



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS

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In the Matter of

CAROL,

Docket No. 07-05-WA

Waiver Proceeding

Respondent

DISMISSAL

In a letter dated May 1, 2007, Respondent requested waiver of a \$15,575.75 debt arising from the payment of a lump-sum leave payment paid to her upon her retirement on July 1, 2006. Respondent received a payment for 252 hours of annual leave she had accumulated and accrued as of her retirement date. On July 5, 2006, Respondent was reemployed at the Department in a new appointment.

On April 23, 2007, the U.S. Department of Education's (Department) human resources office sent a Notice of Debt Letter and Bill of Collection informing Respondent that she owed a debt because she was required to return the lump-sum payment for her annual leave. Specifically, Respondent was entitled to keep only the portion of the payment attributable to 16 hours of annual leave. The April 23, 2007 Bill of Collection also stated that the remaining 236 hours of annual leave was deposited in her leave account on August 15, 2006.

Under the Waiver Statute, 5 U.S.C. § 5584, the Department has the authority to waive claims of the United States against debtors as a result of an erroneous payment of pay to a federal employee. Waiver is an equitable remedy. To receive a waiver, a debtor must demonstrate that (1) there is no indication of fraud, misrepresentation, fault, or lack of good faith by the debtor, and (2) collection of the debt would be against equity and good conscience, and not in the best interests of the United States. The Department promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 *seq.*) and its *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (June 2005)¹, specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).²

¹ The Handbook, ACS-OM-04, was revised and reissued by the Department on March 30, 2007.

² Information regarding the Department's salary overpayment process including the Handbook, ACS-OM-04, is available on OHA's website at: <http://www.ed-oha.org/overpayments>.

The issue presented for the tribunal's consideration is whether the lump-sum payment of annual leave to Respondent represents an erroneous payment of pay eligible for waiver under the Waiver Statute. For the following reasons, I have determined that the payment at issue in this case does not constitute an erroneous payment of pay. As such, the tribunal has no authority to waive this debt.

Under 5 U.S.C. § 5551, a retiring or otherwise separating employee is entitled to receive a lump-sum payment for accumulated and current accrued annual leave to which he or she is entitled by statute. According to 5 U.S.C. § 6303, when an individual who received a lump-sum payment for annual leave is reemployed before the end of the leave period covered by the lump-sum payment, the rehired employee must refund to the employing agency an amount equal to the pay covering the period between the date of reemployment and the expiration of the lump-sum period. The employing agency shall credit an amount of leave equal to the leave represented by the employee's refund to his or her leave account on an adjusted basis as prescribed by regulations promulgated by the Office of Personnel Management (OPM).

By definition, an overpayment must be erroneous when made if it is to be considered for waiver. The Department's lump-sum payment for Respondent's annual leave was not erroneous at the time it was made. The \$15,575.75 payment to Respondent represented a payment she legally was entitled to receive at the time of her retirement. Simply put, the Department was required to pay Respondent a lump-sum payment for her annual leave; therefore it made no error in paying Respondent this money. Analogously, a voluntary separation incentive payment, more commonly known as a buy-out, received by a subsequently rehired employee was not an erroneous payment at the time it was paid; thus, the buyout was not eligible for waiver under the Waiver Statute.³

Even if the debt at issue was an erroneous overpayment that was eligible for waiver under the Waiver Statute, the tribunal also is precluded from waiving collection of a debt arising from a reemployed federal employee's required refund of a lump-sum leave payment. Under OPM regulation, 5 C.F.R. § 550.1206, an agency may not waive collection of this type of debt. The agency, however, may permit an employee to refund the lump-sum payment for annual leave in installments over a period of up to one year.

Although not present in the case-at-bar, a lump-sum leave payment may constitute an erroneous overpayment. When this occurs, the resulting debt is eligible for waiver to a limited extent. For example, when an employee is wrongfully terminated and then retroactively reinstated, the lump-sum payment is considered erroneous because his or her separation was improper.⁴ The reinstated employee is regarded as having retained his or her employee status during the separated period. As a result, the lump-sum leave payment is considered an erroneous overpayment of pay because only separated employees are entitled to receive this payment.

³ See DOHA Case No. 97111206 (Department of Defense, Office of Hearings & Appeals [DOHA]) (January 12, 1998).

⁴ See *In the Matter of Angel F. Rivera*, 64 Comp. Gen. 86; 1984 U.S. Comp. Gen. LEXIS 226 (November 20, 1984). (A separated employee was retroactively reinstated and awarded back pay. The tribunal held that "[w]aiver is appropriate because, at the time the erroneous payments were made, the employee neither knew nor should have known that his separation was improper.")

Under the waiver standard, the determination to waive an erroneous lump-sum payment for annual leave turns on the circumstances surrounding the lump-sum payment at the time it was made, and not on facts existing at a later time (i.e. when the annual leave is credited back to the employee). “If an employee is not reccredited with [the] annual leave covered by the lump-sum payment, but repayment of the lump sum is waived, the employee is in the same position as he or she was prior to the waiver. Likewise, an employee receives no benefit if he [or she] is reccredited with leave and required to repay the lump-sum payment. Only when waiver of the repayment is granted and leave reccredited has the employee received the additional equitable benefit intended by the [W]aiver [S]tatute.”⁵

The portion of a lump-sum leave payment eligible for waiver is limited if back pay is awarded.⁶ The agency must deduct any erroneous payments received as a result of the unjustified or unwarranted personnel action from the awarded back pay.⁷ These erroneous payments include: (1) retirement annuity payments, (2) refunds of retirement contributions, (3) severance pay, (5) lump-sum payments for annual leave, and (6) unpaid authorized deductions incurred during the period of separation (i.e. retirement contributions, federal and state taxes on the back pay award, and health benefits premiums). Consequently, only the portion of the lump-sum leave debt that exceeds the back pay award is eligible for waiver.⁸

Respondent’s May 1, 2007 letter raises a justifiable concern regarding the repayment of this debt. Respondent states that she is ending her employment at the Department in the very near future. To that end, she argues that her termination will trigger a new lump-sum payment for her annual leave, which seems like a “ridiculous waste of time and effort” on her part as well as on the part of the Department’s payroll office. The tribunal is inclined to agree. Departmental policy specifies that clearing employees for separation includes reviewing whether overpayments or other debts exist. Although an employee is charged with the obligation to make arrangements for restitution in instances where indebtedness is involved (including overpayments), the employee’s executive or administrative officer similarly is obliged to review instances of indebtedness before clearing the employee for separation.⁹

The tribunal notes that any portion of the aforementioned debt that remains unpaid when Respondent leaves the Department most likely will be satisfied by deducting the remaining debt amount from her lump-sum leave payment. According to the April 23, 2007 Bill of Collection, 236 hours of annual leave were restored to Respondent’s leave account in August 2006. Consequently, unless Respondent has exhausted all or part of these 236 hours of annual

⁵ See *In the Matter of Richard B. Pilgren*, B-238243, 1990 U.S. Comp. Gen. LEXIS 693, (July 20, 1990) (An employee improperly removed and then reinstated to his position was entitled to back pay).

⁶ Under the Back Pay Act of 1966, as amended, 5 U.S.C. § 5596 (1982), an employee is entitled to back pay when he or she is subject to an unjustified or unwarranted personnel action, which results in the loss or reduction of his or her pay.

⁷ See 5 C.F.R. § 550.805.

⁸ See *In the Matter of Angel F. Rivera*, *supra*. (Only the portion of the debt that remained after deductions were taken from his back pay award was eligible for waiver under 5 U.S.C. § 5584.)

⁹ See *Clearance of Personnel for Separation or Transfer*, U.S. Dep’t of Educ. Departmental Directive OM 3:104 (September 14, 2004).

leave, her debt may be satisfied in this manner to whatever extent desired by Respondent and acceptable to the Department.

Based on the foregoing, Respondent's debt is not eligible for consideration under the Waiver Statute. Accordingly, Respondent's request for waiver is DISMISSED.¹⁰

A handwritten signature in black ink that reads "Greer Hoffman". The signature is written in a cursive style with a large, sweeping flourish at the end.

Greer Hoffman
Waiver Official

Dated: May 15, 2007

¹⁰ This dismissal operates as an adjudication on the merits and constitutes a final agency decision. *See In re Mary*, Dkt. No. 06-64-WA, U.S. Dep't of Educ. (October 19, 2006) at 2, n.1.