



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202-4616

TELEPHONE (202) 619-9700

FACSIMILE (202) 619-9726

In the Matter of

FRANCISCO,

Respondent

Docket No. 07-154-WA
Waiver Proceeding

DECISION GRANTING WAIVER

At issue in 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 **\$1,464.43**.¹ This salary overpayment arises from the improper processing of a promotion from GS-9 to GS-11 prior to implementing a timely within-grade increase. For reasons that follow, the tribunal concludes that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

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 which, thereby, exercises waiver authority on behalf of the Secretary. The undersigned

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 March 2007)).

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

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 dated June 5, 2007 by Respondent identifying the basis for why his request for waiver of the salary overpayment should be granted, copies of various electronic mail communications concerning Respondent's promotion, a copy of Respondent's Leave and Earning Statements for pay periods (0106, 0206, and 0306), a copy of a Notice of Personnel Action (Standard Form 50-B) signed and approved on December 6, 2005 regarding Respondent's promotion from Grade GS-9, step 1 to Grade GS-11, step 1, a copy of a Notice of Personnel Action (Standard Form 50-B) signed and approved on December 6, 2005 regarding Respondent's promotion from Grade GS-9, step 2 to Grade GS-11, step 2, a copy of a Notice of Personnel Action (Standard Form 50-B) signed and approved on December 9, 2005 regarding Respondent's "within-grade increase" in pay from Grade GS-9, step 1 to Grade GS-9, step 2, a copy of a Notice of Personnel Action (Standard Form 50-B) signed and approved on January 8, 2006 regarding Respondent's "general increase" and "locality payment" adjustment of 2.1% in pay for Grade GS-11, step 2, a copy of a notice of debt letter dated April 3, 2007, and a copy of a Bill of Collection (BoC) dated March 12, 2007.

DISCUSSION

I

Within-grade increases are periodic increases in an employee's basic rate of pay from one step of a grade of an employee's position to the next higher step of that grade. The passage of a waiting period is required before an employee is eligible for within-grade advancement in steps. For advancements between each of the first four steps, an employee must wait one year or 52 weeks. A within-grade increase is effective on the first day of the pay period beginning on or after the completion of the required waiting period. For most within-grade increases, the waiting period begins upon the date of the employee's last equivalent increase. There are several factors that may influence the date determining when an employee's last equivalent increase has occurred, including the factor pertinent to this matter - the date an employee received a career ladder promotion.⁶

To receive a career ladder promotion to the next higher grade, an employee must perform at a fully successful level and have served the typically required one-year waiting period in the lower grade. Generally, when an employee is entitled to a within-grade increase that is effective at the same time as a promotion, the agency must process the within-grade increase before processing the promotion.⁷ This order of priority rigorously ensures that within-grade increases are processed in compliance with the minimal waiting periods required before step increases take effect.

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 Carolyn*, Dkt. No. 06-04-WA, U.S. Dep't of Educ. (June 28, 2006).

⁷ See, 5 C.F.R. § 531.214 (2007).

Respondent's within-grade was processed as part of simultaneous personnel actions; simultaneous pay actions occur when multiple pay actions are processed with the same effective date.⁸ In Respondent's circumstance, due to an error in the sequence of processing personnel actions, the order of priority was not followed; hence, the debt in this case arises from the processing of a promotion from GS-9 to GS-11 prior to implementing a timely within-grade increase.

Respondent does not contest the fact that he was not authorized to be paid at the GS-11, step 2 pay schedule during the 2006 pay period due to the error in the timing of the processing the within-grade pay increase. Instead, Respondent argues that waiver of the debt is warranted because he had no reason to suspect that the payments were erroneous at the time the increase in his pay were made or any time thereafter. According to Respondent, his salary in 2006 resulted from the concurrence of two personnel actions each of which was expected and accurate. As a result, Respondent had no reason to question the accuracy of his pay.

II

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,⁹ 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.¹⁰ Respondent must satisfy both factors to obtain a waiver. I find that Respondent satisfies both factors; his evidence and arguments satisfy the requisites of the fault standard, and demonstrate that in equity and good conscience his debt should be waived.

This case is similar to the factors cited in *In re Jay*, Dkt. No. 06-01-WA, U.S. Dep't of Educ. (June 23, 2006) (*Jay*). In *Jay*, the tribunal held that when there are sufficient mitigating factors to warrant an exception to the general rule, holding an employee accountable for recognizing an erroneous within-grade increase, the employee is not at fault. The employee in *Jay* received a premature within-grade increase. The tribunal concluded that the employee was not at fault because he was unaware that the time served during his temporary promotion did not count towards the required waiting period for a step increase.

Similarly, in this case, Respondent was not aware that when an employee is entitled to a within-grade increase that is effective at the same time as a promotion, the erroneous processing of a within-grade increase prior to processing the promotion ultimately could affect an employee's basic rate of pay resulting in an overpayment. Although Respondent had access to the personnel action forms (SF-50) that reveal the order in which the personnel actions were processed, these forms do not disclose that the agency must process the within-grade increase before processing the promotion to maintain the employee's entitlement to the within-grade increase.

⁸ See, Office of Personnel Management, *Simultaneous Pay Actions: Order of Processing Personnel Actions*, http://www.opm.gov/oca/pay/html/simultaneous_pay.asp (noting that simultaneous pay actions are processed in the following order: general pay adjustments before any individual pay action, within-grade increase or quality step increase, promotion and or individual pay action in the order that gives the employee the maximum benefit) (citing 5 C.F.R. §§ 530.321, 531.203 - 531.207, 531.213 - 215, 531.242 - 243, 536.206(d), and 536.304(a)).

⁹ In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

¹⁰ See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

Respondent was expecting his promotion at the same time his within-grade increase was processed and, in fact, the Department processed both the within-grade increase and promotion on the same day, but in the improper order. With regard to an employee's duty to diligently check for inaccuracies in pay, the tribunal finds that this type of error is far too obscure for an employee, not expert in personnel or pay rules, to detect or be alerted of the possible error.¹¹ In deed, under these circumstances, it would be unreasonable to conclude that the Respondent knew or should have known that he was being overpaid.¹²

III

The remaining question is whether Respondent has demonstrated that it is against equity and good conscience for the Federal government to recover Respondent's salary overpayment. To secure equity and good conscience, Respondent must show that he has acted fairly without fraud or deceit, and in good faith with regard to all matters concerning the overpayment. Although there are no rigid rules governing the application of the equity and good conscience standard, the tribunal must balance equity and appraise good conscience in light of the particular facts of the case. Factors weighed by the tribunal include the following: whether recovery of the claim would be unconscionable under the circumstances; whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment; and whether collection of the debt would impose an undue financial burden.

Respondent argues that collection of the salary overpayment would go against equity and good conscience because his failure to recognize the Department's administrative error does not indicate fraud or lack of good faith. Respondent also indicates that repayment would be unfair considering that it is not disputed that, absent the processing error, he was in fact eligible for both pay increases. The tribunal agrees. Respondent's arguments and evidence persuasively underscore why the equities of fairness favor his request for waiver.

There is no basis from the evidence in this case to support a conclusion that Respondent was aware that he was overpaid or that Respondent did not act in good faith. In fact quite to the contrary, Respondent provided evidence supportive of his good faith belief that his pay was accurate during the pay periods at issue. In the form of an email communication from his supervisor, for example, Respondent's evidence shows why Respondent expected a pay increase at the time it occurred: Respondent had been informed that he was awarded a quality-step-increase ("QSI") in pay. In the view of Respondent's supervisor, who argues in support of Respondent, the unfairness of seeking to collect a debt from Respondent is magnified by the fact that Respondent had received an "Outstanding" performance appraisal and had been recommended to be awarded a quality step increase in 2006. Respondent's s supervisor further argues that collecting the debt in this case undermines the performance incentive intended by the QSI. For reasons unknown to the tribunal, Respondent and his supervisor were mistaken about

¹¹ More than one-year after the payroll processing error, the error was discovered by a human resources official while processing a personnel action promoting Respondent in 2007.

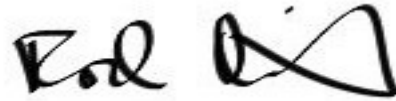
¹² See, *In re Mark*, Dkt. No. 07-297-WA, U.S. Dep't of Educ. (Jan. 29, 2008) (noting that the tribunal's waiver cases have been circumspect with regard to what factors support the circumstances where it is unreasonable to conclude that an employee knew or should have known that he was being overpaid as a result of a promotion).

the QSI; it was not awarded to Respondent. That notwithstanding, Respondent's supervisor points out a factor illustrative of the unfairness of collecting the debt in this case; namely, recovering an appropriate pay increase awarded to an eligible employee because of a payroll processing error profoundly undermines the reliability of a pay system that is intended to provide incentives and awards. Under the circumstances, this is so regardless of whether the pay increase at issue is a within-grade increase or a quality step increase. Accordingly, the tribunal finds that in the interests of the United States waiver should 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 **\$1,464.43** is **HEREBY GRANTED.**

So ordered this 15TH day of February 2008.

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

Rod Dixon
Waiver Official