



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

BARBARA,

Respondent

Docket No. 08-03-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 salary overpayments totaling **\$1,582.67**.¹ 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). *See also, 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 written statement by Respondent identifying the basis for why her request for waiver of the salary overpayment should be granted, copies of various electronic mail communications regarding Respondent's concerns about extending the time for filing a waiver request, a copy of Respondent's Application for Participation in the Voluntary Leave Transfer Program for 2007 and 2008, copies of letters from Respondent's physicians concerning her illness and need for accommodation, and a copy of a Bill of Collection (BoC) issued to Respondent. In addition, to aid the tribunal's fact-finding, the tribunal conducted informational interviews with Jane Bryson, Respondent's former supervisor and Darlene Bentley, a lead payroll technician employed by the Department of Interior.

DISCUSSION

I

The facts are straightforward. The Department commenced a pay and leave audit of Respondent's pay in 2007.⁶ The result of the audit disclosed "incorrect coding of timesheets and multiple timesheet corrections," including 32-hours of pay changes "submitted by the [Respondent] changing pay hours to leave without pay." In total, the audit revealed that Respondent had been overpaid 46 hours at the pay rate of \$42.19 per hour.⁷

In 2007, Respondent participated in the Voluntary Leave Transfer Program (VLTP). The VLTP allows federal employees to donate earned annual leave to other workers, who have requested such donations for a specified personal or family medical emergency. An employee who donates leave may authorize the use of earned and accrued annual leave by agreeing to transfer his or her leave to an employee who needs leave because of a medical emergency.⁸ Although recipients of VLTP leave do not have broad discretion in the use of VLTP leave,⁹ employees may use VLTP leave for circumstances other than a prospective period of illness.¹⁰ For example, a period of leave without pay (LWOP) may be substituted, retroactively, with VLTP leave as long as the leave is transferred consistent with the requirements under the leave share program.¹¹ Similarly, VLTP leave may be used to liquidate indebtedness for advanced

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 The Department completed similar audits of Respondent's pay for 2005 and 2006, which are not at issue here.

⁷ During the period at issue in this proceeding, Respondent's pay rate was \$42.19. The calculation of the debt does not mean that Respondent was paid double her pay rate, but, rather, reflects the conclusion that Respondent was paid while in non-pay status.

⁸ See 5 C.F.R. § 630.901 (2007); PMI 630-10, Department of Education, Voluntary Leave Transfer Program (October 2, 1989).

⁹ See, *In re Dorris*, Dkt. No. 07-01-WA, U.S. Dep't of Educ. (April 17, 2008).

¹⁰ Id.

¹¹ 5 C.F.R. § 630.906(e).

annual or sick leave granted on or after the beginning of the period of an employee's medical emergency.¹²

Respondent sought to liquidate a portion of her indebtedness for the use of advanced leave during periods of illness in 2007. Unfortunately, coding errors in attempts to transfer advanced sick leave to VLTP leave arose and contrary to liquidating indebtedness, Respondent's overpayments remained and, in some cases, increased.

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,¹³ 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.¹⁴ Respondent must satisfy both factors to obtain a waiver. After a review of the record, the tribunal concludes that Respondent's evidence and arguments satisfy the requisites of the fault standard, as well as demonstrate that in equity and good conscience her debt should be waived. The basis of the tribunal's decision begins with an analysis of the fault standard.

II

Fault, as the term is used in the Waiver Statute, is examined in light of the following considerations: (a) whether the erroneous payment resulted from an employee's incorrect, but, not fraudulent, statement that the employee under the circumstances should have known was incorrect;¹⁵ (b) whether the erroneous payment resulted from an employee's failure to disclose to a supervisor or official material facts in the employee's possession that the employee should have known to be material; or (c) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.¹⁶

This case is similar to the factors cited in a recent case identified as *In re Francisco*, Dkt. No. 07-154-WA, U.S. Dep't of Educ. (February 15, 2008) (*Francisco*). In *Francisco*, the tribunal held that notwithstanding the general rule that an employee is held accountable for recognizing or having reason to recognize that he or she has received an erroneous salary payment, a waiver official may find that there are sufficient mitigating factors to warrant an exception to the general rule; in such cases, the employee is not at fault.

The fault standard is satisfied, for example, when the circumstances of the debt show that the employee could not have known he or she was erroneously compensated. To illustrate an application of this standard, the tribunal turns to *In re Joan*, Dkt. No. 06-49-WA, U.S. Dep't of Educ. (January

¹² 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).

¹³ In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

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

¹⁵ Under the fault standard, the scope of Respondent's duty extends to include the obligations 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. *See, e.g., In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (October 19, 2005).

¹⁶ *See generally, Guidelines for Determining Requests* U.S. Department of the Treasury Directive 34-01 (2000), available at <http://www.treasury.gov/reg/td34-01.htm>; Standards for Waiver, 4 C.F.R. § 91.5 (2000).

25, 2007) (*Joan*), wherein an employee recovering from an automobile accident exhausted her available advanced and VLTP leave; subsequently, she was paid despite her leave status. The employee in *Joan*, due to her incapacity, was unable to access her pay account at the time the erroneous payment was made. The tribunal held that since the employee was paid during her hospital recovery she could not have known of the overpayment.¹⁷ The tribunal is persuaded that the same analysis applies here. By all indications, this is not a case of an employee who would shirk her obligation to ensure the accuracy of her pay.¹⁸ Indeed, there is no evidence that Respondent avoided her obligation in this case. In fact, Respondent's salary payment records did not disclose an overpayment because the salary overpayment resulted from Respondent's request to audit her pay records to determine how many hours of advanced leave could be reduced by substituting VLTP leave. In all other respects, the status of Respondent's leave account was consistent with the expectation that she would work and repay the advanced leave upon her return to work. Guided by these facts and the analysis herein, the tribunal concludes that Respondent is without fault.

III

The remaining question is whether Respondent has demonstrated that it is against equity and good conscience for the Federal government to recover the debt in this case. To secure a favorable ruling on the equity standard, Respondent must show that she has acted fairly, without fraud or deceit, and in good faith with regard to all matters concerning the overpayment. In addition, although there are no rigid rules governing the application of the equity, the tribunal must balance equity and appraise good conscience in light of the particular facts of the case and the competing interests in the recovery of debts owed to the United States and the forgiveness of debts owed to the United States. Factors weighed in this balancing of interests include the following: whether the debt is substantial; 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.

There are arguments raised by Respondent that the tribunal will not address, other than to note that Respondent raises a number of arguments that are off the mark and entirely irrelevant to this case. For example, to bolster her basis for waiver, Respondent argues that the Department failed to timely provide her with an accommodation to alleviate pain caused by an ergonomic disability and, in doing so, exacerbated her illness and/or her need to request advanced sick leave and use VLTP leave. In addition, Respondent makes several references to the debt at issue, here, in a manner that stresses her contention that the debt is related to a discrimination claim she is pursuing against the Department. Given the conspicuous irrelevance of these claims, it should go without noting – but, to avoid risking clarity, the tribunal notes nonetheless - that the limited issues concerning a request for waiver do not encompass the extraneous matters Respondent attempts to sweep within the tribunal's scope. Respondent's claim of unfair treatment or employment discrimination is entirely impertinent to this proceeding. The tribunal makes no finding directly or indirectly, explicitly or implicitly that could be deemed relevant to such

¹⁷ *Id.*

¹⁸ *See, In re Russell*, Dkt. No. 05-19-WA, U.S. Dep't of Educ. (June 23, 2005).

matters.

More directly related to this case, Respondent also argues that there is no basis from the evidence to support a conclusion that she was aware that she was overpaid prior to the Department's audit. In addition, Respondent argues that the evidence reveals that she acted in good faith once informed of the debt by attempting to liquidate her indebtedness. In addition, Respondent argues that the unfairness of seeking to collect a debt from her is magnified by the fact that she not only was actively engaged in reducing her debt, but, in addition, she sought out ways to extend her employment with the Department, which, ultimately, could not be accepted by the Department, but would have further reduced her indebtedness. Moreover, Respondent is quite blunt in explaining that beyond the aforementioned circumstances, the financial burden imposed by repayment of the debt also supports her position that in the interests of equity, a waiver should be granted.

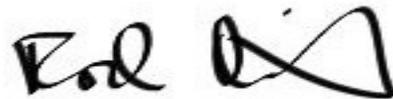
Respondent retired last month, and suffers from chronic fatigue and other chronic ailments. She has food delivered to her, and the size of the debt in this case, although substantially smaller than an overpayment she repaid in 2006, is not insignificant to her in retirement, given the circumstances of her health. Viewed in this light, the tribunal is persuaded that the financial burden is a significant factor supporting Respondent's position. More important, on the basis of the entire record, the tribunal is persuaded that the balance of equities favor Respondent.

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 **\$1,582.67** is **HEREBY GRANTED.**

So ordered this 23rd day of July 2008.



Rod Dixon
Waiver Official