



UNITED STATES DEPARTMENT OF EDUCATION

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

TELEPHONE (202) 619-9700

FACSIMILE (202) 619-9726

In the Matter of

JOAN,

Respondent

Docket No. 06-49-WA
Waiver Proceeding

DECISION GRANTING WAIVER

The principle question to resolve in this case is whether an employee of the Department of Education (Department) should be granted waiver of a debt arising from the Department's erroneous salary payment in the amount of **\$883.71**. The debt resulted from a salary payment for a pay period in which the employee should have been in leave without pay (LWOP) status. For the reasons that follow, the tribunal concludes that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

The pertinent statutory authority for waiver of a salary overpayment is set forth by 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 Department's *Salary Overpayment Handbook*, ACS-OM-04, specifically delegates waiver authority involving all former and current employees of the Department to the OFFICE OF HEARINGS & APPEALS (OHA), which, thereby, exercises waiver authority on behalf of the Secretary. The undersigned is the authorized Waiver Official who has

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). The law of debt collection is extensive. *See, e.g., 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); *see also* 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), and government-wide regulations issued by the Office of Personnel Management (OPM) (5 C.F.R. Part 550, Subpart K). The Department of Education's overpayment procedures may be found on the Office of Hearings & Appeals website at: www.ed-oha.org/overpayments/.

been assigned this matter by OHA.² Jurisdiction is proper under the Waiver Statute at 5 U.S.C. 5584.³

The resolution of this case is based on matters accepted as argument and evidence. The record includes a copy of a signed and sworn written statement dated December 13, 2006 by Respondent regarding the waiver request, a copy of a notice of debt letter dated August 28, 2001, a copy of a Bill of Collection (BoC) dated August 10, 2001, a copy of Respondent's Leave and Earnings Statement (LES) for pay period 01-08, and a copy of a doctor's note dated April 27, 2001.

DISCUSSION

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 \$883.71. In response to the BoC, Respondent timely requested waiver of the overpayment.⁴ For reasons unknown, the Department took no dispositive action on Respondent's case until on July 20, 2006, when Respondent's case was transferred to the Office of Hearings & Appeals for resolution. On November 16, 2006, the tribunal issued an order requesting Respondent's submission of argument and evidence supporting her position that the debt in this case should be waived. Respondent complied by filing supporting documentation on December 13, 2006.

According to the Human Resources System Team, the BoC was issued because the Department erroneously paid Respondent 45-hours of pay for the pay period ending April 7, 2001 (also referred to as the 8th pay period of 2001 or pay period 01-08). Respondent was paid 45-hours of pay notwithstanding that she had exhausted: advanced annual leave, advanced sick leave, and her leave share⁵ accounts during the pay period. Respondent was absent from work due to an automobile accident that required Respondent to rely on leave for an extensive recovery period.

I.

Determining whether waiver is appropriate requires a consideration of two factors; namely, (1) whether there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of Respondent, and (2) whether Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment.⁶

Fault, as used in the statute authorizing waiver, is examined in light of the following considerations: (a) whether there is an indication of fraud; (b) whether the erroneous payment

² See, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

³ Under waiver decisions issued by the Comptroller General interpreting 5 U.S.C. § 5584, "pay" has been held to include "nonpay" or nonsalary compensation, which covers recruitment bonuses, accrual of annual leave, health and life insurance premiums, retention allowances, and all forms of remuneration in addition to salary. See, U.S. Government Accountability Office, *Scope of Waiver Authority*, B-307681 (May 2, 2006).

⁴ Respondent's initial waiver request was filed September 10, 2001.

⁵ For a full explanation of leave share, see *In re Cynthia*, Dkt. No. 05-16-WA, U.S. Dep't of Educ. (Oct. 31, 2005).

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

resulted from an employee's incorrect, but, not fraudulent, statement that the employee under the circumstances should have known was incorrect;⁷ (c) whether the erroneous payment resulted from an employee's failure to disclose to a supervisor or official material facts in the employee's possession that the employee should have known to be material; or (d) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.⁸ Waiver may be granted only if a debtor succeeds in showing that he or she can satisfy the requisites of the fault standard. To meet the standard, the debtor must acknowledge the validity of the debt or urge the absence of any reason to recognize the salary payment at issue as an overpayment. Respondent takes the latter position.

The paradigm for resolving whether the fault standard has been met under circumstances pertinent to this case is most clearly set forth in the decision *In re Veronce*.⁹ In *Veronce*, the waiver official held that the fault standard is met when the employee is "unable to know the circumstances of [the] overpayment," due to the employee's status. In that case, the employee was hospitalized when she was placed in LWOP status, and the LWOP status resulted in an overpayment. The employee did not have access to bank statements or an LES while in the hospital. On this basis, the waiver official ruled that the employee neither knew nor had reason to know that she was erroneously compensated while in a nonpay status. The facts of this case compel the same result.

Respondent argues that waiver of the entire debt is warranted. In Respondent's view, the excessive time elapsed between the erroneous payment and the commencement of this proceeding, and the fact that she had no reason to recognize the occurrence of an overpayment in the eighth pay period of 2001 sufficiently establish that she should be granted waiver of the debt.

While recovering from an automobile accident Respondent participated in a leave share program, and had been awarded advanced sick leave and advanced annual leave as requested. Respondent had also requested that she be put in LWOP status as soon as her requested leave and shared leave had been exhausted. Apparently, the Department erroneously calculated the permissible number of advanced hours it could provide for Respondent's use during 2001. In addition, the error was not discovered until the 10th pay period of 2001 after Respondent had been paid leave that she had not earned, been advanced, or obtained through the Department's leave share program. Subsequently, the Department issued a BoC for the overpayment and appropriately placed Respondent in LWOP status. In light of *Veronce*, the tribunal is persuaded

⁷ Broadly stated, under the fault standard, the scope of Respondent's duty extends to include the obligations to: (1) verify bank statements and/or electronic fund transfers of salary payments, (2) question discrepancies or unanticipated balances from salary payments, and (3) set funds aside for repayment when appropriately recognizing a salary overpayment. See, *In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (October 19, 2005).

⁸ See generally, *Guidelines for Determining Requests* U.S. Department of the Treasury Directive 34-01 (2000), available at <http://www.treasury.gov/regs/td34-01.htm>; Standards for Waiver, 4 C.F.R. § 91.5 (2000).

⁹ Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

that the debt arose at a time when Respondent could not have known of the debt.¹⁰

Even if Respondent had access to a pertinent LES while on leave, the LES, on its face, would not likely disclose that an erroneous payment had occurred. Indeed, the LES for pay period 01-08 is demonstrative; it does not reveal that Respondent had insufficient leave to cover her salary payment for the pay period. To the contrary, the LES indicates Respondent had sufficient leave to cover her entire salary payment. Therefore, like the debtor in *Veronce*, Respondent's circumstances prevented her from knowing about the circumstances surrounding her overpayment.¹¹ Accordingly, the tribunal finds that there is no indication of fault on Respondent's part.

II.

Having found no fault or lack of good faith on Respondent's part, the remaining question is whether it is against equity and good conscience for the Federal government to recover Respondent's debt. In light of the facts, the tribunal is persuaded that collection of the debt would be inequitable.

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, including 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,¹² 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 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."¹³

Respondent argues that it is against equity and good conscience to recover the debt

¹⁰ It remains fundamental to the analysis of when waiver may be granted that when an employee fails to review documentary records, including leave and earnings statements, which, if examined, would have shown the overpayment and provided the employee with an opportunity to correct the overpayment, the employee is not free from fault. The fact that an agency erred in making the overpayment does not relieve the overpaid person 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 right to recover an excess amount. *See, In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

¹¹ *See, In re Veronce* at 6.

¹² *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.

¹³ *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).

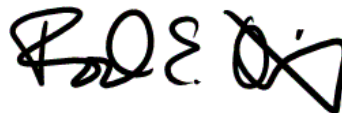
because of the excessive time elapsed between the erroneous payment and the commencement of this proceeding. Five years elapsed while Respondent's waiver request remained unresolved due to a backlog of cases. In a similar case, *In re Kenneth*,¹⁴ the tribunal observed that although a five-year period does not come within the precise contours of waiver cases adopting a *per se* rule that an excessive lapse in the time used to resolve a waiver request accrues to the debtor's detriment, a "five-year time period, at least, borders on excessive."¹⁵ Consequently, the tribunal finds that the five-year time period wherein the Department took no dispositive action on Respondent's waiver request is a relevant equitable factor favoring Respondent's position.¹⁶ More to the point, there is no doubt of the correctness of Respondent's assessment that her ability to provide supporting documentation for her position was greater five years ago than it is now; to wit, Respondent's time-keeping official and two of Respondent's supervisors are now no longer employed by the Department or otherwise available to Respondent. What is more, even if the Department could assert a basis for the extensive delay in resolving Respondent's waiver request, it is doubtful that such a delay should be deemed reasonable under the circumstances of this case, wherein Respondent asserts that the delay imposes a direct burden upon her capacity to present her case. In this regard, the tribunal finds that beyond the mere excess of elapsed time for taking action on the waiver request, the passage of time also has accrued to Respondent's detriment.

ACCORDINGLY, the tribunal concludes that in equity and good conscious and in the interests of the United States waiver should be granted. This decision constitutes a final agency decision.

ORDER

Pursuant to the authority of 5 U.S.C. § 5584, Respondent's request for waiver of the entire debt to the United States Department of Education in the amount of **\$883.71** is **HEREBY GRANTED.**

So ordered this 25TH day of January 2007.



Rod Dixon
Waiver Official

¹⁴ *In re Kenneth*, Dkt. No. 06-52-WA, U.S. Dep't of Educ. (December 12, 2006).

¹⁵ *Id.* See *In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006) (holding that a seven-year time period that elapsed during the pending resolution of Respondent's waiver case is excessive) and *In re Cheryl*, Dkt. No. 05-28-WA, U.S. Dep't of Educ. (February 17, 2006) (holding that over seven years -- or nearly eight -- is beyond what would be customary or expected to resolve a waiver request).

¹⁶ This case can be resolved without addressing whether a five-year delay is necessarily excessive or should be brought within the *per se* rule recognized by *Kenneth*.