



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of
RUSSELL,

Docket No. 05-19-WA
Waiver Proceeding

Respondent

DECISION GRANTING WAIVER

Respondent filed a timely request for waiver of a debt caused by an erroneous salary overpayment.¹ The legal authorities pertinent to the waiver request draw from the waiver statute, the Department's implementing regulations at 34 C.F.R. Part 32 (§ 32.1 *et seq.*), 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).² Taken together, these authorities prescribe procedures for processing debts, authorizing deductions from wages to pay debts, and setting standards for waiving those debts when appropriate.³ The Salary Overpayment Handbook, ACS-OM-04, specifically delegates waiver

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) (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 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. In addition to regulations promulgated by the Department, standards prescribed by the Department of Justice and

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 of Respondent, a June 16, 2005 Memorandum by Veronica D. Trietsch, Director of Human Resources Services (Director's Memo), 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, the circumstances of this case conform to the standard factors warranting waiver. Therefore, Respondent's request for waiver is granted.

PROCEDURAL HISTORY

In the case at bar, on June 8, 2005, the United States Department of Education, Office of Management (OM), Human Resources System Team authorized the issuance of an initial notice of salary overpayment identifying that Respondent owed a debt to the Department in the amount of \$40, 245.58. 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 June 16, 2005 Order Governing Proceedings, Respondent submitted a statement and documents supporting a waiver request on June 16, 2005 and June 17, 2005. Respondent's submissions constitute the complete record upon which the decision in this case is based.

DISCUSSION

Pursuant to 5 U.S.C. § 6303, an employee in the civil service is entitled to annual leave with pay that accrues in hours at 4 hours, 6 hours and 8 hours per pay period depending on the number of *years of service* completed by the employee. Under section 6303, an employee who has completed 15 or more *years of service* earns 8 hours of annual leave per pay period. Often, the number of *years of service* is derived from a straightforward calculation of the time period an individual has worked, but, since *years of service* is a term of art in service computation, the calculation of *years of service* is affected by certain conditions or restrictions under certain circumstances. For example, for military retirees who obtain employment within the civil service, Federal agencies calculate the number of *years of service* an employee has completed by

the Department of the 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). Prior to collecting debts owed to the United States through administrative offset, 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. These standards, along with those cited in notes 1 & 2, *supra*, establish the minimum due process rights that must be afforded to the debtor when an agency seeks to collect a debt by administrative offset.

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

following a standard that turns, in part, on the type of work or service that counts toward *years of service*.⁵

Applying the aforementioned to the facts in this proceeding, Respondent, after over 20 years of military service, entered civilian service with the Department in 1991. At that time Respondent began accruing annual leave at the rate of 8 hours per pay period. As established by the Department, the agency erroneously began crediting Respondent with 8 hours of annual leave per pay period rather than 4. This resulted from an error involving Respondent's service computation date (SCD), which was erroneously established as July 13, 1967, rather than June 15, 1990. The SCD was incorrectly determined because the agency failed to correctly calculate the number of *years of service*; an error that was due to the Department's inclusion of Respondent's 22 years and one month of military service as creditable service in the calculation of *years of service* for annual leave accrual purposes. Pursuant to 5 U.S.C. § 6303 and apart from three exceptions identified therein, military service is not creditable as *years of service* for purposes of determining a federal employee's annual leave accrual rate.⁶ As a result of the Department's erroneous inclusion of all of Respondent's military service as creditable *years of service*, Respondent was credited with annual leave at the rate of 8 hours per pay period for the entire period of Respondent's employment with the Department. According to the BoC, this error resulted in an "over-accrual of 772 hours" or a net debt amount of \$40, 245.58.⁷

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 that 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. 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

⁵ As a notable example, an employee must waive military retired pay to receive any credit for military service unless the retired pay is awarded based on a service-connected disability incurred in combat with an enemy of the United States or caused by an instrumentality of war and incurred in the line of duty during a period of war. *See*, 38 U.S.C. § 301, 5 U.S.C. §§ 6303, 8332, & 8411.

⁶ Of relevance in this case is one exception: for the purpose of annual leave accrual, military service performed during a war or in the area of a campaign or expedition for which a campaign badge has been authorized counts toward annual leave accrual. Consequently, the Department credited Respondent for 13 months of military service in Vietnam. *See*, Director's Memo; *see also In the Matter of: David T. Simrak*, B- 213,727, 1987 WL 102394 (Comp.Gen.), June 8, 1987; *and* THE GUIDE TO PROCESSING PERSONNEL ACTIONS (THE GUIDE), ch. 6, Update 33, (January 2, 2000) (THE GUIDE is issued by the Office of Personnel Management, and pursuant to Executive Order 12107 replaces the Federal Personnel Manual in providing binding guidance to Federal agencies on various personnel matters).

⁷ Although this decision does not resolve whether the 772-hour calculation is accurate, as explained more fully in the text of this decision, *infra*, it is noteworthy that in typical cases addressing whether waiver should be granted for a debt created as a result of an incorrect calculation of annual leave accrual, a determination of whether the excess leave creates a negative leave balance is required. *See*, text of DECISION GRANTING WAIVER at 4, *infra*.

threshold matters: first, whether the overpayment to Respondent constitutes an *erroneous payment of pay*⁸ and, secondly, whether Respondent lacks fault.⁹

In cases that have addressed creditable *years of service* issues, the erroneous crediting of annual leave has been interpreted to “mean a grant of leave which, when corrected, would result in a negative leave balance in the employee’s annual leave account.”¹⁰ Thus, an erroneous crediting of annual leave is not subject to waiver, if there is no negative leave balance. The Comptroller General has consistently ruled in salary overpayment cases that the absence of a negative leave balance means there is no debt or overpayment of pay within the meaning of the waiver statute; the excess leave has been recovered by the employee’s current leave account.¹¹ Most important, the Comptroller General instructs that when an employee has been credited annual leave at an incorrect rate over multiple years, the leave account must be reconstructed for each separate year involved in order to establish the correct annual leave balance at the end of each leave year.¹²

In this case, the BoC identifies the total number of excess credited hours of annual leave, but does not provide a reconstruction of Respondent’s annual leave account for each of the years at issue. Notwithstanding that employees are restricted to carrying forward from year-to-year no more than 240 hours of annual leave, it is quite likely that the negative leave balance would unveil substantially less than the 772 hours identified in the BoC. As such, Respondent’s waiver request will be construed to cover the total debt at issue as a negative leave balance.¹³

Regarding the second threshold issue, determining whether Respondent is at fault, pertinent considerations 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.¹⁴ In applying these considerations to this case, the tribunal concludes that

⁸ 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).

⁹ The fact that 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 No. 04-04-WA, U.S. Dep’t of Educ. (June 14, 2005).

¹⁰ *See, Stephen C. Small*, 1993 WL 58244 (Comp.Gen.), B- 250,228 (1993); *Lamoyne J. DeLille*, 56 Comp.Gen. 824,828 (1977).

¹¹ *See, Stephen C. Small*, 1993 WL 58244 (Comp.Gen.), B- 250,228 (1993).

¹² *Id.*

¹³ In this instance, the infirmity of the BoC does not necessitate cutting short the tribunal’s statutory waiver authority, but in future cases an employee would be better served, if the BoC included or attached a reconstruction of a debtor’s annual leave account for each year at issue as has been required by the Decisions of the Comptroller General.

¹⁴ *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).

Respondent is without fault because Respondent had no reason to recognize the overpayment as an erroneous payment.

Although Respondent has a duty to check salary payment records to ensure that his pay is accurate, the Department's erroneous crediting of annual leave began in Respondent's first pay period. Indeed, the Department had not discovered its error until Respondent indicated his intention to Human Resources Services to accept a buyout and retire from Federal service. At that time, an audit of Respondent's annual leave account disclosed the overpayments.

To be clear, it is worth noting that this is not an instance in which it might be said that granting waiver provides sanction for employees who shirk their obligation to ensure the accuracy of their pay by permitting debtors to retain the benefit of a costly error. It remains fundamental to the analysis, here, that when an employee fails to review documentary records, including leave and earning statements, which, if examined, would have shown the overpayment, the employee is not free from fault. In this case, however, the extraordinary circumstances are clear that the employee is without fault.

To begin with, the Director of Human Resources maintains that Respondent lacked knowledge of civil service rules regarding the accrual of annual leave. There is neither a hint nor an explicit account in the record to support a conclusion that Respondent was aware he was being overpaid annual leave; indeed, Respondent has submitted a sworn statement to the contrary. This case also lacks any credible grounds to conclude that a reasonable person would have been alerted to the error in the *years of service* calculation. Beyond that, there is no indication that a leave and earning statement would disclose the erroneous payment since the error began with the employee's initial salary payment and remained erroneous throughout the employee's period of employment.¹⁵ The employee's SCD was incorrectly calculated. The elapsed time between the agency's error and its discovery of the error exceeded a decade.¹⁶ In addition, the Director's Memo "support[s]" Respondent's request for waiver of the entire overpayment; the memo sets forth the basis of the Director's support and, as such, constitutes a persuasive recommendation for waiver. On the basis of the aforementioned, the tribunal finds that Respondent is without fault for the overpayment, and that it would be against equity and good conscience to deny waiver under these circumstances. Accordingly, waiver of Respondent's debt is warranted.

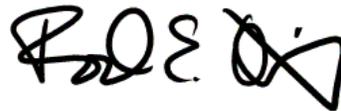
¹⁵ See, e.g., the generally similar "Guidelines for Determining Requests [For Waiver]," U.S. Department of the Treasury Directive 34-01 (2000), available at <http://www.treasury.gov/regs/td34-01.htm> With regard to this latter factor, it is important to note, that the passage of time may not always lead 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.

¹⁶ 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).

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 23rd day of June 2005.

A handwritten signature in black ink, appearing to read "ROE DIXON". The signature is stylized and somewhat cursive.

Rod E. Dixon
Waiver Official