



UNITED STATES DEPARTMENT OF EDUCATION

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In the Matter of
CYNTHIA,

Docket No. 05-16-WA
Waiver Proceeding

Respondent

DECISION DENYING WAIVER

At issue in this case is whether a federal employee may obtain waiver of a debt arising from a salary overpayment and an erroneous use of a family emergency leave account. For the reasons that follow, I find that Respondent's arguments and submissions fail to persuade me that granting waiver of the debt is warranted. Accordingly, Respondent's request for waiver is denied.

This case emerges out of a request for waiver of a salary overpayment. The pertinent statutory authority for waiver of salary overpayments is set forth under the General Accounting Office Act of 1996 (the Waiver Statute), which authorizes the waiver of claims of the United States against debtors as a result of an erroneous payment of pay to a federal employee.¹ In addition to the Waiver Statute, the United States Department of Education's (Department) implementing regulations at 34 C.F.R. Part 32, and the policy set forth in the Department of Education, Administrative Communications System (ACS), *Handbook for Processing Salary Overpayments* (Salary Overpayment Handbook, ACS-OM-04) (June 2005) prescribe procedures for processing debts, authorize deductions from salary and wages to pay debts, and set standards

¹ General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (the Waiver Statute); *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, more fully, the statutory framework governing debt collection) and 5 U.S.C. § 5514 and 31 U.S.C. § 3716 (Congress enacted the Debt Collection Improvement Act of 1996 (DCIA), Pub.L. No. 104-134, April 26, 1996, 110 Stat. 1321).

for waiving debts.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 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), Respondent's submission of the sworn declaration of a coworker concerning timekeeping duties within Respondent's office, a copy of a computer screen shot of Respondent's Leave and Earning Statement for Pay Period 04-23, the Department's Bill of Collection (BoC), and printed copies of electronic communications between Respondent and the Waiver Official.

PROCEDURAL HISTORY

In the case at bar, on March 8, 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 in the amount of \$537.31. The notice authorized the Department to initiate an administrative offset of pay from the salary of Respondent as a result of an erroneous 19¼ hours of family emergency leave for Pay Period 04-23. In response, on April 17, 2005, Respondent timely requested waiver of the overpayment.

DISCUSSION

I.

The misfortunate facts of this case include Respondent's loss of a family member and the associated grief that such a loss imposes. In this regard, Respondent requested that a "Voluntary Leave Transfer Program" account be opened to allow her to care for an ill family member.⁴ In response, the Department opened a family emergency leave account for use by Respondent beginning May 12, 2003.⁵ Respondent informed the Department that her family member died on

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 (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 due process rights afforded a debtor when an agency seeks to collect a debt by administrative offset.

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

⁴ The Department participates in a Voluntary Leave Transfer Program administered by the Office of Management's Work/Life Programs Team. Under the program, an individual who needs leave because of a family or a medical emergency may use the unused accrued annual leave of another employee when such is transferred to the individual specifically for such use. See, Personnel Manual Instruction (PMI) 630-10, Voluntary Leave Transfer Program and Part 630 of 5 C.F.R. (2004).

⁵ A medical emergency is considered a qualifying personal or family medical emergency when:

October 15, 2004. Consequently, the basis for the leave account ended. The Department, accordingly, closed the family emergency leave account, but not before the agency had erroneously paid Respondent 19¼ hours of family emergency leave for Pay Period 04-23.⁶ When the Department determined that Respondent had been erroneously paid from the family emergency leave account, the Department subsequently issued a debt notice for the overpayment amount at issue in this case.⁷

In this case, Respondent argues that she is without fault and that waiver of the debt is warranted because she suffered a great deal from the loss of a significant family member and the associated grief that such a loss imposes. Taking that argument a step further, Respondent contends that the debt warrants waiver because the debt was created to apply “pressure” to her from a supervisor as an attempt by that person to “get rid of” her. In this regard, Respondent argues that the existence of the debt has caused stress. Respondent also contends that she played no role in the error that resulted in the creation of the debt.

Waiver may be granted only if a debtor succeeds in showing that he or she can satisfy the requisites of what is known as the *fault* standard. In assessing whether the fault standard is met, the waiver official must determine whether there is any indication of fraud, misrepresentation, or lack of good faith on the part of Respondent, or any other person having an interest in obtaining a waiver. More directly, fault is examined in light of the following considerations: (a) 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;⁸ (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;

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- The medical emergency is the employee’s, and the employee is expected to be without available paid leave for at least 24 hours because he or she has exhausted both his or her annual and sick leave accounts.
 - The medical emergency is that of a family member (which will require the employee's absence for a prolonged period); and the employee is expected to be without available annual leave for at least 24 hours because he/she has exhausted his/her annual leave account.
 - A medical emergency is a medical condition of an employee that is likely to require an employee's absence from duty for a prolonged period of time and would result in a substantial loss of income to the employee because of the unavailability of paid leave.

See, Personnel Manual Instruction 630-10, Voluntary Leave Transfer Program.

⁶ The Department officially closed the leave account effective October 15, 2004. A new leave account was opened for Respondent on November 20, 2004. The account was opened for a purpose distinct from the purpose of the prior account, but not entirely unrelated.

⁷ An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to the employee’s salary. The erroneous crediting of emergency leave constitutes an erroneous payment of pay. Thus, the debt in this case is subject to the Waiver statute. *See*, 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 Broadly stated, under the fault standard, the scope of Respondent’s duty extends to include the obligations to: (1) verify bank statements and/or electronic fund transfers of salary payments, (2) question discrepancies or unanticipated balances from salary payments, and (3) set funds aside for repayment when appropriately recognizing a salary overpayment. *See, In re William*, Dkt. No. 05-11-WA, U.S. Dep’t of Educ. (October 19, 2005).

or (c) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.⁹

In applying the fault standard to this case, I find that Respondent is not without fault because there can be no question that she had a clear duty to verify that the use of 19¼ hours of family emergency leave was consistent with the basis for which the emergency leave account had been established. The pertinent regulations and the Department's policy could not be clearer: use of leave in an emergency leave account must be consistent with the basis for which the account was established.¹⁰ Regrettably, when Respondent's basis for her use of emergency leave ended on October 15, 2004, Respondent's authorization to use the leave accrued in the emergency leave account also ended.

More to the point, emergency leave accounts are considered closed in the pay period when the basis for the account is no longer present.¹¹ Although transferred emergency leave may be substituted retroactively for any period of leave without pay or used to liquidate an indebtedness for any period of *advanced* leave that begins on or after the date fixed by the Department as the beginning of the medical emergency, transferred emergency leave may not be used after the end of the biweekly pay period in which the leave recipient is no longer affected by the medical emergency for which the leave was granted.¹² In addition, unused transferred annual leave remaining to the credit of the leave recipient must be restored to the original individual leave donors.¹³

Respondent's use of the emergency leave at issue was used for a personal medical emergency, rather than for the basis for which the family emergency leave account was established. As such, Respondent should have known that her use of leave ran contrary to the requirements of the Department's Voluntary Leave Transfer Program. Indeed, the record makes apparent that Respondent eventually established a new medical emergency leave account for a purpose distinct from her prior family emergency. This demonstrably shows Respondent's familiarity with the requirements and procedures of the Department's Voluntary Leave Share Program.¹⁴ More over, Respondent's voluntary participation in the leave share program comes with an evident responsibility to comply with the program's rules. Therefore, Respondent had a duty to question and resolve the erroneous salary payment. It remains fundamental to the analysis of when waiver may be granted that when an employee fails to review documentary records, including leave and earning statements, which, if examined, would have shown the overpayment and provided the employee with an opportunity to correct the overpayment, the

⁹ 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>; Standards for Waiver, 4 C.F.R. § 91.5 (2000).

¹⁰ See, Personnel Manual Instruction (PMI) #630-10, Voluntary Leave Transfer Program and Part 630 of 5 C.F.R. (2004).

¹¹ 5 C.F.R. § 630.909.

¹² 5 C.F.R. § 630.910.

¹³ *Id.*

¹⁴ There is no doubt, that the integrity of the leave share program depends, in no small part, upon the expectations of employees that donated leave is used in accordance with program requirements; under the Voluntary Lave Transfer Program, employees donate their earned hours to whom and for the purpose they deem fit.

employee is not free from fault.¹⁵

II.

Respondent argues that the debt in this case should be waived for an additional reason; namely, that the circumstances of collecting a salary overpayment debt from an employee soon after the employee suffered the loss of a significant family member is unconscionable.¹⁶ According to Respondent, it is against equity and good conscience to recover a debt when the debt arises as part of an expressed animus by a supervisor.¹⁷ Notwithstanding the vicissitudes of Respondent's relationship with her supervisor - - whatever that may be or have been - - Respondent's argument is flawed. Respondent's position proceeds from a premise that is unfounded; namely, that an employee is legally entitled to use the leave hours in an emergency leave account despite expiration of the basis or purpose of the leave account. Regardless of what motivated the supervisor to correct Respondent's time sheet for Pay Period 04-23, Respondent knew or should have known that she was not entitled to paid leave for the time she spent caring for an ill family member *after* the occasion of the family member's death.¹⁸

In addition, the equitable interests favoring waiver do not include Respondent's argument on unconscionability. It is certainly accurate to say that to establish the position that recovery of a debt is against good conscience, a debtor may show that it is unconscionable to require repayment of the debt. As such, it has been recognized that in waiver cases involving overpayments, unconscionability means "[g]oing beyond the bounds of what is customary or reasonable; ridiculously or unjustly excessive."¹⁹ Generally, circumstances that have supported

¹⁵ The fact that an agency 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. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

¹⁶ Respondent's argument is closely tied to her position that the debt is unwarranted or inaccurate. Since Respondent's waiver arguments are tightly woven to a challenge of the nature of the debt, this decision sets out the basis of the debt. Even so, it is noteworthy to recognize that in a waiver proceeding, the debtor acknowledges the validity of the debt or urges that there exists an absence of any reason to recognize the overpayment as an erroneous payment. In this light, issues regarding the specific existence or accuracy of debt are never before the waiver official. Accordingly, to the extent that Respondent's arguments or defenses actually raise issues concerning the validity of the debt, those arguments and defenses will not be addressed in this proceeding.

¹⁷ In her submissions, Respondent noted her belief that the debt in this case has some connection to an unnamed supervisor's attempt "to get rid of [her] because of [her] age."

¹⁸ Although at first blush, the decision in *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005) (*Veronce*), appears to support Respondent's position in this case, *Veronce* is distinguishable from the facts here. In *Veronce*, the waiver official held that it is appropriate to grant waiver of a debt arising from an erroneous payment of salary to an employee who was hospitalized, in a leave without pay status, and "unable to know the circumstances of [the] overpayment," the fulcrum of the waiver official's decision turns on a determination that the employee neither knew nor had reason to know that she was erroneously compensated while in a nonpay status. The facts of this case, however, compel the opposite result. By her participation in the leave share program, it is undeniable that Respondent knew the purpose or reason for which her emergency leave account had been established, and knew or had reason to know when that reason no longer supported use of leave from that specific emergency leave account. Hence, unlike the debtor in *Veronce*, Respondent's circumstances did not "prevent[] her from knowing about the circumstances surrounding her overpayment." See, *In re Veronce* at 6. Accordingly, *Veronce* is not applicable here.

¹⁹ *Aguon v. Office of Personnel Management*, 42 M.S.P.R. 540, 549-50 (1989); see also *Harrison v. Office of Personnel Management*, 57 M.S.P.R. 89, 95 (1993).

a claim of unconscionability, include: (1) an agency's failure to respond within a reasonable period of time to inquiries regarding an overpayment; (2) an agency's gross negligence in handling an overpayment case; and (3) the unreasonable terms of a one-sided agreement.²⁰ More over, under some circumstances, unconscionability may not infect the entire debt at issue; instead, a tribunal may decide to cut out a so-called "cancer of unconscionability" and require a debtor to repay only that portion of the debt that remains after the tribunal's incision. In the case at bar, however, Respondent demonstrates none of the foregoing factors. Simply put, a mere allegation of unconscionable conduct is not sufficient to shock the conscience of the tribunal. Accordingly, a further inquiry into whether the collection of the debt would be against "equity and good conscience" has no bearing here.

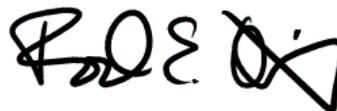
CONCLUSION

The tribunal finds that Respondent should have known that an error in salary payment existed; as such, waiver cannot be granted in this case.

ORDER

Respondent requested waiver of the entire debt. Having found that the circumstances of this case do not conform to the factors warranting waiver, Respondent's request for waiver is **DENIED**. This decision constitutes a final agency decision.

So ordered this 31st day of October 2005.



Rod Dixon
Waiver Official

²⁰ See, *Aguon v. Office of Personnel Management*, 42 M.S.P.R. 540, 550 (1989); *Irvine v. Office of Personnel Management*, MSPB, Docket No. SF-831M-97-0757-I-1 (October 4, 1999).