



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of
CHERYL,

Docket No. 05-28-WA
Waiver Proceeding

Respondent

DECISION GRANTING WAIVER

At issue in this case is whether Respondent, a former employee of the U.S. Department of Education, should be granted waiver of a debt arising from the agency's erroneous payment of salary to her while in a leave without pay (LWOP) status. For the reasons that follow, I find that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted. This decision constitutes a final agency decision.

As a part of Respondent's maternity leave in 1998, Respondent was assigned LWOP status. For the third pay period of 1998 (PP 03/98), Respondent was credited with 24 hours of pay, despite her LWOP status. Respondent identified the error by sending a check for the erroneous pay as instructed by the Department's payroll division. Although the reasons are unclear, it is undisputed that the Federal government did not negotiate Respondent's check. Indeed, when the Department indicated that it could not locate the check, Respondent authorized a "stop-payment" order by her bank, and consented to have the erroneous payment recovered through salary offset, pending the outcome of a waiver proceeding.

On July 25, 2000, the Department's Human Resources System Team (Human Resources) authorized issuance of a Bill of Collection (BoC) identifying that Respondent owed a debt to the Department in the amount of \$495.84. In response to the BoC, Respondent timely requested waiver of the overpayment. For reasons unknown, the Department took no dispositive action on Respondent's case until on October 14, 2005, when Respondent's case was transferred to the Office of Hearings & Appeals for resolution.

On November 1, 2005, I issued an order requesting Respondent's submission of argument and evidence supporting her position that the debt in this case should be waived. In response, Respondent identified the passage of time and the undue financial burden of repaying the debt as equitable arguments warranting waiver.

DISCUSSION

I.

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 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.²

The resolution of this case is based on the matters accepted as argument and evidence in the proceeding, including Respondent's submission of a sworn written statement (and the documents attached therein), Leave and Earning Statements (LES) covering the pay periods at issue in 1998, Respondent's May 12, 1998 letter addressed to the Department's Payroll Division, a March 12, 1998 Notice of Personnel Action concerning Respondent, and the Department's Bill of Collection and Notice of Salary Overpayment.

There is no dispute that this case involves an erroneous payment of pay.³ Respondent was paid during a pay period for which she occupied a leave without pay status. An employee in leave without pay status is not entitled to a salary payment. Consequently, the central focus of this case is whether Respondent is entitled to waiver of the obligation to repay the Department

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 all salary overpayment debt collection) and 5 U.S.C. § 5514 and 31 U.S.C. § 3716 (these statutory sections constitute significant provisions of the Debt Collection Improvement Act of 1996, Pub.L. No. 104-134, April 26, 1996, 110 Stat. 1321). In addition to the Waiver Statute, the United States Department of Education (Department) promulgated regulations at 34 C.F.R. Part 32, and established general policy guidance set forth in the Department of Education, Administrative Communications System (ACS), *Handbook for Processing Salary Overpayments* (Salary Overpayment Handbook, ACS-OM-04) (June 2005) that prescribe procedures for processing debts, authorize deductions from salary and wages to pay debts, and set standards for waiving debts.

² *See*, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases). *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 An erroneous salary overpayment is created by an administrative error in an employee's pay. The fact that the agency erred in making an overpayment does not relieve the overpaid employee 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 authorization to recover the excess amount. *See, In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

the salary paid to her while she was in leave without pay status.⁴

II.

The standard for determining whether waiver is appropriate requires a consideration of whether there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of Respondent, and whether Respondent can show that it is against *equity and good conscience* to recover the overpayment.⁵ In applying that standard to this case, I find Respondent without fault⁶ and that the collection of the debt is against equity and good conscience or otherwise not in the best interest of the United States.

As noted by the Department's prior waiver decisions, the phrase "against equity and good conscience" is neither defined by statute, nor circumscribed by pure bright-line rules.⁷ Even when these words are defined or "interpreted as taking their ordinary, contemporary, common meaning,"⁸ the terms simply denote doing "what is fair and right."⁹ As such, the Department's waiver cases have adopted a number of factors pertinent to determining whether collection of a claim against an employee is against equity and good conscience or otherwise not in the best interests of the United States.

The equity and good conscience factors include the following: (a) whether recovery of the claim would be unconscionable under the circumstances; (b) whether, because of the erroneous payment, the employee either has relinquished a valuable right or changed positions for the worse, regardless of the employee's financial circumstances; (c) whether recovery of the claim would impose an undue financial burden upon the debtor under the circumstances,¹⁰ and (d) whether the time elapsed between the erroneous payment and discovery of the error and notification of the employee is excessive. These factors are neither exhaustive, nor mutually

⁴ In addition to her arguments supporting waiver, Respondent argues that her debt may have been repaid. Although the argument is unsubstantiated, 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. Accordingly, issues regarding the specific existence or accuracy of debt are not before the tribunal.

⁵ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

⁶ The erroneous payments were made as a result of an administrative error for which there is no indication of fraud, misrepresentation, or lack of good faith on the employee's part. Shortly after Respondent was made aware that the government had mistakenly paid her while she was on maternity leave in a LWOP status, she informed Human Resources of the erroneous payment and offered to repay the debt by check. See, e.g., *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005) (holding that where there is no otherwise indication of fault, an employee who neither knows nor has reason to know that he or she was erroneously compensated lacks fault under the application of the fault standard).

⁷ See, e.g., *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005); *In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (October 19, 2005); *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

⁸ *Perrin v. United States*, 444 U.S. 37, 42 (1979).

⁹ Black's Law Dictionary 241 (2nd pocket ed. 2001).

¹⁰ See, e.g., *In the Matter of Mrs. Kathryn H. Vandegrift*, 55 Comp. Gen. 1238, B-182, 704 (July 2, 1976). Whether repayment would impose an undo financial burden on Respondent need not be determined by an unassailable and detailed economic analysis; rather, the tribunal need find only that Respondent has shown that the financial burden suffered is reasonably related to repayment of the debt, and that repayment is not otherwise consistent with equity and good conscience.

exclusive; instead, the factors aid the tribunal in assessing under what circumstances, collecting a debt is “beyond the bounds of what is customary or reasonable” or “unjustly excessive.”¹¹

As noted, Respondent argues that it is against equity and good conscience to recover the debt because requiring her to repay the debt would create a financial hardship or an undue financial burden, and that the time elapsed between the erroneous payment and the current attempt to collect the debt is excessive. In support of this argument, Respondent points out that she attempted to resolve the disputed debt immediately after the overpayment arose, but was unsuccessful. To underscore the significance of the financial burden that would be imposed by repaying the debt, Respondent notes that she is not currently employed. Applying the aforementioned equity and good conscience factors to this case in light of Respondent’s arguments, I am convinced that collection of the debt would be inequitable.

While Respondent was on maternity leave in 1998, she noticed that she was paid for 24 hours of pay despite being assigned LWOP status. As expected, she promptly advised the Department of the error and mailed a check for the erroneous pay as instructed by the Department’s payroll division. The Department received the check, and forwarded the check to the Bureau of Reclamation. At that point, the check was apparently lost. Although the Federal government did not negotiate Respondent’s check - - and, hence, the debt was not recovered - - the nearly 8-year time period that elapsed between the overpayment and the current attempt to collect the debt clearly exceeds what is customary or expected. Beyond the mere excess of the elapsed time, the passage of time has accrued to Respondent’s detriment; she is currently unemployed. There is no reason to doubt Respondent’s assessment that the financial burden of repayment of the debt is greater now than it was while she was employed and prepared to repay the debt. Therefore, I find that the time elapsed between the erroneous payment and the current attempt to collect the debt is excessive, and that requiring the employee to repay the debt would create a financial hardship since the employee is unemployed. I further find that these factors taken together render collection of the debt profoundly inequitable.

ORDER

Under the authority of 5 U.S.C. § 5584, Respondent’s entire debt to the Department in the amount of \$495.84 is **HEREBY WAIVED**.

So ordered this 17th day of February 2006.



Rod Dixon
Waiver Official

¹¹ *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).