



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of
JANICE,

Docket No. 05-21-WA
Waiver Proceeding

Respondent

DECISION DENYING WAIVER

This proceeding is based on a U.S. Department of Education (Department) employee's request for waiver of a salary overpayment of \$2026.75.¹ 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 an erroneous payment of pay to a federal employee.² 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 Department of Education, Administrative Communications System, *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (June 2005).³ 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.⁴ The Handbook, ACS-OM-04, specifically delegates waiver authority

¹ The overpayment is identified as File No. 05LCBMU1 in the August 9, 2005 notice.

² 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 footnote 1 (setting forth the statutory framework governing debt collection by salary and administrative offset).

³ *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).

⁴ 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

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.⁵ 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 Leave and Earnings Statements for Respondent for 2005 Pay Periods (08) and (09). This decision constitutes a final agency decision.

For reasons that follow, the circumstances of this case do not conform to the threshold factors warranting waiver. Therefore, Respondent's request for waiver is denied.

PROCEDURAL HISTORY

In the case at bar, on August 9, 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 \$2026.75. The notice authorized the Department to initiate offset of pay from the salary of Respondent as a result of an erroneous salary payment to Respondent. By letter received August 16, 2005, Respondent filed a written request for waiver.

In an August 22, 2005, Order Governing Proceedings (OGP), Respondent's request for a waiver was deemed timely. On September 20, 2005, Respondent filed a statement and documents supporting her waiver request in accordance with the tribunal's August 22, 2005, Order and subsequent extension of filing time.⁶ Respondent was supplied FPPS documents pertinent to the pay periods in question (08) and (09), as supplied by Human Resources personnel, Linda Barnes, and Respondent has included the same in her filing received September 20, 2005 at Tab IV. Respondent's submissions constitute the complete record upon which the decision in this case is based.

DISCUSSION

The pay the Department is trying to collect from Respondent reflects salary paid for pay periods 08 and 09, starting March 21, 2005 and ending April 16, 2005. Respondent identifies that she returned to work on April 19, 2005.

The Bill of Collection (BoC) issued to Respondent states the basis of the overpayment as: "The employee was overpaid for pay periods 0508-0509 due to time

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).

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

⁶ Respondent was granted an extension for being under Doctor's care. Respondent submitted a Medical certificate supporting a no work limitation in Tab I of her evidence covering the period, 9/9/05 – 10/10/05.

sheet corrections changing 72 hours 010 to 101 for pay period 0508 and changing 80 hours 010 to 101 for pay period 0509.”⁷

Respondent’s waiver request filed with OHA on August 16, 2005, included a one page letter stating her justification for the waiver is: “that I would notify my Supervisor, of my Time and Attendance (T/A), but the time keeper was not given the information, maybe from the supervisor. It has been stated to me from my timekeeper, ‘that if you do not hand in a T/A sheet the data base automatically put[s] you in as 80 worked.’” Respondent then claims this automatic input of time and attendance was a discrepancy for her, and relates this to serving sometime in the past as a timekeeper without identifying that function as to when, where, or length of time doing so. Nevertheless, Respondent does not dispute that she was dealing with an identified timekeeper for the office, Nichelle Boone and has attached email correspondence between her and Ms. Boone. Of particular importance in the record, are messages on April 29, 2005, about the corrected timesheets which went in for Respondent, at her request, as pertain to the affected pay periods 08 and 09, and which include notification to Denver payroll.

Missing from the record are any *contemporaneous* records about what Respondent asked of or represented to her office and her supervisor, about leave for pay periods 08 and 09. Respondent states she notified her supervisor by phone call of her need to be out on March 22 at 9:20 PM, with her absence noted for personal reasons⁸. However, the record is devoid of any acknowledgment by the supervisor of Respondent’s leave request, his approval, or the represented basis for the leave.⁹ While we accept that Respondent may have been caused by exigent circumstances to be out of the office at that time, and recognize that these are sympathetic circumstances, Respondent still has a duty to show proper steps were taken to account for being out on leave, and particularly that Respondent’s timekeeper, Ms. Boone had notice of the situation. The above described email message shows critical information about Respondent’s absence was not communicated to the timekeeper. Respondent admittedly did not turn in a Time and Attendance sheet for pay periods 8 and 9, until she returned to work on April 18, 2005, yet it is clear that Respondent was in the habit of both emailing and faxing information in to her timekeeper with regularity.¹⁰ If this were not the case, Respondent’s failure to communicate with the timekeeper to insure that unpaid leave was being ascribed to the two pay periods would not be such a critical missing piece. The various emails to

⁷ Time and Attendance Pay Codes Manual shows that Pay Code 010 is for Regular Time which covers ...the days of an administrative workweek (a weekly tour of duty) that constitute(s) an employee’s regularly scheduled administrative workweek; Pay Code 101 is for Leave Without Pay (LWOP). See, National Business Center, Payroll Operations Division, DOI (Manual, September 2003)

⁸ Respondent gives as her reason for her absence starting March 22, 2005, as due to the death in her family of a very special someone. She attaches a prayer card with her Tab VII information, her September 17, 2005 Explanation and Table of Contents filing.

⁹ Respondent’s later produced unsigned SF-71 asking for 72 hours LWOP contains a remark section listing “Death in my family.” At a minimum, Respondent’s signature with certification (#7) as to the leave/absence being requested for the purpose indicated would be expected to be produced into this record. This was not done. See Respondent’s Tab VIII, as part of materials filed on September 20, 2005.

¹⁰ See Respondent’s Tab VIII, for email exchanges and for remote exchange of flexsheets and SF-71 forms by facsimile transmission, between Respondent and timekeeper.

Respondent identifying the overpayment result from the corrective action she wanted, show she knew of the consequences.

Moreover, the corrective action Respondent called for rests on incomplete or faulty information. Specifically, when she submits into the record here the two pertinent Request for Leave or Approved Absence SF-71 forms for the affected pay periods, neither are signed or dated by Respondent or her supervisor. It is perplexing why these forms have been put in the record as obviously incomplete and, as such, what do they purport to show. Such forms without more indicate the opposite of properly taking any corrective action in this matter. While Respondent lists 72 hours as LWOP for 3/22/05-4/1/05 on one SF-71 and 16 hours accrued annual for 4/14/05 & 4/15/05 on the second SF-71, without signatures, there can be no conclusion that these were actually processed. LWOP as annual or sick leave is an approved leave situation. Without signatures and dates on these SF-71s supplying approval, these fail to supply any basis of properly requested leave.¹¹ Since Respondent attaches after-the-fact emails (April 29, 2005) with these two representative SF-71s, a gap of information exists as to why these SF-71s are yet unsigned, even after Respondent's return to work.¹²

Thus even after-the-fact information Respondent supplies to reconstruct the circumstances around which she requested the leave for this period (PP 08 and 09) falls short, as it is clearly incomplete. Yet, for purposes of establishing the overpayment of salary for unworked hours, Respondent did seek correction to change the paid to unpaid leave (LWOP) and other Tab VII submissions include: copies of Human Resources Leave and Earnings Statement of PP 08 and 09, to show PP200508 earnings paid her for 80 hours worked (p.2) and PP200509 earnings paid her for 80 hours worked. (p.2). Respondent submitted these into the record without comment, contrary to the OGP directives, asking Respondent to inspect and address them.

Respondent seeks a waiver for salary over two pay periods for hours not worked while she thought she was on a non-pay status LWOP, but says she found she was being paid by direct deposits presumably to her bank. She does not specify exactly on the direct deposits, although one of her emails says she found this happening in the first pay period (08). Respondent states that, "I did not return to the office until April 19, 2005. I noticed while being out on Leave; PP08 and PP09 had been direct deposited into my account. I notified Mr. Murray, at his duty station as soon as I learned of the overpayment. A correction was put in by me for the overpayment."¹³

¹¹Two email messages Respondent attaches Re: Flexsheet/leave slip purport to show an exchange of flexsheets between Respondent's timekeeper Ms. Boone and her, and Respondent's acknowledgment of them. Yet, this exchange is before Respondent went out on March 19, 2005. These emails go to February 15, 2005 and March 17, 2005. There is no correlation with the sending of flexsheets on February 15,th a month prior to the affected time period.

¹² Respondent varies her return date as either April 18 or April 19, 2005. Yet, Respondent did supply an email approval for an earlier pay period, PP 07 showing an instance where she notified her supervisor about changing her time and attendance for March 17 with the supervisor sending a return email to her giving his approval. Yet, Respondent does not submit any such email approvals for the times in question, PP08 and 09, to show her clarification about leave status for those periods.

¹³ See, Respondent's September 17, 2005 filing, with one page Explanation and other Tab VIII materials.

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 payments 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 by Respondent, or any other persons having an interest in obtaining waiver, may waiver be granted.

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*¹⁴ and, secondly, whether Respondent lacks fault.¹⁵ As waiver constitutes an equitable remedy, it is not available to a party who is not entirely without fault.¹⁶

Fault Standard

In a waiver proceeding, the debtor acknowledges the validity of the debt; consequently, issues regarding the existence or the accuracy of debt are not before the tribunal. Respondent acknowledges the validity of the debt, as stated in her waiver request as filed on August 16, 2005. To the extent that Respondent's arguments or defenses raise any issues concerning the validity of the debt, they will not – because they cannot – be addressed in this proceeding.

There is no dispute that this case involves an “erroneous payment of pay.” The nature of the debt in this case involves overpayment of salary for two pay periods which Respondent did not work. Putting those pay periods in context, per the 2005 Payroll Schedule, the record should reflect that pay period 08 began March 20 through April 2, and pay period 09 began April 3 through April 16, 2005.

As stated in the BoC, “The employee was overpaid for pay periods 0508-0509 due to time sheet corrections changing 72 hours 010 to 101 for pay period 0508 and changing 80 hours 010 to 101 for pay period 0509.”

Respondent asserts that she was aware she had been erroneously overpaid when she found direct deposits of paychecks for the relevant pay periods (08) and (09). However, Respondent had a duty to inspect her Leave and Earnings Statements (LES) for the applicable period and by doing that she would have seen the credit for 80 hours

¹⁴ 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).

¹⁵ 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 fight to recover an excess amount.

¹⁶ See DOHA Case No. 02040401 (May 21, 2002).

worked through PP#08 and later of #09. She did not submit either LES into the record. An employee has a duty to inspect and verify his/her leave and earnings statements. Respondent failed to meet this duty and must be held to be at fault.¹⁷

While Respondent does not dispute that she got paid for unworked hours, Respondent raises questions not to the amount or the erroneous payment of salary during that time, but to the process, namely that she was not clear why this happened without her information (time and attendance sheets) being submitted in the first place. Respondent focuses much attention at the process and questions why salary got paid without her handing in time and attendance along with leave slips. Then Respondent includes an email from her timekeeper, Nichelle Boone dated April 29, 2005, which clarifies why Respondent's office did what it did, and how the timekeeper then acted on the basis of corrected time & attendance (t & a) forms for each pay period involved according to the flexsheets/leave slips Respondent submitted to her and Respondent's supervisor. Again, the operative facts here seem to be Respondent sought and took the corrective action, to bring the erroneous salary payment to light and to get correct time sheets in for the 08 and 09 pay periods. But, in doing so, Respondent does not even supply completed records to support the action.

Curiously, while Respondent is dissatisfied, and indicates she is confused with how the salary error got through in the first place and believes she should be absolved of some or all of the overpayment through a waiver, Respondent has placed "contradictory" information in the record about an earlier pay period. Specifically, in an email from Respondent's timekeeper (Boone) to Respondent dated March 8, 2005, subject: T&A for PP05, the timekeeper advises Respondent that she placed 80 straight hours in the system since Respondent hadn't reported anything. From this it appears a defacto situation that straight, interpreted as regular hours, was what the timekeeper would process thru, unless Respondent's t & a submission showed changes to that before it went thru for certification.¹⁸

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 to, or had no reasonable expectation of payment in the amount received.¹⁹ 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, and individual's

¹⁷ See, *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.)

¹⁸ Email message from Nichelle Boone to Respondent, Subject: T & A for PP0506, March 8, 2005 prior to the PPs reflected in the BoC. This email advised Respondent that if she could forward her t&a ASAP, the timekeeper could make the changes before they go thru for (noon) certification. This message shows that Respondent and her timekeeper had recent dialogues before the affected PPs, when office practice was shared and this undercuts reliance on any real confusion of what seems to be an ongoing practice.

¹⁹ See *In re Troy A. Watlamet*, Dkt. No. D 2001-29 (U.S. Dep't of Int.)(March 14, 2003).

position, grade level, education and training may be taken into consideration.²⁰ Where a reasonable person would have made inquiry, but the employee did not, then he or she is not free from fault.²¹

In applying the threshold factors to this case, the tribunal concludes that Respondent is not without fault in that she would be aware she was receiving more than she was entitled to and had no reasonable expectation of payment in the amount received. If an employee knew or, as a reasonable person, should have known that she received a payment to which she was not entitled, waiver is not proper. In such a situation the employee does not acquire title to the money and has a responsibility to hold the excess amount until asked to return it.²² When an employee receives pay for unworked pay periods, there is not a reasonable expectation of entitlement to those salary dollars. When an employee is on LWOP, [or here represents she thought she was on that status and initiates corrective action to convert paid leave to that status], she should have no entitlement to payment after she had begun LWOP status.²³

An employee has a duty to monitor both her leave and earnings statements (LES) and her bank statements to verify their accuracy.²⁴ Respondent says nothing about verifying her leave and earnings statements (LES), which could have alerted her to the situation leading to the overpayment sooner. Respondent says she became aware of the overpayments through direct deposits and notified her supervisor, however, all information about the corrections is well after the closure of the involved pay periods, falling in the April 27-29th time period. Respondent says she notified the supervisor in PP08 but submits nothing to show she actually did. Respondent herself instituted corrective action to undo salary payment for the periods not worked as shown by emails on April 29th. Knowing she had not worked during periods 08 and 09, she had no reasonable expectation of gaining title to monies for that time.

Finally, under the circumstances of non-entitlement to salary for unworked hours, Respondent did not acquire title to the excess amount, and has a duty to hold the money for eventual repayment. This is a basic principle of waiver case law.²⁵

²⁰ See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

²¹ See *In re Vincent L. Brown*, Dkt. No. D 2003-118 (U.S. Dep't of Int.) (August 5, 2004).

²² See DOHA Case No. 01092001 (October 29, 2001).

²³ See DOHA Case No. 02022603 (April 17, 2002). While the court was sympathetic to the employee's situation for being on LWOP to care for an ailing family member (sister), the employee did not acquire title to the money. Furthermore, the fact that the money was deposited directly in her bank account instead of being mailed to her does not provide a basis for waiver, since she should have monitored her banking account. See B-252672 (sept.20, 1993).

²⁴ Reliance on bank statements may have delayed employee in knowing that a situation was present which could lead to an overpayment under the circumstances of Respondent's expectations and may hamper an employee in taking prompt action. See DOHA Case No. 98081701 (August 21, 1998), when an employee is provided information by the government which indicates an error, she is generally considered to be at fault if she fails to review the information and bring it promptly to the attention of the proper authority.

²⁵ See, e.g., DOHA Case No. 02032601 (May 31, 2002), which relies on 5 U.S.C. § 5584, stating that waiver is precluded when an employee is aware that he is being overpaid. The employee does not acquire title to any excess payments merely because the government has committed an administrative error. He has the duty to hold the overpayment for the eventual repayment to the Government.

II. Equity and Good Conscience

Notwithstanding the aforementioned determination that the threshold factors for waiver are not met in this case for PP08 and PP09 of unearned salary payment due to the tribunal's fault finding, the tribunal will briefly consider whether "the collection of [the debt] would be against equity and good conscience and not in the best interests of the United States." Here, however, the tribunal finds that the equities do not balance in Respondent's favor.

At the outset, this inquiry requires consideration of whether there is evidence of fraud or misrepresentation by Respondent. 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.²⁶

In balancing the equities, tribunals have drawn upon the concept of fairness by exercising judgment in light of the particular facts of the case. In this regard, a number of factors have been found pertinent to determining whether collection of the claim against an employee is against equity and good conscience or otherwise not in the best interests of the United States. For enumeration of these factors, see *In re Anh-Chau*, Dkt. No. 05-04-WA (June 17, 2005), which includes, whether recovery of the claim would impose an undue financial burden upon the debtor under the circumstances.

In all respects, the facts of this case illustrate that Respondent did make reasonable efforts to make sure that she was paid correctly. However, Respondent's proper action does not overcome the existence of a debt or the propriety of repaying it.²⁷ While Respondent attempted to address the overpayment, that certainly does not free this Respondent from liability, when it is clear that the employee never did acquire title to the excess amount, and has a duty to hold the money for eventual repayment. This is a basic principle of waiver case law.²⁸

There is no doubt that repayment of any sum may be inconvenient and unplanned in terms of any household budget, but that does not equate to a showing of financial burden such that the equities call for waiver. There is simply no persuasive evidence in this record to show how repayment of this debt would be a financial burden.

²⁶ See, *In re Anh-Chau*, Dkt. No. 05-01-WA (June 17, 2005) at footnote 17, which explores the phrase "against equity and good conscience."

²⁷ It has been consistently held that where an employee was aware or should have been aware of an overpayment of pay when it occurred, the employee cannot reasonably expect to retain such payments, but should set them aside and expect the Government to seek recovery. See, e.g., *In the Matter of Ray E. Lundquist*, Dkt. No. D-2003-105 (U.S. Department of Interior) (June 21, 2004) referencing that this is well settled by decisions of the Comptroller General, and instructing that the employee should make provision for repayment.

²⁸ See, e.g., DOHA Case No. 02032601 (May 31, 2002), which relies on 5 U.S.C. § 5584, stating that waiver is precluded when an employee is aware that he is being overpaid. The employee does not acquire title to any excess payments merely because the government has committed an administrative error. He has the duty to hold the overpayment for the eventual repayment to the Government.

Notwithstanding the tribunal's August 22, 2005 Order Governing Proceedings urging Respondent to "fully identify and explain with reasonable specificity all the facts, documents, and sworn statements, if any, which Respondent believes supports her position," Respondent did not do so. In fact, Respondent's Explanation signed September 18, 2005, as her formal reply to the Order Governing Proceedings, does not even raise a financial burden claim, much less provide relevant facts to support the claim.

Respondent's submission is devoid of any claim that repayment would be a financial burden, and is devoid of any supporting information on this. Possible ways of supporting such a claim would be for her to submit information about other financial indebtedness, money constraints, unexpected expenses, or other such contingencies. This was not done. Lacking evidence to support the claim that repayment would be a financial burden, this leaves the tribunal unable to weigh factors favorably for Respondent in the balance of equity and good conscience. Respondent has not shown that it would not be in the best interest of the United States to require her to repay this debt.

CONCLUSION

The tribunal finds that Respondent did know an error in salary payment existed and took steps to correct it so it would not reoccur; for those reasons, the tribunal examined the waiver request under the balancing of equity and good conscience. The tribunal finds that the interests of equity and good conscience do not otherwise warrant waiver in this case. Respondent's request for waiver must be denied.

ORDER

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

So ordered this 12th day of October, 2005

Nancy S. Hurley
Waiver Official

To arrange payment of this debt, the employee should contact Linda Barnes of the Office of Management (OM), Human Resources Team.