



UNITED STATES DEPARTMENT OF EDUCATION

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

In the Matter of

FRANCES,

**Docket Nos. 07-283-WA
07-284-WA**

Waiver Proceeding

Respondent.

DECISION GRANTING WAIVER

Respondent, a former U.S. Department of Education (Department) employee, requested waiver of two salary overpayment debts in the amounts of \$613.17 and \$1,544.34, arising from a payroll adjustment that changed 66 hours of donated leave to leave without pay. Based on the reasons articulated in this decision, I find that waiver of this debt is warranted. Accordingly, Respondent's request for a waiver is GRANTED.

Jurisdiction

Respondent's waiver request arises under 5 U.S.C. § 5584, authorizing the waiver of claims of the United States against debtors as a result of an erroneous payment of pay to a federal employee.¹ 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),² specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).³

The undersigned is the authorized waiver official who has been assigned this matter by OHA. Resolution of this case is based on the matters accepted as argument, evidence, and/or documentation in this proceeding when considered as a whole, including the Respondent's initial request for waiver and attached documentation, and documents compiled by the Department's human resources office. This decision constitutes a final agency decision.

¹ See General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828; see also *In re [Redacted]*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 18, 2006) at 1, note 1.

² The Handbook, ACS-OM-04, was revised and reissued by the Department on March 30, 2007.

³ Information regarding the Department's salary overpayment process including the Handbook, ACS-OM-04, is available on OHA's website at: www.ed-oha.org/overpayments.

Procedural History

According to the March 27, 2007 and May 2, 2007 Notice of Debt Letters and attached Bills of Collection (BoC), the \$613.17 and \$1,544.37 overpayments arise from a shortfall of 8 hours of donated leave apiece for two pay periods (Pay Periods 22 and 26 of 2006) and a shortfall of 40 hours of donated leave for Pay Period 4 of 2007. The aforementioned debts total \$2,157.54. Respondent, a participant in the Department's leave share program,⁴ exhausted her donated leave during each of these pay periods. As a result, the Department converted these three shortfalls of paid leave to leave without pay (LWOP).

On May 29, 2007, Respondent filed a request for waiver of the aforementioned debts. In a June 5, 2007 Order Governing Proceedings, Respondent's request for a waiver was deemed timely and Respondent was afforded an opportunity to supplement the record. On June 27, 2007, Respondent filed a statement and attachments in support of her waiver request.

Discussion

Waiver of an erroneous salary payment is an equitable remedy available only when there is no indication of fraud, misrepresentation, fault, or lack of good faith by the debtor.⁵ The debtor also must demonstrate that collection of the debt would be against equity and good conscience, and not in the best interests of the United States. At issue is whether Respondent's arguments and submission support a request that a portion or the entire erroneous salary overpayment be waived. There is no dispute that this case involves an erroneous payment of pay.⁶ The Department's error stems from its aforementioned failure to properly account for the balance of leave in Respondent's leave share account.

Fault Standard

The fault standard is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. Fault also is determined by assessing whether a reasonable person should have known or suspected that he or she was receiving more than his or her entitled salary.⁷ In assessing the reasonableness of a debtor's failure to recognize an overpayment, the tribunal may consider the employee's position and grade level, newness to federal employment, and whether an employee has records at his or her disposal, which, if reviewed, would indicate a

⁴ Under the Department's leave share or leave donation program, Department employees may transfer part of their unused accrued annual leave to other federal employees having medical or family medical emergency situations. *See* Federal Employees Leave Act of 1998, Pub. L. 100-566, 5 C.F.R. Part 630 and U.S. Dep't of Educ. Personnel Manual Instruction, Voluntary Leave Transfer Program – Administrative Procedures, PMI 630-10 (October 2, 1989). *See also, In re Mary Jane*, Dkt. No. 06-82-WA, U.S. Dep't of Educ. (December 15, 2006) for a more expansive discussion of the Department's leave share program.

⁵ *See In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

⁶ An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to his or her salary. *See* 34 C.F.R. Part 32 (2005).

⁷ *See In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

salary overpayment.⁸ Thus, every waiver case must be examined in light of its particular facts and circumstances.⁹

Respondent argues that the overpayment occurred through administrative error and not through any fraud, misrepresentation, fault or lack of good faith on her part. Respondent argues that she had no way of knowing that she received an overpayment because she did not know how or when leave donations were assigned to her leave share account. Respondent states that she was undergoing a family emergency/health crisis which precipitated her participation in the leave donation program and she did not question the payments she received. Respondent next claims that she has experienced financial hardship, stress, and been unduly burdened by the Department's error and by the delay in processing her retirement from federal service. Respondent asserts that due to the Department's delay in processing her retirement action, she was without any income for three months. As a result, Respondent claims that her financial resources were depleted.

The archetype for analyzing the fault standard under circumstances similar to this case is set forth in a previous decision of the tribunal.¹⁰ In this decision, the debtor, a participant in the Department's leave share program, erroneously received leave in excess of the amount actually donated. The Hearing Official found that the debtor's failure to recognize that she received an overpayment was reasonable because she had no way of knowing that her leave share account was exhausted. The Hearing Official also noted that the Department's leave and earnings statements did not contain any information that would have alerted the debtor to the overpayment. Finally, the tribunal noted that the debtor was absent due to the requisite medical emergency that necessitated her participation in the leave share program. Consequently, Respondent's ability to otherwise inquire as to her balance of donated leave was compromised.

In the case-at-bar, Respondent also did not know how much leave had been donated to her leave share account nor did she have documentation in her possession that would have indicated that she had received an overpayment. Moreover, Respondent's ability to otherwise inquire as to her balance of donated leave was similarly compromised by the requisite medical/family emergency that informed her participation in the leave share program. Therefore, the tribunal finds that Respondent is without fault as her failure to recognize that an overpayment occurred was reasonable.

Equity and Good Conscience

To secure equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.¹¹ Beyond this framework, there are no rigid rules governing the application of the equity and good conscience standard. The tribunal must balance equity and/or appraise good conscience in light of the particular facts of the case.¹² To this end, the tribunal

⁸ See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

⁹ See *id.* at 5.

¹⁰ See *In re Mary Jane*, Dkt. No. 06-82-WA, U.S. Dep't of Educ. (December 15, 2006).

¹¹ See 5 U.S.C. § 5584 and *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005) at 5.

¹² See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (December 14, 2005).

may consider whether recovery of the claim would be unconscionable including whether collecting the debt goes beyond what is customary and reasonable. An agency's failure to respond to a debtor's waiver request and/or its gross negligence in handling an overpayment case may go beyond what is customary and reasonable.¹³ Other factors weighed by the tribunal include the following: whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment; whether recovery of the claim would impose an undue financial burden on the debtor; whether the time elapsed between the erroneous payment and the agency's discovery of the error and subsequent employee notification is excessive; and whether the cost of collection equals or exceeds the amount of the claim.¹⁴

Respondent maintains that the Department's failure to timely process her retirement resulted in a three-month period in which she received no income. During this period, Respondent claims that her financial resources were depleted and has attached numerous medical and household bills in support of her claim of financial hardship. The tribunal notes that this overpayment occurred through no fault of Respondent. Additionally, the overpayment occurred during a period of time in which she was undergoing a family/medical emergency. Moreover, the tribunal is persuaded that Respondent's medical emergency and the Department's delay in processing her retirement paperwork created a financial hardship. Based on the aforementioned factors, the tribunal finds that recovery of the debt would go against equity and good conscience.

ORDER

Pursuant to my authority under the Waiver Statute, 5 U.S.C. § 5584, Respondent's request for waiver in the amount of \$2,157.54 is **GRANTED**.

So ordered, this 18h day of September 2007.



Greer Hoffman
Waiver Official

¹³ *See id.*

¹⁴ *See id.*