



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

VANESSA,

Respondent

Docket No. 08-07-WA
Waiver Proceeding

DECISION GRANTING WAIVER

The OFFICE OF HEARINGS & APPEALS (OHA)¹ maintains authority and jurisdiction to waive² claims of the United States against a former or current employee of the Department.³ The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁴ At issue in this case is whether a former employee of the Department of Education (Department) should be granted waiver of repayment of a debt arising from an erroneous **\$171.77** salary payment for a Federal holiday occurring after the date the former employee resigned. For reasons that follow, the tribunal concludes that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

¹ 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)).

² *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.

³ *See also*, General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (codified at 5 U.S.C. 5584) (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/.

⁴ *See*, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

In a waiver proceeding, the debtor acknowledges the validity of the debt, but argues that he or she should not be required to repay the debt on the basis of the circumstances of the debt and argues that there is no indication of fraud, misrepresentation, fault, or lack of good faith by Respondent or anyone else having an interest in obtaining a waiver of the claim.⁵ In doing so, the debtor is expected to: (1) explain the circumstances of the overpayment, (2) state why a waiver should be granted, (3) indicate what steps, if any, the debtor took to bring the matter to the attention of the appropriate official or supervisor and the agency's response, and (4) identify all the facts and documents that support the debtor's position that a waiver should be granted.

The record in this case constitutes what has been accepted as argument and evidence including: a copy of a signed, sworn, written statement by Respondent, submitted on September 30, 2008, copies of a series of email messages from Respondent addressed to human resource officials concerning Respondent's debt, a copy of an August 2008 earnings statement from Respondent's current employer, a copy of an earnings statement from Respondent's former employer, a copy of Respondent's Flexible Schedule Certification Form for pay period ending July 5, 2008, a copy of a Notification of Personnel Action accepting Respondent's resignation effective July 3, 2008, and a copy of a Bill of Collection (BoC) dated August 19, 2008.

DISCUSSION

I.

After review of the factual record, the following facts are found pertinent to this case. Respondent was employed as a reader assistant for employees who are blind or visually impaired by the Department's Office of Special Education and Rehabilitative Services, Rehabilitation Services Administration from September 6, 2005 until the date of her resignation on July 3, 2008. Respondent resigned to become an editorial assistant for the Maryland State Teachers Association. Respondent informed her supervisor, Tom Finch, as well as a human resources official, Darlene Thornton, that her final day "in the office at the Department" would be July 3, 2008. Respondent also completed a Flexible Schedule Certification Form that indicated under the "Time in Duty Status" column that on July 3, 2008 Respondent earned 8 regular hours of pay and on July 4, 2008 earned 8 hours of holiday pay. In light of the information on this form, Respondent was paid for 80 hours of work, including 8 hours for the Federal holiday on July 4, 2008.

OPM has established that "employees normally are paid on a holiday on which they do not work under the assumption that, but for the holiday, they would have worked and received pay."⁶ Similarly, if an employee is in a pay status for at least 4 hours on the day before or after

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* 70 Fed. Reg. 1070 (2005) (proposing to issue a clarifying regulation to be codified at 5 C.F.R. § 610.204). OPM's failure to promulgate a final regulation, without more, does not indicate a change in its position since the policy is long-standing. *See, e.g.*, OPM Compensation Policy Memorandum 99-4, www.opm.gov/flsa/oca/compmemo/1999/NEWYRQA.asp

the holiday, he or she is entitled to be paid for the holiday.⁷ But, when an employee resigns or otherwise terminates employment with the Federal government on a date prior to a Federal holiday, the former employee cannot be paid for the holiday.⁸ In other words, an employee is not entitled to receive pay for a holiday that occurs on a day after the employee resigns or retires.

II

The standard for determining whether waiver of a debt 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.

The basis of the tribunal's findings begins with an analysis of the fault standard. Although *fault* is often used in a conventional sense to refer to blunder, mistake, or responsibility, the term has a specialized and particular meaning in the Waiver Statute. Rather than its conventional use, fault 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;¹¹ (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.¹²

Respondent argues that waiver of the entire debt is warranted because neither her supervisor, nor her timekeeper seemed aware that she could not be paid for July 4, 2008, notwithstanding her resignation of July 3, 2008. In Respondent's view, the erroneous holiday payment should have been recognized by someone prior to the salary payment. Respondent states that the fact that no one recognized the error on her Flexible Schedule Certification Form, illustrates the obscurity of the policy. More directly, Respondent argues that she was unaware of the policy effecting resignation on a holiday, and would not have resigned in a pay period ending

⁷ See also *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005) (noting OPM's guidance that an employee in nonpay status before a holiday is not entitled to compensation for the holiday).

⁸ See 70 Fed. Reg. 1070 (2005); OPM Compensation Policy Memorandum 99-4, www.opm.gov/flsa/oca/compmemo/1999/NEWYRQA.asp. Essentially, this policy precludes an employee from effectively retiring or resigning on a holiday with the intent to be paid for the holiday.

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).

¹¹ 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).

¹² See generally, *Guidelines for Determining Requests* U.S. Department of the Treasury Directive 34-01 (2000), available at <http://www.treasury.gov/regs/td34-01.htm>; Standards for Waiver, 4 C.F.R. § 91.5 (2000).

on a holiday, if she had been aware of the Federal policy.

The issue in this case is similar to *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 factors that militate against a finding that the employee is at fault.

Drawing on *Francisco*, 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 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.¹³ Similarly, the tribunal recognized in *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005), that an employee, untrained or inexperienced in employee or labor relations, should not be at fault when the rule underlying the existence of a debt is obscure or exclusively set out in Comptroller General waiver opinions. I am persuaded that the same analysis from these cases applies here. By all indications, this is not a case where Respondent would have been able to discover the erroneous payment or otherwise knew of the inaccuracy of her pay.¹⁴

Respondent informed her superiors of her intention to resign on July 3, 2008, and Respondent made it clear that she had intended to obtain the benefit of holiday pay on July 4, 2008. Given the conspicuous clarity of Respondent's intention, it follows that it would be reasonable to have expectations that her supervisor or timekeeper would inform her of her mistake. I do not doubt Respondent's assertions that the Federal government personnel policy effecting resignation on a holiday was unfamiliar to her, and that under the circumstances, she would not have recognized that her final pay was incorrect. Indeed, Respondent's supervisor and timekeeper seem to bolster Respondent's assertion that the holiday policy is obscure by their failure to correct Respondent and by the authorization of the overpayment. As such, after a full review of the record, I am persuaded by Respondent's evidence and arguments showing that the requisites of the fault standard have been satisfied.

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, I must balance equity and appraise good conscience in light of the particular facts of the case and against the competing interests in the recovery of debts owed to the United States. Factors weighed in this balancing of interests include an assessment of: whether the debt is substantial; whether recovery

¹³ *Id.*

¹⁴ See also, *In re Russell*, Dkt. No. 05-19-WA, U.S. Dep't of Educ. (June 23, 2005).

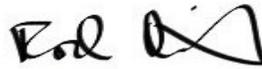
of the claim would be unconscionable under the circumstances; whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment; and whether collection of the debt would impose an undue financial burden.

Respondent argues that repayment of this debt would impose a financial burden on her because she is currently employed in a position that pays over \$10,000 less annually than her former position with the Department. In addition, Respondent points out that the debt constitutes approximately 8% of her \$2200 monthly net income. In this light, the tribunal concludes that Respondent's assertions highlight the potential financial hardship repayment of this debt may impose. The financial burden is a significant factor supporting Respondent's position that repayment would be inequitable. In light of the aforementioned and on the basis of the entire record, I find that in the interests of the United States waiver of this debt 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 **\$171.77** is **HEREBY GRANTED**.

So ordered this 11TH day of May 2009.



Rod Dixon
Waiver Official