



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202-4616

In the Matter of

JAY,

Respondent.

Docket No. 06-01-WA

Waiver Proceeding

DECISION GRANTING WAIVER

Respondent, a U.S. Department of Education (Department) employee, requested waiver of a salary overpayment debt arising from the Department's premature award of Respondent's within-grade salary increase. Based on the reasons articulated in this decision, I find that waiver of this debt is warranted. Accordingly, Respondent's request for a waiver is granted.

Jurisdiction

Respondent's 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.¹ The Department promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 *seq.*) and its *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (June 2005), specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).²

The undersigned is the authorized waiver official who has been assigned this matter by OHA. 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 initial request for waiver and attached documentation, Respondent's subsequent statement and attachments, and documents compiled by the Department's Human Resources office. This decision constitutes a final agency decision.

¹ See General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828; see also *In re Tanya*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 18, 2006) at 1, n.1.

² Information regarding the Department's salary overpayment process including the Handbook, ACS-OM-04, is available on OHA's website at: www.ed-oha.org/overpayments.

Procedural History

According to the December 29, 2005 Notice of Debt Letter and attached Bill of Collection (BoC), the \$505.32 overpayment arises from the Department's premature award of Respondent's within-grade increase which is also commonly referred to as a "step increase" in a federal employee's salary. The BoC notes that Respondent's step increase was processed on July 10, 2005 (Pay Period 16 of 2005) although it should not have been awarded until December 12, 2005 (Pay Period 2 of 2006). Based on the Department's error, Respondent was paid at a GS-14, step 2 salary for six pay periods (Pay Period 16 through Pay Period 21 of 2005) rather than his GS-14, step 1 salary.

By letter dated February 22, 2006, Respondent filed a request for waiver. In a January 24, 2006 Order Governing Proceedings, Respondent's request for a waiver was deemed timely and Respondent was afforded an opportunity to supplement the record. Respondent's submission was due on or before February 6, 2006. Respondent failed to file a response with the tribunal. After a telephone conference with the Waiver Official on February 21, 2006, Respondent filed a short statement and attached documentation in support of his waiver request.³

Discussion

Waiver is an equitable remedy.⁴ To secure a waiver of an erroneous payment of pay, a debtor must demonstrate that he or she is not at fault in accepting or not recognizing an erroneous payment of pay. The debtor also must demonstrate that collection of the debt would be against equity and good conscience, and not in the best interests of the United States. At issue in this instant proceeding is whether Respondent's arguments and submissions support a request that a portion or the entire erroneous salary overpayment be waived.⁵

Fault Standard

In waiver cases, the fault standard is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. Fault is determined by assessing whether a reasonable person should have known or suspected that he or she was receiving an overpayment of salary.⁶ An employee who neither knows nor has reason to know that he or she was erroneously compensated lacks fault under the application of this standard.⁷ If an employee has records at his or her disposal, which, if reviewed, would indicate a salary overpayment, and the

³ Respondent attached copies of a Notice of Personnel Action (SF-50) detailing his temporary promotion to a GS-14, step 1 position at his prior agency and two Leave and Earnings Statements he received during this temporary promotion period.

⁴ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

⁵ An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to his or her salary. See 34 C.F.R. Part 32 (2005). It is apparent from the BoC that the overpayment constitutes an erroneous payment of pay. The Department's error was in its premature award of Respondent's within-grade salary increase.

⁶ See *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

⁷ See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

employee fails to review those documents, the employee is not without fault.⁸ Thus, every waiver case must be examined in light of its particular facts and circumstances.⁹

Respondent asserts that he did not realize the timing of his step increase was in error because he was unaware that the time he was temporarily promoted to a GS-14, step 1 grade did not count towards calculating the required waiting period for a step increase to the GS-14, step 2 level.¹⁰ Consequently, Respondent argues that when he received his step increase in Pay Period 16 of 2005, he believed he was eligible to receive this increase based on the time he was temporarily promoted to a higher GS-14, step 1 grade.

Within-grade increases or step increases are periodic increases in an employee's basic rate of pay from one step of the grade of his or her position to the next higher step of that grade.¹¹ For advancements between each of the first four steps, an employee must wait one year or 52 weeks.¹² Advancements between steps five through seven require a waiting period of two years or 104 weeks of service and steps eight through ten require three years or 156 weeks of service.¹³ For most within-grade increases, the waiting period begins upon the date of the employee's last equivalent increase.¹⁴

There are several bases for determining when an employee's last equivalent increase has occurred, including the one pertinent to this matter - the date an employee received a temporary promotion.¹⁵ Generally, if an employee is temporarily promoted to a higher grade and is later promoted to the same grade held during the temporary promotion, the time served during the temporary promotion period is included in the calculation of the required waiting period for a step increase in the higher grade.¹⁶ However, for an employee who is temporarily promoted to a higher grade, returned to his or her regular grade and step, and then subsequently permanently promoted to the same higher grade, the time served during the temporary promotion period is not counted in the calculation of the required waiting period for a step increase in the higher grade.¹⁷ When an employee is returned to his lower grade before being permanently promoted, the time served during the temporary promotion may be creditable towards the waiting period for a within-grade increase in the employee's lower grade.¹⁸ Consequently, for the temporarily promoted

⁸ See *In re Cynthia*, Dkt. No. 05-16-WA, U.S. Dep't of Educ. (October 31, 2005).

⁹ See *In re Veronce* at 5.

¹⁰ Respondent was employed as an educational specialist at another federal agency where he served as a GS-13, step 3 employee. According to Respondent's March 8, 2004 Notice of Personnel Action (SF-50), his temporary promotion was not to exceed July 5, 2004. Respondent then joined the Department in December 2004 as a GS-14, step 1 employee. On July 10, 2005, the Department processed a within-grade increase, raising Respondent's salary to the GS-14, step 2 level.

¹¹ See 5 C.F.R. § 531.405(a).

¹² See *id.*

¹³ See *id.*

¹⁴ See 5 C.F.R. § 531.405(b).

¹⁵ See 5 C.F.R. § 531.407.

¹⁶ See *id.* See also, *Office of Personnel Management's Q & A on General Schedule Within-Grade Increases (hereinafter OPM's Q & A on Within-Grade Increases)*, available at <http://www.opm.gov/oca/pay/HTML/wgqiqa.asp>.

¹⁷ See *id.*

¹⁸ See 5 C.F.R. § 531.215(c)(1).

employee who is later promoted to the higher grade, the date of the employee's last equivalent increase is the date the employee was permanently promoted to the higher grade and he or she must begin a new waiting period.¹⁹

Prior waiver decisions from the Office of the Comptroller General have established the general rule that an employee is expected to know the required waiting periods between within-grade increases and to inquire about increases that do not conform to those waiting periods.²⁰ On the other hand, if an employee does not have specialized knowledge about the federal pay structure, has no prior experience with an erroneous within-grade increase, and has no specific knowledge or reason to know a particular within-grade increase was erroneous, the applicability of this general rule may not be appropriate.²¹ Thus, there may be mitigating circumstances which warrant an exception to this general rule.

In applying the fault standard to this case, the tribunal concludes that Respondent lacks fault. As an initial matter, the tribunal finds no evidence indicating that Respondent was aware that his within-grade increase was erroneous. In assessing the reasonableness of Respondent's belief that he was entitled to receive his step increase when he did, the tribunal finds that the rules for determining when a temporarily promoted employee received his or her last equivalent increase once permanently promoted are complex and may not be readily apparent or known to an employee not involved in personnel matters. Respondent was not employed as a personnel specialist nor is there any evidence in the record that he had specialized knowledge relating to the federal pay structure. Thus, Respondent's unfamiliarity with these rules is understandable.

Further, the tribunal notes that Respondent's erroneous step increase was premature by six pay periods which approximated the length of time he previously served as a GS-14, step 1 employee and that he was permanently promoted only a few months after his temporary promotion ended.²² Consequently, the timing of Respondent's step increase would not have observably alerted him to a possible error. In light of the foregoing facts, Respondent's failure to suspect or inquire about his premature within-grade increase was reasonable. Therefore, the tribunal concludes there are sufficient mitigating factors to warrant an exception to the general rule holding an employee accountable for recognizing an erroneous within-grade increase.

¹⁹ See *OPM's Q & A on Within-Grade Increases*, *supra*.

²⁰ See *In the Matter of Richard G. Anderegg*, 1989 WL 237527 (Comp. Gen.), 68 Comp. Gen. 629 (August 23, 1989); *In the Matter of Daniel J. Rendon*, 1989 WL 237511 (Comp. Gen.), 68 Comp. Gen. 573, B-231,018 (August 2, 1989); *In the Matter of Dominick A. Galante*, B-1985070 (November 19, 1980); *In the Matter of Alfred P. Feldman*, 1984 WL 43822 (Comp. Gen) B-212, 361 (February 13, 1984).; *In the Matter of Dominick A. Galante*, 1980 WL 14599 (Comp. Gen.), B-198,570 (November 19, 1980).

²¹ See *id.* See also, *Guidelines for Waiving Claims Against Treasury Employees for Erroneous Payments*, U.S. Dep't of Treasury Directive 34-01, available at <http://www.treasury.gov/regs/td34-01.htm> and *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

²² The record does not include documentation relating to the 2004 pay periods for Respondent's prior agency. Analogously, under the Department's 2004 Payroll Schedule, this amount of time would have spanned up to nine pay periods (Pay Periods 7 through 15 of 2004).

Equity and Good Conscience

To secure equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith. Beyond this framework, there are no rigid rules governing the tribunal's assessment of the equity and good conscience standard in waiver proceedings.²³ The tribunal must balance equity and/or appraise good conscience in light of the particular facts of the case.²⁴ 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 his or her position based on the overpayment; and whether collection of the debt would impose an undue financial burden.²⁵

Respondent argues that collection of the salary overpayment debt would go against equity and good conscience because repayment would create a financial hardship. Respondent states that he currently provides significant financial support for the medical care for his granddaughter who suffers from Cerebral Palsy. Respondent also states that he has incurred additional financial burdens due to the recent death of his mother.

There is no evidence in this case suggesting Respondent did not act in good faith or was aware of the overpayment. The tribunal is convinced that repayment of this debt would be financially burdensome to Respondent at this time. Consequently, waiver of Respondent's debt would not go against equity and good conscience.

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 of the entire \$505.32 debt is **GRANTED**.

So ordered, this 23rd day of June 2006.



Greer Hoffman
Waiver Official

²³ See *In re Veronce* at 7.

²⁴ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (December 14, 2005); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (September 14, 2005).

²⁵ See *id.*