



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

DORRIS,¹

Respondent

Docket No. 07-01-WA
Waiver Proceeding

DECISION DENYING WAIVER

At issue in this case is whether an employee of the Department of Education (Department) may obtain waiver of a debt arising from salary overpayments caused by the Department's erroneous payments of leave from the voluntary leave transfer program totaling **\$2,997.26**. For reasons that follow, the tribunal concludes that waiver of the debt is unwarranted. Accordingly, Respondent's request for waiver is denied.

Congress authorized the waiver of claims of the United States against a debtor as a result of an erroneous payment of pay to a Federal employee pursuant to the General Accounting Office Act of 1996.² The Department delegated the waiver authority involving all former and

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 Waiver Statute, its predecessor, and other pertinent laws governing Federal government debt collection are 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/.

current employees to the OFFICE OF HEARINGS & APPEALS (OHA),³ which, thereby, exercises waiver authority on behalf of the Secretary of Education. The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁴

The record before the tribunal constitutes what is accepted in this proceeding as argument and evidence, including: a copy of a signed, sworn, written statement by Respondent, dated January 28, 2007, providing Respondent's position why waiver of the salary overpayment is warranted, copies of electronic mail communications from Respondent addressed to officials in payroll and human resources, a copy of an August 24, 2005 memorandum from Anne Barrett, Team Leader of Work/Life Programs, approving Respondent's application to participate in the Department's Voluntary Leave Transfer Program, a copy of an electronic mail communication, dated November 2, 2006, addressed to Respondent from her supervisor, Marilyn Hall, regarding Respondent's participation in the Department's Voluntary Leave Transfer Program, a copy of a notice of debt letter dated November 29, 2006, and a copy of a Bill of Collection (BoC) dated November 14, 2006.

DISCUSSION

Jurisdiction is proper pursuant to the Waiver Statute at 5 U.S.C. 5584.⁵ There is no dispute that this case involves an "erroneous payment of pay." The nature of the debt in this case involves an "error in time and attendance records," which is a type of payment of pay subject to both waiver and administrative offset.⁶ The Department seeks to collect salary payments to Respondent beginning in pay period 17 of 2005 thru pay period 20 of 2006, during which Respondent was overpaid 110.25 hours. The difference between what Respondent was paid and what the Department has determined that Respondent should have been paid constitutes 110.25 hours. At Respondent's rates of pay during the relevant pay periods, 110.25 hours of pay results in a \$2,997.26 salary overpayment.

As determined by the Department, the overpayment resulted from an excessive payment of leave donated to Respondent as a result of the employee's participation in the Voluntary Leave Transfer Program (VLTP). The VLTP allows Federal employees to donate earned annual leave to each other for a specified personal or family medical emergency. An employee who donates leave may authorize the use of the employee's earned and accrued annual leave by agreeing to transfer his or her leave to an employee who needs leave because of a medical emergency.⁷

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 March 2007)).

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 34 C.F.R. § 32.5 (2007).

⁷ See 5 C.F.R. § 630.901 (2007); PMI 630-10, Department of Education, Voluntary Leave Transfer Program (October 2, 1989).

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,⁸ 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.⁹ Whether a debtor lacks fault under the Waiver Statute depends upon the tribunal's determination of whether the debtor failed to review documentary records, including notices of personnel action, leave and earning statements, and other payroll records, which, if examined, would show or identify an overpayment and provide the debtor with an opportunity to correct the overpayment.¹⁰ In a waiver proceeding, the debtor must carry the burden of showing that he or she is free of fault.

In applying the waiver standard to the case at bar, Respondent does not argue that her sick leave or annual leave were sufficient and appropriate to cover her time of absence; nor does Respondent make an affirmative showing that her voluntary leave share account had sufficient hours that should have retroactively relieved her indebtedness.¹¹ Instead, Respondent argues that it is unfair to hold her accountable for errors that officials within her division made in causing her to be paid excessive leave while she was in the leave share program. In support of her position, Respondent submits a copy of an electronic mail message from Marilyn Hall, Respondent's supervisor, dated November 2, 2006 addressed to Respondent and her union representative, Sharon J. Harris. In the electronic mail message, Marilyn Hall concedes that when Respondent was approved for participation in the VLTP, Hall had limited experience as a supervisor and was "not familiar with all the policies governing time and attendance and use of leave." Hall further concedes that she allowed her timekeeper to code all of Respondent's leave as "donated leave for a personal medical condition, without regard to the nature of each absence." Hall admits that during Respondent's absence, Hall "did not know that this [approving all leave as VLTP leave] was [] incorrect."¹² In Respondent's view, the fact that her leave was erroneously coded for several months during her absence from work and participation

⁸ In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

⁹ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

¹⁰ See, e.g., *In re Jerry*, Dkt. No. 05-29-WA, U.S. Dep't of Educ. (Feb. 16, 2006).

¹¹ In some circumstances, annual leave transferred to an employee under the leave share program may be substituted retroactively for a "period of leave without pay (LWOP) or used to liquidate an indebtedness for advanced annual or sick leave" granted on or after the beginning of the period of the medical emergency. 5 C.F.R. §§ 630.906(e) & 630.909 (2007); see also PMI 630-10, Department of Education, Voluntary Leave Transfer Program (October 2, 1989).

¹² Respondent submitted several documents identifying the dates and reasons for her absences; Respondent's reasons for absence ranged from her own personal medical emergencies to the health care of a family member.

in the VLTP demonstrates a “good faith” basis to grant waiver of the entire overpayment.¹³ On this point, Respondent’s position is unpersuasive.

There can be no question that Respondent had a clear duty to verify that her use of voluntary transferred leave was accurate and consistent with the basis for which the VLTP leave account had been established.¹⁴ Nor is this a burdensome requirement since Respondent establishes the purpose of the voluntary leave account. Respondent was approved as a VLTP participant on the basis of her stated personal medical emergency. Pursuant to regulations governing the VLTP, Respondent’s coworkers decide whether to donate leave to Respondent based on the stated medical emergency. In that respect, the Department’s policy could not be clearer: use of leave in an emergency leave account must be consistent with the basis for which the account was established.¹⁵ Transferred emergency leave may not be used for a different purpose for which the VLTP account was established.¹⁶

Moreover, consistent with the fact that employees have restricted access to the leave credited in a VLTP account, VLTP regulations not only provide that the VLTP account may only be used for the use for which the account was established, but require that unused transferred leave remaining to the credit of the leave recipient be restored to the original individual leave donors.¹⁷ As such, employees do not have broad discretion to use VLTP leave. In the case at bar, rather than follow the use requirements of the VLTP, Respondent attempted to use leave credited to her VLTP account for *personal* as well as *family* emergencies. In doing so, Respondent exceeded the scope of her VLTP account.

Respondent makes much of the fact that her supervisor blundered in approving VLTP requests that were both improvident and impermissible. In Respondent’s view, her supervisor and timekeeper should have been able to identify the erroneous uses of the VLTP account. In some respects, Respondent’s argument has a common sense logic for which one can sense Respondent’s frustration. It cannot be the case, however, that a supervisor’s error may dislodge an employee’s independent duty to ensure that leave requests are submitted in a manner that is clearly consistent with the VLTP requirements. The integrity of the leave share program depends, in no small part, upon the expectations of employees who donate leave to the program that donated leave is used in accordance with program requirements, including assurances that an employee is donating his or her earned hours of annual leave only to whom and for the purpose of which he or she deems fit.¹⁸ Respondent’s use of leave for the care of a family member dishonored these assurances and ran contrary to the established purposes of her participation in

¹³ The tribunal is baffled by this aspect of Respondent’s position. It must be clear to Respondent that she is not being held accountable for the errors made by Hall. Clearly, it is impertinent that an error by the employer results in the salary overpayment. It is fundamental that neither the existence of an error or a mistake in payroll, nor an error in the application of a rule or regulation governing pay can, itself, entitle an employee to waiver of an overpayment; 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).

¹⁴ 34 C.F.R. § 630.909 (2007).

¹⁵ See, Personnel Manual Instruction (PMI) #630-10, Voluntary Leave Transfer Program and Part 630 of 5 C.F.R. (2007).

¹⁶ 5 C.F.R. § 630.910 (2007).

¹⁷ *Id.*

¹⁸ 5 C.F.R. § 630.910 (2007).

the Department's Voluntary Leave Transfer Program.

What is more, to correct administrative errors in pay, the fault standard imposes a duty upon the employee ostensibly to limit the Federal government's exposure to overpayments since it is often the case that an employee is in the best position to recognize a mistake in pay.¹⁹ Fault, as the term is used in the Waiver Statute, is examined in the context of an employee's duty to prevent or discover mistakes and errors in salary payments when doing so is feasible. This duty comports with the employee's unique ability to know of the antecedents that may give rise to changes in pay that may result in erroneous payments. Employees are not only often informed of a personnel action that affects pay before the pay change is implemented (e.g., promotions, pay increases, monetary awards or bonuses), but it is often the employee who initiates a change in status that results in a pay change (e.g., application for approval in the VLTP, change in health benefit coverage or a change in a retirement benefit). As such, the employee is uniquely able to scrutinize the subsequent pay change for erroneous under *or* overpayments, and alert the employer to potential errors in pay. More directly, the tribunal's cases repeatedly acknowledge that "in the event that an employee receives an erroneous salary payment, the employee has an independent duty to hold onto the overpayment for future repayment to the government."²⁰ Accordingly, notwithstanding the errors of Respondent's supervisor, Respondent is not being held accountable for those errors; rather, Respondent maintained an independent duty to ensure that her VLTP requests were within the scope of the established VLTP account.

In light of the aforementioned, the tribunal finds that Respondent's arguments and evidence fall short of establishing that she satisfied the requisites of the fault standard.²¹ Accordingly, in the interests of the United States, waiver cannot be granted. This decision constitutes a final agency decision.

¹⁹ More broadly, as noted, *supra*, the fact that an agency erred in making the overpayment does not relieve the overpaid person from liability. 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 the excess amount. *See, In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

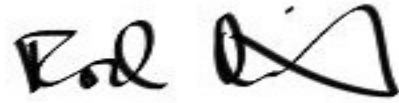
²⁰ *In re Robert*, Dkt. No. 06-77-WA, U.S. Dep't of Educ. (November 7, 2006) (*see, e.g.*, DOHA Case No. 01092001 (Department of Defense, Office of Hearings & Appeals [DOHA]) (October 29, 2001); DOHA Claims Case No. 99111916 (December 8, 1999).

²¹ To the extent that Respondent raises arguments bearing on the equities and justice of collecting the debt, unfortunately, these arguments are simply beside the point when it is determined that an individual knew or should have known that an error in salary payments existed. *See, e.g., In re Joanne*, Dkt. No. 06-22-WA, U.S. Dep't of Educ. (May 1, 2007).

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 **\$2,2997.26** is **HEREBY DENIED**

So ordered this 17TH day of April 2008.

A handwritten signature in black ink, appearing to read "Rod Dixon", written in a cursive style.

Rod Dixon
Waiver Official