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OFFICE OF HEARINGS AND APPEALS
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In the Matter of
KELLY,

Docket No. 06-19-WA,
Docket No. 06-51-WA,
Docket No. 06-60-WA,
Waiver Proceedings

Respondent

DECISION GRANTING WAIVER

Respondent, an employee of the U.S. Department of Education (Department), requested waiver of three salary overpayment debts arising from the Department's premature award of Respondent's within-grade salary increase (WIG), resulting in two WIG awards in one year. For the reasons that follow, I find that waiver of the debts is warranted. Accordingly, Respondent's request for 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 delegates the Secretary's waiver authority involving all former and current employees for salary overpayments to the Office of Hearings and

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 Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at 1,n.1.

Appeals (OHA).² The undersigned is the authorized Waiver Official who has been assigned to this case³, and jurisdiction is proper because this case clearly involves an erroneous payment of pay subject to waiver under the Waiver Statute at 5 U.S.C. §5584.

The resolution of this case is based on the matters accepted as argument and evidence in the proceeding. The record in this case includes Respondent's initial request for waiver in these three matters and documents compiled by the Department's Human Resources office, which includes Federal Personnel Payroll Systems (FPPS) printouts for viewing employee personnel data (Time & Attendance, Leave and Earnings Statements), SF-50s, Notification of Personnel Actions, email messages about Respondent's Within grade (WIG) inquiry and history, and Report of Investigation. Clarification on why three overpayment debts were generated and the timing of those resulted from HR staff feedback.

In addition to Respondent's initial request for waiver letter April 14, 2004, in compliance with the Order Governing Proceedings (OGP), she filed a supplemental response on October 1, 2006, and revised this to add the her sworn verification on October 11, 2006. Respondent filed this supplemental response after taking the opportunity to inspect the files personally and refresh her recollection about chronology of events at the time of the within grade award(s) and the contacts or representations about the award(s) sequence and timing with Human Resources (HR) personnel. Respondent represented that she needed such opportunity since there was a significant passage of time since she requested the initial waivers, and actually thought the matters had been resolved back in 2004. As such, she needed an opportunity to see what evidence Human Resources (HR) was submitting to answer their demands. She made this in person review on September 21, 2006. Both at this file inspection session and in her supplemental response, Respondent noted there were multiple salary adjustments and changes in salary earnings and reflected dollar amounts due to other occurrences in the operative periods, salary years 2002-2003. Respondent has explained and asserted those impacts in her supplemental response. This decision constitutes a final agency decision.

Discussion

As a preliminary matter, it is worthy to note that all waiver proceedings necessarily involve some type of administrative error by the employer-agency; the error is what leads to the salary overpayment. Our waiver cases have consistently acknowledged that despite the fact an administrative error by the Department causes an employee to be paid in excess, the existence of administrative error does not, itself, entitle the Respondent to a waiver.⁴

² Respondent's request for waiver was filed with the Human Resources Services (HRS) office on April 14, 2004. Cases predating the delegation of OHA's waiver authority were not automatically transferred to OHA. On July 20, 2006, this waiver request for file Nos. 04LCBLY3 (\$1,369.59), 04LCBLY5 (\$161.13), & 04LCBLY4 (\$246.08) were transferred to OHA.

³ See, 5 U.S.C. § 5584(b) as it identifies the authority held by the authorized official in waiver cases.

⁴ *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 15, 2005).

Waiver of an erroneous salary payment is an equitable remedy available only when there is no indication of fraud, misrepresentation, fault, or lack of good faith by the debtor.⁵ The debtor must also 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 here is whether Respondent's arguments and submissions support a request that a portion or the entire erroneous salary overpayments be waived. The Department's error arises from its award of duplicate within grade (WGI) increases in 2003, once corrected, it caused a resulting systemic adjustment generating three overpayments for three consecutive periods. How the corrective accounting happened was then explained by HR staff member, Kim McNutt, who reviewed when and why the corrective action generated three separate overpayments. She did this for clarification since this was not an obvious result. As she confirmed the corrective action to cancel the second (duplicate) WGI had an effective date of April 20, 2003, but the action went through with no immediate impact or cancellation effect on the erroneous increase until March 2, 2004, thereby causing a ripple effect back through the system, causing the debt to kick in for the time periods covered.

Fault Standard

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 more than his or her entitled salary. In assessing reasonableness of the debtor in not recognizing an overpayment, the tribunal may consider an employee's position and grade level, newness to federal government, and whether the employee has records that would indicate a salary overpayment.⁶

As an initial matter, when reviewing the newness of employment factor, Respondent qualifies for this as her starting date at the Department, and for federal service as shown by her SF-50s, was in January 2001. The corrective action about the premature award of her within grade increase occurred in April 2003, only two years later. Yet, between her start date and the correction, she advanced more quickly than is the norm, by receiving a quality step increase (QSI) in October 2002. However, that QSI did not change her regular waiting period for the next step increase. But, the QSI did change salary amounts and, in doing so, that could arguably make a new employee more vulnerable to confusion about the timing of her next within grade increase and the correct sequence of things.

Respondent goes on to raise several arguments in support of her waiver request and that she herself was not fault or lacked good faith in the matter. She represents that she really did not know there was a mistake or error until she inquired about the WIG she was expecting to come due in January 2004. It was when she contacted (HR) personnel about it that the problem surfaced. Respondent says she proceeded in good faith to make the inquiry, and follow it through the appropriate chain of command through her

⁵ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

⁶ See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

immediate office and then HR, to have the corrections done. Moreover, Respondent asserts that at the time she got the premature WIG award, causing the second WIG in April 2003, that there were several changes occurring in her bi-weekly pay and because of the timing and initiation of those changes, and with the usual delays of the changes, this was not apparent and would have been difficult to notice or effectively track. Respondent says that the monetary difference tied to the WIG was not a substantial amount (not unusually high) and occurred in close proximity to several other salary changes that were taking effect. Among those other changes she enumerates the following: 1) she changed her federal and state tax withholdings due to marriage; 2) she received a cost of living increase; 3) she had a different amount deducted for her thrift savings plan (TSP); 4) she had a different cost for health insurance; and 5) she had a "Federal debt recovery" amount of over \$200 that was also taken out of her paycheck that she still does not understand. Respondent goes on to claim that in her time at the Department, her personnel actions have not occurred in a timely manner and she had no reason to otherwise believe there was error in her pay during 2003. She cites that her WIG and her QSI did not themselves occur when anticipated as examples of usual delays in personnel actions. It is not uncommon that some delays between actions initiated and the time of discovery on the paycheck are several months. As such, this places a great strain on employees to timely discover changes out of sync with the initiation actions.

Respondent contends that for the very first time when she reviewed her files at the tribunal's office, that she actually saw the SF-50 form which relates to the WIG problem when personnel found the March 2003 WIG action. The Employee copy of that SF-50 Form (March 2003) is in the file, and Respondent says she had not received it and, if she otherwise had seen it, she would have known there was an error, per the "remarks" section. Additional copies of the March 2003 Personnel Action Form, including the OPF Copy and Agency Copy along with the Employee Copy are present. Regularity of process and notice to Respondent of the Action is difficult to assume under these circumstances.

In applying the fault standard to this case, the tribunal concludes that Respondent is not at fault. Respondent has shown that multiple changes and adjustments were being processed to her salary payments during the time the salary overpayments occurred and were triggered by the retroactive corrections. Moreover, respondent has shown that she did not even have access to a critical SF-50, Personnel Action, since the Employee Copy is retained in the original debt files and she never saw it prior to this inspection. Respondent has affirmed the veracity of this representation, and it will be accepted as true, and, it further indicates that regularity of process, notice of the Action, did not occur. Respondent must receive the benefit of the doubt in this case.

Equity and Good Conscience

To secure equity and good conscience, an individual must have acted fairly with out fraud or deceit, and in good faith.⁷ The tribunal must balance equity concerns in light of the particular facts of the case. There are no rigid rules governing the application of the

⁷ See 5 U.S.C. § 5584 and *In re Veronce*, *supra*.

equity and good conscience standard. The tribunal must balance equity and or appraise good conscience in light of the particular facts of the case⁸. 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 position based on the overpayment; whether recovery of the claim would impose an undue financial burden on the debtor; whether the time elapsed between the erroneous payment and discovery of the error and notification is excessive.⁹

First, the ability to discover the salary overpayment with multiple salary adjustments occurring when Respondent did receive the unearned 2003 WIG, given the *previously stated* changes (tax withholdings, cost of living increases, TSP, health insurance, and unexplained debt recovery amount taken), would impair most employees ability to monitor the correctness of salary matters. Add in the fact, that she was a relatively new employee undergoing all these payroll changes, with only two years of experience (2001-03), which may have hindered her ability to monitor and track payroll events as well as more long-term employees could. She did work with her office and the HR office and showed she made good faith effort to resolve the matter and actually believed when she filed her waiver request that it had been resolved then. Indeed, this is significant because the first notice Respondent received that this was an ongoing matter was her receipt of the OGP in August 2006, which crossed over Respondent's new leave of absence which she began in July 2006 with approval of her office to obtain a higher educational degree. Her LOA runs from July 2006-July 2007.¹⁰

The fact remains that Respondent is without her usual salary means, due to this recent decision to pursue higher education on a full time, unpaid basis. Respondent applied for and received a full-time, unpaid leave of absence in July 2006. Respondent says she did start a full time return to higher education courses in January 2006, which correlates with higher household expenses going for that and supports a hardship claim. In addition, Respondent states that her husband is now a part-time student at Virginia Tech, and with these outgoing expenses and student status, their income does not meet fixed expenses. With this situation, Respondent would be under a hardship situation in now adding repayment of the subject debt amounts.

Admittedly, the current situation of higher education expenses, and unpaid leave without pay was not in effect when Respondent sought waiver relief back in August 2004. However, at that time, Respondent notes that she and her husband were the primary caretakers for her mother-in-law, and this involved expense and prompted her to file the waiver request to seek relief, because repayment at that time would have been a strain. Again, with one factor or another that Respondent shows repaying these salary debts which total close to \$1700¹¹ would be a very real hardship, then or now.

⁸ See *in re Cynthia*, Dkt. 05-06-WA, U.S Dep't of Educ. (September 14, 2005).

⁹ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005)

¹⁰ Respondent submits all documentation of her full time student status exists at her OSEP (Office of Special Education & Rehabilitation Services) office. The office confirmed Respondent is on a LOA.

¹¹ The cumulative amounts of the 3 overpayment debts are \$1369.59 & \$161.13 & \$246.08

Since a good argument can be made that Respondent has changed her position, and gone back to school on an unpaid leave of absence, while thinking she could afford to do this without this, kind of or significant dollar, overpayment amount threatening her, there is a real question of fairness and equity. When an individual makes a decision to go on an LOA, he or she normally weighs the expense and available income sources to know if it is feasible. A bottom-line question here is-- would Respondent likely have gone on this unpaid LOA in July 2006 when faced with an active debt of almost \$1700, which she otherwise believed had been resolved. A reasonable answer is that it is unlikely because why would an individual make such a change of position with disregard to that indebtedness factor and any onerous repayment terms he or she would face, without sufficient income. The timing of notification to Respondent in August 2006 about the active state of the debt, after the claims lay dormant for 2 and a half years at the Department, also impacts her harshly since she is at a reduced income level compared to the level she held back in April 2004. That delay before bringing the case forward is too high a penalty with an LOA now in place and one that was pursued in good faith with planning how to meet expected expenses, not unexpected ones. Respondent's diminished income and the continuation of the same through July 2007, is a sound basis now for finding repayment is unwarranted and would otherwise constitute a real hardship. Based on the aforementioned factors, the tribunal finds that recovery of the debt would go against equity and good conscience.

ORDER

Respondent requested waiver of the entire debt, inclusive of three overpayments, herein. Having found that the circumstances of this case conform to the threshold factors warranting waiver, respondent's request for waiver of the entire case is **GRANTED**.

So Ordered, this 29th day of December 2006.

Nancy S. Hurley
Waiver Official