



UNITED STATES DEPARTMENT OF EDUCATION

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In the Matter of

MARLENE,

Respondent

Docket No. 06-79-WA
Waiver Proceeding

DECISION DENYING WAIVER

The question presented by this case is whether an employee of the Department of Education (Department) should be granted waiver of a debt arising from an erroneous salary payment in the amount of **\$93.72**. The salary overpayment arose from the improper payment of a within-grade step increase (WIGI) for two consecutive pay periods.¹ For the reasons that follow, the tribunal concludes that waiver of the debt is not warranted. Accordingly, Respondent's request for waiver is denied.

By enactment of the General Accounting Office Act of 1996 (the Waiver Statute), Congress authorized 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 delegated waiver authority involving all former and current employees of the Department to the OFFICE OF HEARINGS &

¹ WIGIs 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.

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/.

APPEALS (OHA),³ which, thereby, exercises waiver authority on behalf of the Secretary. The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁴ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. 5584.⁵

In adjudicating this case, the tribunal's findings and conclusions are based on matters accepted as argument and evidence, including: a copy of a signed and sworn written statement dated December 13, 2006 by Respondent regarding the waiver request, a copy of a statement requesting waiver dated November 9, 2006, a copy of a notice of debt letter dated October 20, 2006, a copy of a Bill of Collection (BoC) dated October 4, 2006, a copy of Respondent's Individual Payroll Record, dated August 21, 2006 (SF-1127), and copies of a series of email communications occurring on December 7, 2006 between Respondent and the tribunal.

DISCUSSION

I

A determination of whether waiver is appropriate requires consideration of two factors: (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 the term is used in the Waiver Statute, 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;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

³ The Department's policy is set forth in the U.S. Department of Education, Administrative Communications System Departmental Handbook, HANDBOOK FOR PROCESSING SALARY OVERPAYMENTS (ACS-OM-04, June 2005 (revised Dec. 2006)).

⁴ See, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

⁵ 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).

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

⁷ Under the Waiver Statute, "since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive." *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005). More 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).

debtor must either acknowledge the validity of the debt or urge the absence of any reason to recognize the salary payment at issue as an overpayment.

The paradigm for resolving waiver cases involving erroneous WIGI payments under circumstances pertinent to this case is set forth in the decision *In re Jeanette*.⁹ *Jeanette* provides a clear and succinct framework identifying the factors that would support waiver of a debt when an erroneous WIGI payment is the factual predicate of the debt. In *Jeanette*, the waiver official held that a finding of no fault is appropriate when an employee: (1) does not have specialized knowledge about the federal pay structure, or (2) has no prior experience with an erroneous within-grade increase, or (3) has no specific knowledge or reason to know a particular within-grade increase was erroneous.¹⁰ In *Jeanette*, a salary overpayment arose as a result of the Department's erroneous WIGI payments to the employee over the course of 16 pay periods. The waiver official concluded that notwithstanding that the employee neither was the cause of the erroneous payment nor lacked good faith in compliance with personnel rules governing WIGI payments, the employee was at fault as that term is defined under the Waiver statute. There was no reason to mitigate the fault standard; the employee was a "long-term employee," the personnel rules regarding the eligibility for a WIGI was both easily accessible and clear, and the employee had been alerted to the error by the Department. Therefore, the waiver official concluded that the employee knew or should have known the WIGI payment to be erroneous. Likewise, I am persuaded that this case compels the same result.

In the 15th and 16th pay periods of 2006, the Department erroneously paid Respondent at the GS-9, step 7 pay rate, notwithstanding that the employee's appropriate pay rate was GS-9, step 6. In the 17th pay period of 2006, the Department canceled the erroneous WIGI, and processed a personnel action to promote Respondent to GS-11, step 2. These facts are uncontested. Moreover, Respondent does not contest the fact that the WIGI paid to her was improper; instead, Respondent argues that a waiver of the debt is warranted because she neither had a reason to suspect that the WIGI was erroneous, nor a basis, generally, to discover the existence of erroneous WIGI payments. Expanding on this argument, Respondent asserts that while, now, she "can see where the error occurred and agree [sic] with the dollar amount... [t]he person that made the error should be the person held accountable." Similarly, Respondent argues that the erroneous WIGI payments were the fault of the Department, and requiring her to repay the debt is tantamount to penalizing her for the "negligence" of others.¹¹

⁹ Dkt. No. 06-11-WA, U.S. Dep't of Educ. (Sept. 20, 2006). See also, *Jeanette's* companion cases docketed under Dkt. No. 06-12-WA and Dkt. No. 06-13-WA.

¹⁰ Of course, in determining whether an employee is without fault, "pertinent circumstances such as position, grade level, education, and training of the debtor may be taken into consideration." *In re Anh-Chau*, Dkt. No. 05-01-WA, U.S. Dep't of Educ. (June 17, 2005).

¹¹ Generally, it is impertinent that an error by the employer-agency is the factor that leads to the salary overpayment. Since a mistake in payroll or in the application of a rule or regulation governing pay is the usual vehicle that drives creation of the employee's debt, waiver decisions consistently acknowledge that despite the fact that the an error by the Department causes an employee to be paid in excess of the employee's lawful rate of pay, the existence of the error cannot, itself, entitle an employee to waiver. No employee has an entitlement to pay that he or she obtains as a result of an overpayment. *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 15, 2005).

According to Respondent, she was told by a member of the Department's human resources staff to expect a WIGI, and in the 15th and 16th pay periods of 2006 her pay was increased from Step 6 to Step 7 within the same grade. In this regard, in Respondent's view, she should not be held responsible for mistakes made by staff responsible for ensuring that personnel actions are executed in accordance with the guidelines of the Department. Respondent also argues that at the time she received the WIGI she was also expecting a grade promotion and, therefore, did not recognize the WIGI pay increase as improper.

As noted *supra*, a within-grade increase is a periodic increase or advancement 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, which is effective no sooner than on the first day of the pay period beginning on or after the completion of the required waiting period. For advancements between each of the first four steps, an employee must wait one year or 52 weeks, and for advancements between steps five through seven the waiting period is two years or 104 weeks of service.¹²

Contrary to Respondent's arguments, Respondent could determine when she was eligible for a WIGI in several ways, including by computing the applicable waiting period pertinent to the date she was hired, the date she received her last career ladder promotion, or the date she received an "equivalent increase" in pay. Using the latter alternative, Respondent would have been alerted to the error in her WIGI since she should have anticipated an increase in pay based upon a promotion in grade rather than an increase in the step of the same grade.¹³

As *Jeanette* instructs, within the context of an employee's duty to prevent or discover an improper salary overpayment, an employee is expected to know the required waiting periods between within-grade increases and to inquire about increases that do not appear to conform to the mandatory waiting period. Although in this case Respondent vigorously argues that the Department's human resources personnel are better situated to discover and ferret out errors in employee pay, the argument misses the point. There is no doubt that personnel staff should and often do take on the task of correcting mistakes of the type at issue in this case, but the equitable remedy of waiving a debt resulting from a salary payment for which an employee is not lawfully entitled imposes a duty on the employee as well. Despite the skill of a personnel or payroll specialist, it is often the case that an employee is in the best position to recognize a mistake in pay.¹⁴ Consequently, to successfully persuade the tribunal that the debt created from an unauthorized salary payment should be waived, the employee must comply with his or her duty to verify the accuracy of salary payments, question discrepancies or unanticipated payments when they occur, and disclose errors to supervisors or payroll officials.

This conclusion comports with the tribunal's decisions identifying the antecedents that may give rise to a basis for mitigating a finding of fault. Only under circumstances, such as

¹²Waiting periods not within the scope of this case are not identified, *but see* 5 U.S.C. § 5335; 5 C.F.R. § 531.412.

¹³ Pursuant to 5 C.F.R. § 531.403, Respondent's promotion from GS-9 grade to GS-11 grade in the 17th pay period of 2006 constitutes an equivalent increase in pay that triggers a new time period for calculating the waiting period to be eligible for a WIGI.

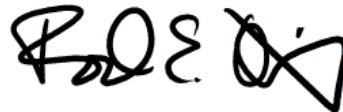
¹⁴ Respondent states that when she inquired about the validity of her WIGI she was told that the WIGI "was valid." Respondent does not, however, identify to whom she communicated or the nature and substance of the communication.

those identified in *Jeanette*, may an employee's failure to recognize an improper WIGI be considered a factor militating against a finding of fault under the waiver standard. In Respondent's case, she clearly could have corroborated the accuracy (or lack thereof) of her eligibility for a WIGI by computing the timing of her previous WIGI and the applicable waiting period. Moreover, the fact that she was informed of both her promotion and of her eligibility for a WIGI in approximately the same time frame reveals that she had reason to inquire further about the propriety of these personnel actions given the applicable mandatory waiting periods for with-in grade pay increases. Guided by the facts of this case and the analysis herein, I conclude that Respondent is not without fault as that term is defined under waiver standards. Accordingly, I find that in the interests of the United States waiver cannot 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 **\$93.72** is **HEREBY DENIED**.

So ordered this 30TH day of March 2007.

A handwritten signature in black ink, appearing to read "Rod Dixon", with a stylized flourish at the end.

Rod Dixon
Waiver Official