



UNITED STATES DEPARTMENT OF EDUCATION

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

In the Matter of

VIVIAN,

Docket No. 06-32-WA

Waiver Proceeding

Respondent.

DECISION GRANTING WAIVER

Respondent, a former U.S. Department of Education (Department) employee, requested waiver of a \$1,880.55 salary overpayment debt arising from an adjustment that changed 69 hours of donated leave to leave without pay. 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, 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, note 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 April 7, 2003 Notice of Debt Letter and attached Bill of Collection (BoC), the \$1,880.55 overpayment arises from a shortfall of 69 hours of donated leave for Pay Period 20 of 2002. Respondent, a participant in the Department's leave share program, exhausted her donated leave during this pay period. As a result, the Department converted 69 hours of paid leave to leave without pay (LWOP).

Respondent filed her request for waiver and attachments on May 14, 2003.³ In an April 27, 2007 Order Governing Proceedings, Respondent's request for a waiver was deemed timely and Respondent was afforded an opportunity to supplement the record. Respondent retired from the Department in April 2007 on disability.⁴ Consequently, Respondent was unable to supplement her prior statement.

Discussion

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 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 is whether Respondent's arguments and submission support a request that a portion or the entire erroneous salary overpayment be waived. There is no dispute that this case involves an erroneous payment of pay.⁶ The Department's error stems from its aforementioned failure to properly account for the balance of leave in Respondent's leave share account.

Fault Standard

The fault standard is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. Fault also 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.⁷ In assessing the reasonableness of a debtor's failure to recognize an overpayment, the tribunal may consider the employee's position and grade level, newness to federal employment, and whether an employee has records at his or her disposal, which, if reviewed, would indicate a salary overpayment.⁸ Thus, every waiver case must be examined in light of its particular facts and circumstances.⁹

³ Respondent's pending waiver request was transferred to OHA on July 20, 2005.

⁴ The Department's Employee Relations identified April 11, 2007 as her official retirement date and confirmed that Respondent retired on disability.

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

⁶ 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).

⁷ See *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

⁸ See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005) (Veronce).

⁹ See *id.* at 5.

Respondent argues that the Department's error occurred through administrative error and not through any fraud, misrepresentation, fault or lack of good faith. According to a May 16, 2003 report prepared by the Department's human resources office, the error was made by a payroll technician at the Department's payroll contractor. The Department also admits that at the time of the overpayment, it did not have a method in place to track donated leave; thus, Respondent would not have known she was overpaid because she did not know how much leave had been donated.

The archetype for analyzing the fault standard under circumstances similar to this case is set forth in the tribunal's *In re Veronce* decision.¹⁰ In *Veronce*, the hearing official determined that due to the employee's medical status, she was unable to review documents that would have revealed an overpayment. Consequently, the tribunal determined that the employee met the fault standard because she neither knew nor had reason to know that an overpayment occurred.

In the case-at-bar, the facts weigh even more heavily towards the tribunal's finding that Respondent is not at fault. Under the Department's leave share program, Department employees may transfer part of their unused accrued annual leave to other federal employees having medical or family medical emergency situations.¹¹ The Department has acknowledged that it failed to have a system in place that informed leave share participants of how much leave had been donated and how much had been used. Further, Respondent was absent due to the requisite medical emergency that necessitated her participation in the leave share program. Consequently, Respondent's ability to otherwise inquire as to her balance of donated leave was compromised. Finally, the Department's leave and earnings statements or other personnel documentation did not contain any information that would have alerted Respondent to the overpayment. In light of these facts, the tribunal finds that Respondent's failure to recognize that an overpayment occurred was reasonable.

Equity and Good Conscience

To secure equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.¹² Beyond this framework, there are no rigid rules governing the application of the equity and good conscience standard. The tribunal must balance equity and/or appraise good conscience in light of the particular facts of the case.¹³ To this end, the tribunal may consider whether recovery of the claim would be unconscionable including whether collecting the debt goes beyond what is customary and reasonable. An agency's failure to respond to a debtor's waiver request and/or its gross negligence in handling an overpayment case may go beyond what is customary and reasonable.¹⁴ Other factors weighed by the tribunal include the following: whether the debtor has relinquished a valuable right or changed his or her position

¹⁰ See *In re Veronce supra*.

¹¹ See Federal Employees Leave Act of 1998, Pub. L. 100-566, 5 C.F.R. Part 630 and U.S. Dep't of Educ. Personnel Manual Instruction, Voluntary Leave Transfer Program – Administrative Procedures, PMI 630-10 (October 2, 1989). See also, *In re Mary Jane*, Dkt. No. 06-82-WA, U.S. Dep't of Educ. (December 15, 2006) for a more expansive discussion of the Department's leave share program.

¹² See 5 U.S.C. § 5584 and *In re Veronce supra* at 5.

¹³ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (December 14, 2005).

¹⁴ See *id.*

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 the agency's discovery of the error and subsequent employee notification is excessive; and whether the cost of collection equals or exceeds the amount of the claim.¹⁵

In April 2007, Respondent retired on disability due to a resurgence of the medical crisis that precipitated her participation in the leave share program. According to the Department, Respondent remains seriously ill and thus has been unable to participate further in pursuing her waiver request.¹⁶ The tribunal notes that the four-year delay has accrued to Respondent's detriment because she is unable now to more actively participate in this proceeding.¹⁷ 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. Having found that the circumstances of this case conform to the threshold factors warranting waiver, Respondent's request for waiver of the entire debt is **GRANTED**.

So ordered, this 9th day of August 2007.



Greer Hoffman
Waiver Official

¹⁵ *See id.*

¹⁶ In a May 31, 2007 telephone communication with the tribunal, Respondent's former supervisor stated that Respondent remained seriously ill, which precipitated her retirement.

¹⁷ *See In re Suzanne*, Dkt. No. 06-56-WA, U.S. Dep't of Educ. (April 20, 2007) ("A delay of five years does not automatically establish that the passage of time accrued to ... [the debtor's] detriment [...] ... If a delay impinges on a debtor's ability to pursue his or her waiver request, waiver may be appropriate[.] ...")