.

On February 25, 2005, Respondent received written confirmation that she suffers from end-stage kidney disease.²² Respondent's treatment includes hemodialysis three times a week.²³ Respondent also demonstrated that she was hospitalized in December 2004, and again in February 2005.²⁴ Respondent has demonstrated that her serious illness and medical treatments prevented her from knowing about the circumstances surrounding her overpayment as well as her ability to review documentation such as LES statements.

effective date of retirement was December 31, 2004. FPPS, however, also indicates that Respondent was in paid leave status for 30 hours and was placed in a non-pay status for 30 hours in Pay Period 2. *See* FPPS Time and Attendance Screen Shots for Respondent submitted by the Department's Human Resources Services office (upon request of the Waiver Official.) Although Respondent does not contest the validity of the overpayment, December 30, 2004, may have been her compressed day off, which would have placed her in a pay status the day immediately preceding the holiday. Additionally, OPM has published guidance indicating that an employee will be entitled to receive pay for the holiday if the employee's retirement is made effective on that date. *See* Questions and Answers on Pay and Leave Administration for the New Year's Day Weekend, available at <http://www.opm.gov/flsa/oca/compmemo/1999/NEWYRQA.asp>.

²² *See* Respondent's Submission, Kaiser Permanente History Provider Note from Dr. Ronaldo S. Mayga dated February 25, 2005.

²³ *See Id.*

²⁴ Respondent submitted documentation regarding her December 28 – 30, 2004 hospital admission. *See* Respondent's Submission, Washington Hospital Center Notice of Service dated January 5, 2005.

Next, the tribunal must determine whether collection of the debt would be against equity and good conscience. To secure equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.²⁵ Where the circumstances are as consistent with honesty and good faith as with dishonesty, the inference of honesty is to be drawn.²⁶ Beyond this framework, however, there is minimal guidance on how to balance equity and/or appraise good conscience in waiver proceedings. While it appears there are no rigid rules governing the application of this phrase, many waiver cases intertwine the reasonableness of the debtor's actions or lack thereof (fault standard), with an analysis of any circumstance indicating dishonesty, or awareness of the overpayment.²⁷ Other factors include whether the recovery of the claim would be unconscionable under the circumstances, whether the employee has relinquished a valuable right or changed his or her position based on the overpayment, and whether recovery would impose an undue financial burden.²⁸

There is no evidence in this case suggesting Respondent did not act in good faith or was aware of the overpayment. Respondent was hospitalized twice during this period and undergoing time-consuming medical treatment. The lack of guidance available to employees regarding holiday pay when they are in LWOP status also indicates Respondent's lack of understanding and awareness. Consequently, waiver of the aforementioned overpayment would not be against equity and good conscience. Accordingly, waiver of Respondent's debt is granted.

²⁵ 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.

²⁶ See *In re Department of the Air Force – Fraudulent Claims*, 1978 WL 13485 (Comp. Gen.), 57 Comp. Gen. 664 (August 11, 1978).

²⁷ See *In re Chief Hospital Corpsman William R. Brown, USN (Ret.)*, 1996 WL 722777, B-270-349 (Comp. Gen.) (December 17, 1996); *In re Fort Polk Employees*, 1996 WL 615978, B-261-699 (Comp. Gen.) (October 25, 1996); *In re David L. Williams*, 1992 WL 338404, B-243-3135, B-243315.3 (Comp. Gen.) (November 5, 1992).

²⁸ See *In re Anh-Chau* at 5.

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 22 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