



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

TATIANA,

Respondent

Docket No. 06-83-WA
Waiver Proceeding

DECISION GRANTING 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 **\$3,506.33**.¹ This salary overpayment arose from the granting of leave which, when corrected, resulted in a negative leave balance in the employee's leave account. For the reasons that follow, the tribunal concludes that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

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 to the OFFICE OF HEARINGS & APPEALS (OHA),³

¹ *Waiver* is defined as "the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee as [provided] by 5 U.S.C. 5584...or any other law." 5 C.F.R. § 550.1103.

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 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). The Department's overpayment procedures may be found on the Office of Hearings & Appeals website at: www.ed-oha.org/overpayments/.

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)).

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 bases findings and conclusions on matters accepted in this proceeding as argument and evidence, including: a copy of a signed, sworn written statement dated January 8, 2007 by Respondent providing a basis for waiver of the salary overpayment, a copy of a “Proof of Income” letter issued by the State of Maryland, Howard County, Department of Social Services, and a copy of a Bill of Collection (BoC) dated November 28, 2006.

DISCUSSION

I

Respondent was hired by the Department in October 2005; shortly thereafter, in January 2006, Respondent informed her supervisor that she would be seeking maternity leave in April 2006. At that time, Respondent was directed to a human resources official who informed her of the Department’s policies regarding maternity leave, including the options of requesting advance leave and unpaid leave. On this basis, Respondent requested and received advance leave. While at home recovering from surgery that was attendant to the birth of Respondent’s child, Respondent was informed by the Department that she had used the maximum number of leave hours that could be advanced to her in the 2006 pay year. As a result, Respondent pursued several options by seeking advice from the Department on whether she could: return to work on a part time schedule, work from home, or take an extended leave. In response, she was informed that none of the options were available to her. Subsequently, Respondent resigned.

Pursuant to 5 C.F.R. Part 630, Subparts B & D, a Federal employee in full-time status is entitled to sick leave with pay that accrues at the rate of four hours per pay period regardless of the number of years of service completed by the employee.⁶ At that rate in Respondent’s case, she had not earned sufficient leave to meet her desired use of maternity leave. Pursuant to 5 U.S.C. § 6307, Federal agencies may grant leave at any time during a leave year in advance of its accrual, but, generally, where leave is so advanced, it must be repaid or recovered by biweekly sick leave earnings over the balance of the current leave year.

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 Exceptions to this rule apply to presidential appointments that are not pertinent to this case.

As established by the Department, the reconstruction of Respondent's leave records show that she obtained and used 220 hours of leave in excess of that to which she was entitled as a result of her resignation immediately following her use of advance leave. Accordingly, the 220-hour "negative leave balance" constitutes the salary overpayment or debt that is the subject of this waiver proceeding.⁷

Only errors in salary payments or salary overpayments are subject to waiver in a waiver proceeding. At first blush, it could be said that the Department did not make an error in paying Respondent and, therefore, Respondent's debt should not be subject to waiver. In other words, a threshold question arises regarding whether the leave payments to Respondent actually constitute *erroneous payments of pay*.⁸

Undoubtedly, the crediting of leave, subsequently determined to be improper, does not always result in a debt. The erroneous crediting of annual leave has been interpreted to "mean a grant of leave which, when corrected, would result in a negative leave balance in the employee's annual leave account."⁹ Thus, the absence of a negative leave balance means no debt or overpayment of pay exists within the meaning of the Waiver Statute. This conclusion directly follows in cases where advance leave, ultimately, is recovered by the employee's current leave account.¹⁰ In the case at bar, since Respondent resigned before annual or sick leave could be earned and, thereby, recovered from a current leave account, the tribunal finds that a negative leave balance exists. Accordingly, Respondent's negative balance constitutes a debt subject to waiver under the terms of the statute.

II

In applying the Waiver Statute, the tribunal must consider 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.¹¹

Fault, as the term is used in the Waiver Statute, is examined in light of the following considerations: (a) whether the erroneous payment resulted from an employee's incorrect, but, not fraudulent, statement that the employee under the circumstances should have known was

⁷ A negative leave balance is a grant of advance leave that cannot be recovered through deductions from an employee's current leave account. *See, e.g., In re Russell*, Dkt. No. 05-19-WA, U.S. Dep't of Educ. (June 23, 2005).

⁸ An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to the employee's salary. *See also*, SALARY OFFSET TO RECOVER OVERPAYMENTS OF PAY OR ALLOWANCES FROM DEPARTMENT OF EDUCATION EMPLOYEES, 34 C.F.R. Part 32 (2004) (the Department's regulations at Part 32 apply with equal force to former and current employees).

⁹ *See, Stephen C. Small*, 1993 WL 58244 (Comp.Gen.), B- 250,228 (1993); *Lamoyne J. DeLille*, 56 Comp.Gen. 824,828 (1977). It is noteworthy that it is of no pertinent distinction for the matter at hand whether the negative leave balance is a negative sick leave balance or a negative annual leave balance.

¹⁰ *See, Stephen C. Small*, 1993 WL 58244 (Comp.Gen.), B- 250,228 (1993).

¹¹ *See, In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

incorrect;¹² (b) 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 (c) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.¹³ Waiver may be granted only if a debtor can satisfy the requisites of the fault standard.¹⁴ In addition, to meet the standard, the 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. Respondent takes the latter position.

Respondent argues that waiver is warranted because she was unaware of personnel regulations that mandated that her status as a Career Intern precluded her use of alternative work schedules, which otherwise would have ensured that she maintained the capability to repay her current leave account. In addition, Respondent argues that her status as a recently hired employee should demonstrate why she was unfamiliar with personnel rules governing the use of leave by Career Interns. In this regard, Respondent argues that it is unreasonable to conclude that she should have known that the consequences of receiving advance leave under the circumstances of her case could result in a debt to the Department. The tribunal agrees with Respondent's arguments.

On July 6, 2000, President Clinton signed Executive Order 13162 authorizing the establishment of the Federal Career Intern Program to assist agencies in recruiting and attracting exceptional individuals with a variety of experience and academic competencies. Generally, interns are appointed at grades GS-5, 7, or 9 in the excepted service for a period not to exceed 2 years, unless extended up to one additional year with the approval of the Office of Personnel Management (OPM). Upon successful completion of the internship, an intern becomes eligible for a noncompetitive conversion to career or career-conditional appointment. Throughout the internship, the intern participates in a formal training program, and carries out job assignments to develop competencies appropriate to the agency's mission.¹⁵ Respondent was appointed as part

¹² 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, e.g., In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (October 19, 2005).

¹³ *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).

¹⁴ A waiver case appears to give support to a shorthand approach to resolving waiver cases. This case ignores the fault standard established by statute, set forth by government-wide regulations, and followed by the Department's waiver decisions. To avoid confusion among debtors who consult our case law for guidance and reference in seeking waivers, this decision makes it clear that the tribunal rejects the legitimacy of any approach that substitutes a reasoned determination of whether a debtor's argument and evidence satisfies the fault standard with a shorthand conclusory review. Aside from application of the statute of limitations, there is no valid support or legal authorization under the Waiver Statute (or cases applying its terms) for substituting a complete examination of all the relevant factors pertinent to adjudicating a waiver request with unexplained conclusions grounded on speculation and conjecture. *Cf., In re Vanessa*, Dkt. No. 06-37-WA (June 18, 2007). To be sure, it would defy both logic and elementary principles of administrative law to decide a waiver case when the record is "clearly inadequate to fairly assess [the waiver] request." *Id.*

¹⁵ Although the program provides for a noncompetitive appointment to the competitive service, the requirements for appointment include, requiring that the positions be announced, that displaced employees be given preference, and that the program only be used as a supplement to competitive examining. *See*, 5 C.F.R. Parts 213 & 315.

of an outstanding scholars program used to select those college graduates from accredited schools who obtain a grade point average of 3.5 or higher on a 4.0 scale for all undergraduate courses completed toward a baccalaureate degree or who stand in the upper 10% of a baccalaureate graduating class.

Although the Department's waiver decisions recognize that waiver is not appropriate for employees who shirk their obligation to ensure the accuracy of their pay,¹⁶ there is no evidence that Respondent avoided her obligation in this case. In fact, Respondent's salary payment records did not disclose an overpayment. The salary overpayment resulted from Respondent's decision to separate from Federal service; therefore, Respondent's pay throughout her service and until the point in time she resigned was accurate and the status of her leave account was consistent with the expectation that she would return to work and repay the advance leave. In this respect, Respondent's review of documentary records, including leave and earning statements, would not have disclosed an overpayment.

Moreover, this case follows those cases in which it has been determined that an employee's position or grade level creates a circumstance that diminishes the on-going duty employees have to know or to inquire about a salary payment;¹⁷ to wit, waiver cases have recognized that the scope of the duty under the fault standard may vary among employees of different positions and different grade levels.¹⁸ Respondent was employed as an intern for less than 6 months at the GS-7 level when the circumstances of the overpayment arose. We have held that, generally, an employee under such circumstances lacks knowledge of the complex civil service rules regarding advance leave. Guided by these facts and the analysis herein, the tribunal concludes that Respondent is without fault as that term is defined under the waiver standard.

III.

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 and Respondent's arguments, 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

¹⁶ See, *In re Russell*, Dkt. No. 05-19-WA, U.S. Dep't of Educ. (June 23, 2005).

¹⁷ Cf. *In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (Oct. 19, 2005) (recognizing, in an advanced annual leave case, that, among other factors, at a senior grade level, like GS-14, an employee should have known that his LES disclosed that he had not fully repaid his advanced annual leave at the time he separated from Federal service).

¹⁸ See, e.g., Department of Defense, Office of Hearings & Appeals (DOHA) Case No. 97052111 (September 30, 1997) (holding that a "financial officer is expected to be familiar with the regulations" and regardless of a supervisor's mistake "a finance officer should have questioned the [over] payment").

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,¹⁹ 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."²⁰

Respondent disclosed to both her supervisor and a human resources official her lack of familiarity with and understanding of the civil service rules regarding advance leave. As a result of her medical condition and the birth of her child, Respondent pursued several alternative work options with the Department, including requesting whether she could return to work on a part time schedule, work from home, or take an extended leave. In doing so, she was informed that none of the options were available to her, and as a result, she resigned. Unfortunately, as explained more fully *infra*, the Department's advice was faulty.

There is no doubt that, ultimately, the Department could have denied Respondent's requests and provided Respondent with reasons for doing so. But, the Department erred when it concluded that Respondent was strictly ineligible to pursue these options as a result of her status as a career intern. Although, under Executive Order 13162, there is a limitation on the term of appointment of a career intern that may not exceed 2 years unless extended, there is no limitation or condition precedent, express or implied, limiting a career intern's eligibility for alternative work schedules.²¹ Nor is there a general limitation on eligibility for alternative work schedules applicable to career intern appointments pursuant to regulations promulgated by OPM.²² Quite the contrary, pursuant to 5 C.F.R. §§ 213.3202 and 340.202, career interns are expressly eligible for, *inter alia*, promotions, permanent appointments, and part-time work schedules.²³

Beyond tendering erroneous guidance, Respondent's reliance upon the Department's guidance accrued to her detriment. Notwithstanding that evidence that a government official was mistaken cannot serve as a basis for estopping the Federal government from collecting a debt, equitable considerations in reviewing a waiver request may include considering whether Respondent reasonably relied upon the government's advice to her detriment.²⁴ Indeed, rather

¹⁹ 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.

²⁰ *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).

²¹ Respondent had not completed the first year of her appointment prior to resigning so the term limitation was inapplicable.

²² See, 5 C.F.R. § 213.3202 (2006).

²³ Career interns are excepted service, Tenure Group II appointments. 5 C.F.R. § 213.3202(o)(4).

²⁴ See, e.g., *Lee v. Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813); *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990) (the government may not be estopped from enforcing the public laws). This case fits easily within the Court's precedent; under the circumstances of this case, equity serves a limited purpose. The

than “estopping” the government from acting in a certain manner or from otherwise enforcing the law, this case raises the concern of how to appropriately apply equitable principles that underscore the importance of protecting an individual’s reliance on an official’s mistaken advice or guidance when, in doing so, the individual has acted to their detriment. The equities favoring waiving a debt could hardly be stronger given Respondent’s request for a part-time work schedule, and the circumstances of the recent birth of her child. Under the Federal Employees Part-Time Career Employment Act of 1978, for example, Congress expressly identified that one purpose of authorizing the Federal government to offer Federal employees part-time work assignments included providing “parents opportunities to balance family responsibilities with the need for additional income” and to “reduce unemployment while retaining the skills of individuals who have training and experience.” Unfortunately, these objectives were clearly overcome in Respondent’s circumstance.

Beyond the circumstances of the erroneous advice provided Respondent, another factor that is pertinent to the balance of equities in this case is the financial burden collection of this debt would impose upon Respondent. According to Respondent, she is an unemployed, single mother who receives financial assistance from the State of Maryland. In support thereof, Respondent submitted a copy of a “Proof of Income” letter issued by the State of Maryland, Howard County, Department of Social Services, which identified her expenses and State assistance. To underscore the significance of the financial burden that would be imposed by repaying the debt, Respondent’s evidence shows that she receives food stamp assistance, housing assistance, medical assistance, and a monthly cash assistance of \$386.00.

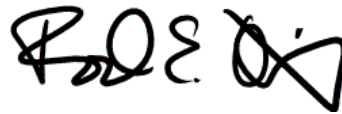
The tribunal is persuaded by Respondent’s arguments and evidence underscoring why the equities of fairness favor her request for waiver. There is no basis in the record to support a conclusion that Respondent was aware she was being overpaid; indeed, the record shows that Respondent’s reliance upon the Department’s erroneous advice may have been a significant factor in Respondent’s ultimate decision to resign her position. Moreover, Respondent was in little or no position to militate against the likelihood of a salary overpayment, given the erroneous advice she was provided. These factors taken together with the aforementioned circumstances of Respondent’s financial burden render collection of the debt in this case profoundly inequitable. Accordingly, in equity and good conscience and in the interests of the United States Respondent’s request for waiver should be granted. This decision constitutes a final agency decision.

question addressed is not whether the Department *would* have granted Respondent part-time or tele-work as requested, but, rather, whether she was *eligible* for consideration of the alternative work schedules.

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 **\$3,506.33** is **HEREBY GRANTED.**

So ordered this 23rd day of July 2007.

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

Rod Dixon
Waiver Official