



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

MARK,

Respondent

Docket No. 07-297-WA
Waiver Proceeding

DECISION DENYING 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 **\$1,283.32**.¹ This salary overpayment arises from the erroneous payment of salary paid to Respondent after the term of a temporary promotion expired. 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 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 Dec. 2006)).

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 December 31, 2007 by Respondent providing a basis for waiver of the salary overpayment, copies of electronic mail communications addressed to Respondent in his capacity as an acting “special agent in charge,” copies of travel vouchers dated September 12, 2007 and October 4, 2007, a copy of a certified Flexible Schedule Certification Form and leave request form for Pay Period ending October 13, 2007, a copy of a Notice of Personnel Action (Standard Form 50-B) signed and approved on April 12, 2007 with the following included on the form in Box 5-B: “NATURE OF ACTION: Promotion NTE 08-12-07,” a copy of a notice of debt letter dated November 28, 2007, and a copy of a Bill of Collection (BoC) dated November 11, 2007.

DISCUSSION

I

Consistent with merit system principles, the general rule in Federal employment is that competitive procedures must be followed when carrying out personnel actions resulting in a promotion; however, an exception to this general rule allows Federal employers to exercise the discretion to temporarily promote an employee without following competitive procedures. To ensure that this exception does not overcome the general rule, the temporary quality of such promotions is given genuine import by way of a specified term limitation. This case involves a request for waiver of a salary payment that exceeded its term limitation.

The following facts are uncontested. Respondent’s position is not a bargaining unit position. Respondent’s pay schedule was advanced from a GS-14 level to GS-15 as salary payment for work performed while temporarily promoted as an acting supervisor within the Office of Inspector General. Respondent was issued a Notice of Personnel Action (Standard Form 50-B) signed and approved on April 12, 2007 with the following included in BOX 5-B: “NATURE OF ACTION: Promotion NTE 08-12-07.” The notice indicated that the effective date of Respondent’s promotion was April 15, 2007. The term of Respondent’s temporary promotion could not exceed August 12, 2007. The Department erroneously continued to pay Respondent at the GS-15 level for four pay periods beyond the expiration of the temporary promotion.

Respondent does not contest the fact that he was not authorized to be paid at the GS-15 level beyond August 12, 2007. Instead, Respondent argues that notwithstanding that fact, waiver of the debt is warranted because he neither had reason to suspect that the overpayments were erroneous when made, nor a basis to discover that the payments were erroneous. Expanding upon this argument, Respondent also asserts that the personnel rule giving rise to the overpayment is arcane, and that neither he nor his supervisors were aware of the limitation on his

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).

term of appointment.

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,⁶ 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.⁷ Respondent must satisfy both factors to obtain a waiver. Measured against this standard, and guided by the rulings in a line of the tribunal's cases beginning with *In re Richard (Richard)*,⁸ I find that Respondent does not satisfy the requisites of the fault standard. Since Respondent's case falters on the initial factor of the waiver standard, the tribunal does not consider the equity and good conscience factor.

To reach a determination on fault, the aforementioned factors are examined in light of the scope of Respondent's on-going duty to know and/or to inquire, when appropriate, about the accuracy of his salary payments. The scope of this duty includes the obligation 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.⁹

Instead of citing the cases that follow the reasoning and holding in *Richard*, Respondent cites two different cases: *In re Pedro (Pedro)*¹⁰ and *In re Thomas (Thomas)*.¹¹ In Respondent's view, those cases are relevant to the matter at issue in this case because *Pedro* and *Thomas* stand for the proposition that employees are without fault for salary overpayments arising from promotions where it is unreasonable to conclude that the employee knew or should have known that he was being overpaid.

A number of cases have come before the tribunal involving erroneous salary payments arising from promotions. These cases have typically fallen into one of two types: cases involving an erroneous *calculation of pay rate* or cases involving an erroneous *term of appointment*. In the latter type of case, the employee is overpaid because he or she is paid during a time period that exceeds the legally authorized term of appointment, whereas in the former type of case, the employee is overpaid because the rate of pay, which is often computed by application of a multi-step formula, was erroneously calculated. Our cases reflect that the significance of this distinction is that in cases involving an erroneous salary payment arising from a promotion, the tribunal has not taken the expansive view preferred by Respondent.

⁶ In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

⁷ See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

⁸ *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

⁹ See, e.g., 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").

¹⁰ Dkt. No. 06-78-WA, U.S. Dep't of Educ. (April 13, 2007).

¹¹ Dkt. No. 06-80-WA, U.S. Dep't of Educ. (April 19, 2007).

Instead, the tribunal has 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. As a result, the distinction drawn from the tribunal's cases recognize that an employee is more likely to know or have reason to know of an erroneous salary payment in promotion cases when the error stems from payments that exceed the authorized term of appointment¹² rather than when the error arises from an inaccuracy in the calculation of pay. This conclusion follows from a basic and pragmatic guideline: employees are more likely to detect errors in pay when those errors are more easily detectable. Hence, in *Pedro* and *Thomas*, the tribunal ruled that it is unreasonable to conclude that an employee is expected to be aware of the "complicated rules that determine the employee's step level upon a promotion"¹³ and, therefore, an employee may satisfy the fault standard where it is shown that the employee either questioned an "unexplained increase in pay that would cause a reasonable person to make an inquiry" or where the "employee is promoted to a higher grade but his or her step level for the new grade is miscalculated."¹⁴

In *Richard*, the tribunal addressed the standard for granting waiver of a debt arising from a salary overpayment involving an employee who was in a temporary promotion that exceeded the lawful term of appointment.¹⁵ The tribunal recognized that an employee who is paid a salary for a period that exceeds the term of a temporary appointment may be required to repay a portion of the salary payment (or the entire amount) as a debt owed to the Federal government.¹⁶ This is so because in accordance with the Department's Personnel Manual Instruction (PMI), competitive procedures must be followed in personnel actions resulting in a temporary promotion that *exceeds* 120-days for employees who are not in a bargaining unit position.¹⁷ Quite like Respondent's circumstance, the employee in *Richard* had been temporarily promoted, and remained in the job beyond the authorized term. The tribunal held that the employee did not lack fault for the overpayment because the employee had failed to inquire about or dutifully track the expiration of his 120-day temporary appointment.¹⁸

¹² Cf., *In re Elizabeth*, Dkt. No. 06-46-WA, U.S. Dep't of Educ. (Nov. 7, 2006) (adopting the standard in *Richard*, but holding the employee without fault because the term of appointment identified in the SF-50 was erroneous).

¹³ Dkt. No. 06-80-WA, U.S. Dep't of Educ. (April 19, 2007) (*Thomas*) (detailing the complex calculations for certain step level promotions).

¹⁴ Dkt. No. 06-78-WA, U.S. Dep't of Educ. (April 13, 2007) (*Pedro*).

¹⁵ See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

¹⁶ *Id.*

¹⁷ PMI 335-1 (Jan. 11, 1993, as amended, April 12, 2000). The Department's PMI is issued under the authority of OPM's GUIDE TO ISSUING PERSONNEL ACTIONS and Executive Order 12107. See, <http://www.opm.gov/feddata/gppa/Gppa01.pdf>. Competitive procedures must be followed if the temporary promotion exceeds 120-days. See, 5 C.F.R. § 335.103(c)(3)(iii) (OPM providing any agency the discretion to select and appoint an employee to a temporary promotion for 120-days or less without complying with competitive procedures).

¹⁸ Similarly, the tribunal has relied upon a framework set out in *In re Jeanette*, Dkt. No. 06-11-WA, U.S. Dep't of Educ. (Sept. 20, 2006), (and *Jeanette's* companion cases docketed under Dkt. No. 06-12-WA and Dkt. No. 06-13-WA) for guidance in resolving waiver cases involving erroneous within-grade or WIGI payments. In *Jeanette*, the waiver official held that a finding of no fault is appropriate when an employee: (1) does not have specialized knowledge about the federal pay structure, or (2) has no prior experience with an erroneous within-grade increase, or (3) has no specific knowledge or reason to know a particular within-grade increase was erroneous. In *Jeanette*, a salary overpayment arose as a result of the Department's erroneous WIGI payments to the employee over the course

An important factor in *Richard* included the fact that the employee was a supervisory employee who had been temporarily promoted to an acting director position paid at the GS-15 level. This important factor also is present in this case. Respondent was a supervisory employee who had been temporarily promoted to a supervisory position paid at the GS-15 level.

An employee's grade level and position of responsibility¹⁹ may create a circumstance that ostensibly enhances the on-going duty the employee carries regarding his obligation to inquire about the accuracy of his salary payments.²⁰ As a result of an employee's presumed knowledge or responsibility, waiver cases consistently have recognized that the scope of the duty under the fault standard may vary among employees of different positions and different grade levels.²¹

In this respect, the tribunal finds that it is entirely reasonable to expect Respondent - - an acting supervisor paid at the GS-15 level - - to monitor his pay statements and notices of personnel action for relevant items such as the term limit of his appointment, and to note the occurrence or absence of an appropriate and expected change in pay connected to the expiration of the temporary appointment. More directly, Respondent is expected to have observed that his SF-50 indicated when the 120-day appointment would properly end. Even if the tribunal accepted that the notation of "NTE" on Respondent's SF-50 is a somewhat cryptic manner of expressing a term limitation - - as Respondent contends, it still follows that a reasonable person in Respondent's position and circumstance would inquire with human resources for guidance on what the notation meant, and, in doing so, would have been alerted to the meaning of the notation "NTE." Indeed, this point is not mere speculation. Respondent concedes that when he asked Patricia Warren, a personnel specialist, whether his SF-50 identified an expiration date for his temporary promotion, Warren directed his attention to "Block 5B" - - the exact location of the expiration date on his SF-50.

Despite the frustrating aspect of providing high-level temporary services to an employer unauthorized to pay for such services, 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. 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 could 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,

of 16 pay periods. The waiver official concluded that notwithstanding that the employee neither was the cause of the erroneous payment nor lacked good faith in compliance with personnel rules governing WIGI payments, the employee was at fault as that term is defined under the Waiver statute. As *Jeanette* instructs, within the context of an employee's duty to prevent or discover an improper salary overpayment, an employee is expected to know the required waiting periods between within-grade increases and to inquire about increases that do not appear to conform to the mandatory waiting period.

¹⁹ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

²⁰ 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).

²¹ 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").

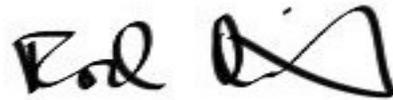
monetary awards or bonuses), but it is often the employee who initiates a change in status that results in a pay change (e.g., change in health benefit, retirement benefit, or a change in work schedule or leave status). As such, the employee is uniquely able to scrutinize the subsequent pay change for erroneous under *or* over payments, and alert the employer to potential errors in pay.

In light of the aforementioned, the tribunal finds that Respondent's arguments and evidence fall short of establishing he satisfied the requisites of the fault standard. Guided by the analysis herein, Respondent is not without fault. Accordingly, in the interests of the United States, waiver cannot 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 **\$1,283.32** is **HEREBY DENIED.**

So ordered this 29TH day of January 2008.



Rod Dixon
Waiver Official