



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS

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December 23, 2005

In the Matter of

LEO,

Docket No. 05-27-WA
Waiver Proceeding

Respondent

DECISION GRANTING WAIVER

This proceeding concerns a U.S. Department of Education (Department) employee's request for waiver of a salary overpayment of \$157.18.¹ 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 promulgated regulations at 34 C.F.R. Part 32 (§ 32.1. *seq.*) and set forth its 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 processing salary overpayments made to current or former federal employees and set standards for waiving those debts. The Handbook, ACS-OM-04, specifically designated 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 matters accepted as argument, evidence, and/or documentation in this proceeding when considered as a whole, including Respondent's initial request for waiver and attached documentation, and documents

¹ The overpayment is identified as File No. LCB424 in the June 10, 1996 notice is computed as 10 salary hours at hourly rate of \$16.51 for \$165.10 gross, less deductions of \$20.55, to equal \$144.55 net and \$12.63 Medicare & OASDI for the \$157.18 total.

² See Pub. L. 90-616, § 1(a), Oct. 21, 1968, 82 Stat. 1212, and amended by Pub. L. 104-316, the General Accounting Office Act of 1996, Title I, § 103(d), October 19, 1996, 110 Stat. 3828. The 1996 Amendments were made effective 60 days after Oct. 19, 1996, as set out under section 130c of Title 2.

compiled by the Department's Human Resources (HR) office. This decision constitutes a final agency decision.

PROCEDURAL HISTORY

According to the June 10, 1996 notice of overpayment, based on the bill of collection summary, the overpayment stems from payment of \$165.10 during pay period 6 of 1996 as a result of an advance of 10 hours of annual leave to cover the employee's absence due to an illness and death in his family. Payroll then made an adjustment to convert the 10 hours to leave without pay (LWOP). By letter dated June 23, 1996, and by email of August 19, 1996, Respondent disputes the overpayment, and claims it was eliminated when 10 hours of compensatory (comp) time he had earned could be substituted for the LWOP. This cancels out the LWOP, resolving the overpayment. In July 1996, Respondent sought and received from HR personnel, copies of his leave and pay audits covering the applicable pay periods for 03 –07 of 1996. Respondent offered clarification of the matter in his email to HR personnel stating that his timekeeper was going to make necessary amendments of his leave records to allow for substitution of comp time for the LWOP. Respondent specifically requested HR to advise him if this did not take care of everything in this case. He received no further response from HR.

Respondent made good on his assertions that his timekeeper would submit the corrected time and attendance (T & A) records to show comp time earned to eliminate the LWOP charge.³ Through Respondent's efforts, corrected time and attendance records were submitted by his timekeeper, with clear notations in the Remarks Section showing that Respondent had earned comp time, it was never credited, and a time and attendance adjustment was due. As applicable, the proper pay code (040) for compensatory time earned appears on three of Respondent's T & A Reports⁴ submitted August 29, 1996, and the three include the timekeeper's instructions to payroll for corrective action. Two T & A Reports show that 8 comp hours were earned, but employee received LWOP, so the required action was to correct and pay. One shows that the employee earned 16 hours comp but received LWOP, and to reinstate for that. The T & A Pay Codes Manual does provide for accumulation or carryover of comp time from pay period to pay period.⁵

The matter was inactive for a lengthy period of time but was subsequently keyed into the Overpayment (O/P) tracking System in March 1998, further updated in February 2004, and finally transferred to the Office of Hearings and Appeals (OHA) in October 2005. In an October 28, 2005, Order Governing Proceedings (OGP), Respondent was afforded an opportunity to supplement the record. Respondent contacted the tribunal on November 29, 2005, to clarify whether a debt still existed as outlined in the OGP, and to say that after nine years time he had no further records, indeed no remaining records to submit, and he thought his prior submissions resolved the matter.

³ File notations (LCB424) show HR received corrected T & As from Respondent's timekeeper, Joe Flauta, on 8/29/96.

⁴ See Respondent's 1996 T & A Reports showing hours code as 040 which reflects compensatory time earned per the Department of Interior (DOI) T & A Pay Codes Manual (September 2003).

⁵ Per the Manual, an employee can carry over and accumulate comp time, at Chapter 5, page 5-2.

DISCUSSION

Waiver of a debt under 5 U.S.C. § 5548 is an equitable remedy. To secure waiver of an erroneous payment of pay,⁶ a debtor must show that he or she is not at fault in accepting or not recognizing an overpayment of salary. The debtor also must show that collection of the debt would be against equity and good conscience, and not in the best interests of the United States.

The standard for determining whether a debtor is at fault in accepting or not recognizing an overpayment is whether, under the particular circumstances, a reasonable person should have known or suspected that he or she was receiving more than his or her entitled salary.⁷ An employee who knows or should know that he or she received an erroneous payment is obliged to return that amount, or set aside an equivalent amount for refund to the government when the error is corrected.⁸ Furthermore, where a reasonable person would have made inquiry, but the employee did not, then he or she is not free from fault.⁹

In his June 23, 1996 explanations, Respondent clarifies that he was advanced leave to cover an unexpected absence (family illness and death) and he would attempt to clear up any discrepancies with payroll on it. His subsequent actions to get his timekeeper to apply earned comp time to account for any overpayment discrepancy by means of corrected time sheets show a direct attempt to return the amount in kind by a substitution of comp time earned for LWOP. His 1996 time and attendance reports, as discussed above, show that he not only had sufficient earned comp time to satisfy a 10 hour overpayment as here, but even had a surplus of comp time of 22 hours over and above those disputed hours. The three consecutive T & A reports that reflect this, submitted August 29, 1996, carry the timekeeper's messages to payroll to pay Respondent for the comp time earned but never credited. With this in the record, there is a reasonable basis for finding the Respondent expended reasonable efforts to address the overpayment through appropriate corrective action, and he thought it was fully resolved by his actions.

In applying the fault standard to this case, the tribunal concludes that Respondent does lack fault. As an initial matter, the tribunal notes the unusual circumstances and extenuated delay surrounding this case. Here, the Department allowed Respondent's waiver request to languish for over nine years. Such a significant period of inactivity and delay would give most people the impression that the matter was resolved within the

⁶ An erroneous payment of pay (i.e. a 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). The fact that an administrative error created an overpayment does not relieve the overpaid person from liability. See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005), footnote #6. Here, an administrative error stems from the Department's failure to credit comp time Respondent actually earned for 10 hours charged him as LWOP.

⁷ See *In re Troy A. Watlamet*, Dkt. No. D2001-29 (U.S. Dep't of Int.) (March 14, 2003) and *In re Danielle*, Dkt. 05-18-WA, U.S. Dep't of Educ. (October 11, 2005).

⁸ See *id.* And 5 U.S.C. § 5585.

⁹ See *id.*

same year as the overpayment arose. Aside from that, the ability to reconcile an overpayment with earned leave due to Respondent's qualifying for comp time shows that he was an employee with fluctuating leave on the positive; not the deficit side. The very nature of the advance leave given to the employee in this case due to family illness and death, is one that most supervisors would obviously accommodate. In doing so, they would readily substitute creditable leave when possible to cancel a debt or overpayment from insufficient leave to avoid further disruption or aggravation to the employee. Here, his supervisor signed off on the time and attendance reports, giving approval to the corrected timekeeper notes to apply the comp time earned to Respondent's leave balance. It is clear that all involved with this matter were aligned in getting the matter resolved at the time. Yet, the corrective action inexplicably brought no resolution since the matter remained in the system, still causing disruption nine years later, even after the Respondent himself has left the Department.¹⁰

Based on the actions of the Respondent and timekeeper to rectify the matter in a timely way, there is no legitimacy to keeping it open and the Respondent is clearly disadvantaged by any further attempts at collection.

Given the aforementioned factors, Respondent cannot be held accountable at this point for the consequences of the Department's failure to timely process his waiver request. Moreover, Respondent cannot reasonably be expected to have known this matter was not resolved and that the overpayment still existed after nine years of inactivity. For a review of similar conclusions in another long delayed waiver matter, see *In re Catherine*, Dkt.05-26-WA, (December 12, 2005), where the case inactivity was ongoing over five years time.

The tribunal must next consider whether collection of a debt would go against equity and good conscience. To satisfy the equity and good conscience standards, the debtor must have acted fairly without fraud, deceit, and in good faith.¹¹ In waiver proceedings generally, there has not been abundant guidance on how to balance equity and/or appraise good conscience.¹² Factors weighed by the tribunal include the following: whether recovery of the claim would be unconscionable under the circumstances; whether the debtor has relinquished a valuable right or changed position based on the overpayment; and whether collection of the debt would impose an undue financial burden. The tribunal has held that if the circumstances in any case are consistent with honesty and good faith, the inference of honesty is to be drawn.¹³

Respondent took effective steps to inquire into the nature of the overpayment and take corrective action to address it with the aid of his supervisor and timekeeper, and thereby acted in good faith. When an employee in a situation of advanced leave can

¹⁰ Respondent is no longer a Department employee and left its employment several years ago. His former timekeeper is also no longer a Department employee. While personnel turnover is to be expected over such a delayed period, it further compromises an employee's ability to effectively pursue a waiver years later.

¹¹ See 5 U.S.C. § 5584 and *In re Veronce* Dkt No. 05-14-WA, U.S. Dep't of Education (July 22, 2005) at 7

¹² See generally, *In re Veronce*, and *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Education (Dec. 14, 2005) at 5.

¹³ See *In re Veronce* at 7.

otherwise apply his credit of compensatory time to a leave deficit, this is a clear way to close out the problem. Respondent took the added precaution of asking Human Resources to advise him if his actions did not satisfactorily address the matter. He made this specific request in his August 19, 1996 email to the HR team representative. The request was ignored and no further communication occurred between HR and Respondent. The matter should have been closed on the basis of the corrected time reports nine years ago. It would be against equity and good conscience at this late date not to do so. Granting this request for waiver is supported by the circumstances since HR personnel never advised him of the sufficiency or insufficiency of his corrected T & A reports and he rested on that corrective action. Finally, by HR's silence on and inaction in the case, he was led to believe there was no further problem all this time.

With comparison to Office of Personnel Management's (OPM) elimination of a debt for unconscionability, collection has been struck down when to pursue the debt is "beyond the bounds of what is customary or reasonable; ridiculously or unjustly excessive..."¹⁴ Among pertinent examples cited is a situation where an employee encounters an exceptionally lengthy delay in adjusting a money matter (annuity) and management fails to respond within a reasonable period to (annuitant) inquiries regarding an overpayment.¹⁵ Arguably, those examples correspond to the present case, and have a similar impact so as to find that recovery would be unconscionable under the circumstances. Accordingly, the waiver here will be granted.

ORDER

Respondent requested waiver of the entire debt. Having found that the circumstances of this case do conform to the threshold factors warranting waiver, Respondent's request for waiver of the \$157.18 overpayment is **GRANTED**.

So ordered this 23rd day of December 2005.

Nancy S. Hurley
Waiver Official

¹⁴ See, *Aguon v. Office of Personnel Management*, 42 M.S.P.R. 540, 550 (1989); see also *Harrison v. Office of Personnel Management*, 57 M.S.P.R. 89, 95 (1993).

¹⁵ See *Aguon* at 550.