



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS

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In the Matter of

G.N.,

Respondent

Docket No. 08-11-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 an employee of the Department of Education (Department) should be granted waiver of repayment of a debt arising from the Department's erroneous salary payments from the voluntary leave transfer program and from advanced sick leave totaling **\$3,591.03**. 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 December 15, 2008, a copy of a memorandum from Respondent addressed to Theresa Strassler, an official in payroll, a copy of a notice of debt letter, dated September 22, 2008, and a copy of a Bill of Collection (BoC) dated September 22, 2008. In addition, to aid the tribunal's fact-finding, I conducted informational interviews with Mark Washington, Respondent's supervisor, and a lead payroll technician employed by the Department of Interior.

DISCUSSION

I.

After review of the factual record, the following facts are found pertinent to this case. On February 26, 2008 at 11:45a.m., Respondent left work ill without notice or prior approval. Subsequently, Respondent submitted leave requests covering absences, which eventually totaled 120 consecutive days. Respondent exhausted her advanced leave. Respondent "did not have enough sick or annual leave to cover the complete 120 day period." Respondent also requested participation in the Department's Voluntary Leave Transfer Program (VLTP).⁶

The VLTP allows 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 participating in VLTP who needs leave because of a medical emergency. Although recipients of VLTP leave do not have broad discretion in the use of VLTP leave,⁷ they may use VLTP leave for circumstances other than a prospective period of illness.⁸ 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.⁹ Similarly, VLTP leave may be used to liquidate indebtedness for

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

⁷ *See, In re Dorris*, Dkt. No. 07-01-WA, U.S. Dep't of Educ. (April 17, 2008).

⁸ *Id.*

⁹ 5 C.F.R. § 630.906(e).

advanced annual or sick leave granted on or after the beginning of the period of an employee's medical emergency.¹⁰

Respondent sought to cover her absences as well as liquidate a portion of her advanced leave through participation in the VLTP.¹¹ After a limited participation in VLTP, Respondent's supervisor audited Respondent's leave and determined that Respondent had been erroneously paid from pay period 07 through pay period 09 of 2008; to correct the errors, Respondent's status was converted from pay status to nonpay status (some time periods were redesignated as leave without pay (LWOP), while others were redesignated as absent without leave (AWOL)). The corrections resulted in Respondent owing the debt that is the focus of this case.

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,¹² 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.¹³ 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;¹⁴ (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.¹⁵

Respondent argues that waiver of the entire debt is warranted because her supervisor,

¹⁰ 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).

¹¹ In some circumstances, annual leave transferred to an employee under the leave share program may be substituted retroactively for a "period of leave without pay (LWOP) or used to liquidate an indebtedness for advanced annual or sick leave" granted on or after the beginning of the period of the medical emergency. 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).

¹² In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

¹³ *See In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

¹⁴ 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).

¹⁵ *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).

Mark Washington, “charged [her] with over payment [sic] of salary.” In Respondent’s view, the erroneous salary payments should have been “covered under the [VLTP].” Respondent states that she disagrees with her supervisor’s decision not to apply VLTP to cover her absences, and, in doing so, she notes that “[t]his is the first I have heard of a supervisor not accepting medical documentation from a physician and placing the employee on AWOL.”

This case is similar to the factors cited in a recent case decided by the tribunal, *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 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.¹⁶ The tribunal is persuaded that the same analysis applies here. By all indications, this is not a case where Respondent abused the VLTP or otherwise knew of the inaccuracy of her pay.¹⁷

Respondent was absent from work and requested various forms of leave to cover her absences. The tribunal does not doubt that the factors giving rise to the overpayment are sufficiently unfamiliar to Respondent that under the circumstances, she would not have recognized that during her absences her pay status was periodically incorrect. Indeed, Respondent’s manager had not determined that Respondent did not have sufficient leave to cover her absences until after a leave audit revealed that Respondent had fewer hours of advanced leave and fewer hours of leave share than her leave accounts once indicated. Although there can be no question that Respondent has a clear duty to verify that her use of leave is accurate and consistent with her supervisor’s guidance, that duty is not violated when an employee’s salary and pay records, personnel actions, or other supporting payroll documents do not disclose an error in pay. In the record in this case, there is no evidence showing that Respondent was aware that her use of leave was not in conforming with the use of donated leave for a personal or family medical emergency or otherwise contrary to the permitted uses of advanced leave. After a full review of the record, the tribunal concludes that Respondent’s evidence and arguments satisfy the requisites of the fault standard.

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

¹⁶ *Id.*

¹⁷ See, *In re Russell*, Dkt. No. 05-19-WA, U.S. Dep’t of Educ. (June 23, 2005).

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 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 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 her supervisor blundered in putting her on AWOL when LWOP was the proper nonpay status, and that this error weighs in her favor for obtaining a waiver of the debt. I disagree. The distinction Respondent refers to is impertinent in this case; the result under AWOL or LWOP is the same in light of the fact that the conversion from pay status to nonpay status will lead to a salary overpayment. Since in this case the overpayment arose from the Department's erroneous salary payments to Respondent while she was in a non-pay status - - and, both LWOP and AWOL denote a non-pay status, the distinction between AWOL and LWOP has no bearing on Respondent's debt.

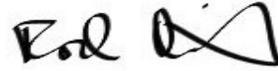
Next, Respondent argues that when she believed she had exhausted her approved leave, she provided her supervisor with medical documentation sufficient to establish that it was appropriate to grant her extended LWOP. Notably, Respondent's assertion highlights her genuine effort to ensure that she was in the appropriate pay status during her absences. The tribunal is also persuaded of the potential financial hardship repayment of this debt may impose given, as Respondent indicates, she has not received "a pay check for months" as of the date of the debt letter. The financial burden is a significant factor supporting Respondent's position. In light of the aforementioned and on the basis of the entire record, I am persuaded that the balance of equities favor Respondent. ACCORDINGLY, I find that in the interests of the United States waiver of this debt should be granted.¹⁸ This decision constitutes a final agency decision.

¹⁸ Respondent raises arguments bearing on her preference in receiving "payment for the 160 hours of Leave Share that was originally keyed on [her] timesheets," but the tribunal has no jurisdiction to rule such matters.

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 **\$3,591.03** is **HEREBY GRANTED.**

So ordered this 24TH day of February 2009.

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

Rod Dixon
Waiver Official