



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of
COLENE,¹

Docket No. 06-74-WA
Waiver Proceeding

Respondent

DECISION DENYING 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 **\$1,524.97** for a pay period in which the employee was absent without leave (AWOL). For the reasons that follow, I find that waiver of the debt is not warranted. Accordingly, Respondent's request for waiver is denied.

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.² 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 Sharon J. Harris, Area 1 – Chief Steward/Fair Practice & Women's Rights Coordinator for American Federal of Government Employees/Local 2607, represented Respondent.

² 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.³ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. 5584.⁴

The resolution of this case is based on matters accepted as argument and evidence. The record includes a copy a signed and sworn written statement dated October 20, 2006 by Respondent regarding the waiver request, a copy of a notice of debt letter dated August 10, 2006, a copy of a Bill of Collection (BoC) dated August 11, 2006, a copy of an Amended Time and Attendance Report issued by the Federal Personnel Payroll System (changing Respondent's pay status from pay to AWOL), a copy of an email message dated June 9, 2006 sent to Respondent from Respondent's supervisor, a copy of a signed health disclosure form along with clinical notes, a copy of a doctor's note dated October 11, 2006 (addressed, generally, to the tribunal on behalf of Respondent), and a copy of Respondent's Flexible Schedule Certification Form for pay period ending April 29, 2006 (signed by the employee, but not certified by the supervisor).

DISCUSSION

In a waiver proceeding, the debtor acknowledges the validity of the debt or urges an absence of any reason to recognize the overpayment as an erroneous payment. The standard for 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.⁵ Measured against these factors, 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 resulted from an employee's incorrect, but, not fraudulent, statement that the employee under the circumstances should have known was incorrect;⁶ (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.⁷

In this case, Respondent argues that waiver of the entire debt is warranted. In Respondent's view, she is not at fault for the debt because she met with her supervisor to discuss her pay status for the pay period at issue in May 2006, which preceded the issuance of the BoC. In support of Respondent's contention, she submitted a copy of an email addressed to her from

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

⁴ Under the 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).

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

⁶ 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).

⁷ 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).

her supervisor memorializing their discussions about her pay status. Building upon this claim, Respondent also argues that she and her supervisor did not agree on her pay status for the pay period at issue and, therefore, there is no basis to conclude that she was in a position to alert the Department to an overpayment.

A waiver proceeding is a narrowly focused proceeding. To proceed, the debtor acknowledges the validity of the debt or urges the absence of any reason to recognize the salary payment at issue as an overpayment. Respondent takes the latter position. According to the Human Resources System Team, the BoC was issued because the Department erroneously paid Respondent 40-hours of pay from April 16, 2006 through April 29, 2006 (referred to as the 10th pay period of 2006 or Pay Period 06-10). Respondent was paid 31-hours for the first week of the pay period and 9 hours of annual leave during the second week of the pay period. Subsequently, the Department determined that Respondent was AWOL.

AWOL generally denotes that an employee was absent from duty, and either that an employee's absence was not authorized or that a request for leave was properly denied.⁸ Notably, an agency may not charge leave to an employee whom it knows was present and performed work. In this regard, the Office of Personnel Management (OPM) instructs that implicit in the term "leave" is the notion that an employee on leave is not at work or performing official duties.⁹

The facts in this case are disputed, and the circumstances of the debt in this case are far from clear. The Department determined that Respondent was overpaid 31 hours in the first week of Pay Period 06-10, yet this determination lacks explanation as to why the total overpaid hours are less than 40 hours in a given workweek; notably, Respondent works a 40-hour workweek, but it is unclear whether the 31-hour absence was determined as a result of an unauthorized absence or a request for leave that was properly denied.¹⁰

Similarly troublesome is Respondent's implicit, if not direct, challenge of her assignment as AWOL. Respondent argues that she worked as required during the first week of the pay period at issue, yet she submits evidence – in the form of an email from her supervisor – showing that her supervisor required her "time card" to be amended to reflect an AWOL status. Although the email message from her supervisor does not indicate the pay period for which it pertains, Respondent provides the missing link herself by indicating that the message is relevant to the pay period at issue.¹¹ The aforementioned notwithstanding, Respondent carries the burden of showing, as she urges, that there is an absence of any reason to recognize the salary payment at issue as an overpayment; notably, she does not meet that showing.

⁸ See *Boscoe v. Department of Agriculture*, 54 M.S.P.R. 315 (1992).

⁹ See Compensation and Leave Decision, Case No. S002860, May 25, 1999, <http://www.opm.gov/payclaims/1999/S002860.htm>; see also 5 U.S.C. 6302 (annual and sick leave are provided for days "on which an employee would otherwise work and receive pay . . .")

¹⁰ It may be that Respondent accounted for 4 hours of work on April 20, 2006, but neither Respondent nor the Department account for this anomaly. See, Amended Time and Attendance Report (indicating Respondent's status on April 20, 2006 as 5 hours AWOL without further explanation).

¹¹ In accordance with the evidence in the record, Respondent was granted advanced sick leave for a portion of the second week of the pay period at issue.

Respondent says she was not AWOL, but saying so does not make it so - especially when the evidence shows that Respondent was unsuccessful in convincing her supervisor that her pay status should not be AWOL. Moreover, Respondent makes no argument for why her supervisor was not in a position to know the employee's pay status. Even more harmful to Respondent's position, she presents no evidence to rebut her supervisor's determination that she was AWOL.

Since Respondent was informed in May that her pay status for the pay period at issue would be changed to AWOL, she was alerted to the possibility that the Department may seek to recover the salary overpayment. More to the point, Respondent presents no probative evidence that supports her position that she continues to have no reason to recognize the salary payment at issue as an overpayment. There is no documentation in the record accounting for her presence at work during the period at issue. Thus, there is no basis upon which to conclude that Respondent does not lack fault for the debt.

Beyond the aforementioned, Respondent's sworn statement includes no argument why, in the interests of equity and fairness, this debt should be waived.¹² Instead, Respondent focuses steadfastly upon her position that ostensibly the debt is not valid or that she has no reason to recognize it as such. Consequently, even if Respondent had not been found at fault for the overpayment, Respondent's submission sheds no revealing light on why waiver should be granted in the interests of equity and fairness. Accordingly, I have no choice, but, to conclude that collection of the debt should not be waived.

CONCLUSION

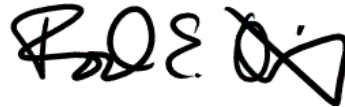
The tribunal finds that waiver cannot be granted in this case. This decision constitutes a final agency decision.

¹² Respondent submits evidence, in the form of a Federal Occupational Health disclosure record issued by the United States Public Health Service, that shows that Respondent left her workstation in the morning of April 26, 2006 to receive medical assistance, and, shortly thereafter, Respondent was transported to an emergency room. Respondent also submits a letter addressed to the tribunal from a doctor who indicates that Respondent has been in the doctor's care for a specified serious illness since 1998. Notwithstanding the convincing evidence of Respondent's health care concerns, Respondent fails to draw the tribunal's attention to the pertinence of the evidence. None of the evidence directly relates to the 40 hours at issue.

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 **\$1,524.97** is **HEREBY DENIED.**

So ordered this 23rd day of January 2007.

A handwritten signature in black ink, appearing to read "Rod Dixon", written above a horizontal line.

Rod Dixon
Waiver Official