



UNITED STATES DEPARTMENT OF EDUCATION

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

In the Matter of

NICOLE,

Docket No. 09-07-WA

Waiver Proceeding

Respondent.

DECISION GRANTING WAIVER

At issue in this case is whether Respondent, a former U.S. Department of Education (Department) employee, should be granted a waiver of a \$450.49 salary overpayment debt. The overpayment arose from the Department's failure to correctly process two personnel actions effectuating both a promotion and subsequent step increase. Based on my review, I find that waiver of this debt is warranted. Accordingly, Respondent's request for a waiver is granted.

Jurisdiction

The Waiver Statute, 5 U.S.C. § 5584, authorizes the waiver of claims of the United States against debtors as a result of an erroneous salary payment 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,⁴ May 7, 2009 statement and attached documentation, documents compiled by the Department's Human Resources office, and a May 11, 2009 recommendation from the Department that waiver be granted. 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 Tanya*, 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.

⁴ Respondent requested a waiver via email to OHA's Acting Director, Rod Dixon, on April 16, 2009.

Procedural History

According to the March 23, 2009 Notice of Debt Letter and attached Bill of Collection (BoC), the \$450.49 overpayment arises from the Department's failure to correctly process two personnel actions in 2004. First, Respondent was promoted from a GS-12, step 4 position to another position at the GS-13, step 3 level. However, according to personnel rules, Respondent's pay should have been set at the GS-13, step 1 level. Second, soon after her promotion, Respondent erroneously was given a within grade increase to the step 4 level. According to Respondent's personnel director, these errors were not discovered until five years later in 2009.

Discussion

A salary overpayment is created by an administrative error in the pay of an employee in regard to the employee's salary.⁵ The fact that an administrative error created an overpayment does not relieve the overpaid employee from liability.⁶ Instead, an employee who does not contest the validity of the debt may request that the debt be waived or forgiven.

Waiver is an equitable remedy available only when there is no indication of fraud, misrepresentation, fault, or lack of good faith by the debtor.⁷ 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 in this proceeding is whether Respondent's arguments and submissions support a request that a portion or the entire overpayment be waived in accordance with standards prescribed by statute and consistent with the case law and regulations promulgated by the Department.

Fault Standard

The fault standard is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. Fault 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.⁸ 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 salary overpayment.⁹ Thus, every waiver case must be examined in light of its particular facts and circumstances.¹⁰

In her April 16, 2009 waiver request and her May 7, 2009 statement, Respondent states that she received this bill of collection while on medical leave. Respondent asserts that this debt

⁵ See 34 C.F.R. Part 32 (2004).

⁶ See *In re Robert*, Dkt No. 05-07-WA, U.S. Dep't of Educ. (July 8, 2005), n. 12.

⁷ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

⁸ See *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

⁹ See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

¹⁰ See *id.*

represents an illegal attempt to demote her and that she has not received a personnel action justifying the salary demotion.

“Where an employee is promoted to a higher grade but his or her step level for the new grade is miscalculated, and employee typically is not expected to be aware of and understand the rules regarding the determination of his or her step level upon a promotion. The tribunal has held that an employee generally should be aware of the waiting periods between step increases and should make an inquiry about any increase not in accord with those waiting periods.”¹¹ It is not reasonable, however, to expect an employee not involved in personnel matters to be aware of the complicated rules regarding the establishment of his or her step level upon a promotion. The complexity of the personnel rules, however, does not obviate an employee who fails to question an unexplained increase in pay that would cause a reasonable person to make an inquiry.¹²

Within-grade increases are periodic increases in an employee’s basic pay rate.¹³ These increases are also known as step increases. For advancements between each of the first four steps, an employee must wait one year.¹⁴ For most within-grade increases, the waiting period begins upon the date of the employee’s last equivalent increase, which includes the two bases pertinent to this case: a prior step increase and a promotion to a new career ladder position.¹⁵

As an initial matter, the tribunal finds there is no evidence of fraud, misrepresentation or lack of good faith in this case. Although an employee typically is expected to know what the waiting periods are between within-grade increases, Respondent’s failure to recognize that the aforementioned personnel actions were incorrect relates to the actions themselves. First, it is understandable that Respondent did not question the salary level she was given upon her promotion. Once that first action occurred, her subsequent failure to recognize that she received a within-grade increase too soon also was understandable given that it occurred within one pay period of her promotion and likely was interpreted as a correction of downgrading her step level from four to three after she was promoted to the next grade. In fact, Respondent’s confusion is evident in her belief today that this overpayment today represents a demotion. Finally, the tribunal gives significant weight to the fact that Respondent’s personnel director as well as the senior executive for her office, recommend that a waiver be granted given their examination of how these personnel errors occurred, and that the closeness in timing of these personnel actions to her promotion likely made these errors undetectable to Respondent. Consequently, the tribunal finds that Respondent has met the fault standard.

Given Respondent’s ill-health and subsequent retirement as well as the Department’s statement that they believe waiver of this debt is equitable and appropriate, the tribunal concludes that collection of this debt would go against equity and good conscience.

¹¹ See *In re Pedro*, Dkt. No. 06-78-WA, U.S. Dep’t of Educ. (April 13, 2007) at 4 and Collection from Current and Former Employees for Indebtedness to the United States, U.S. Dep’t of Energy Order 533.1 (2003), available at <http://www.directives.doe.gov/pdfs/doe/doetext/neword/533/o5331.html> (last visited July 30, 2009).

¹² See *id.* at 4.

¹³ See 5 C.F.R. § 531.405(a).

¹⁴ See *id.*

¹⁵ See 5 C.F.R. §§ 531.405(b) and 531.407.

ORDER

Pursuant to my authority under the Waiver Statute, 5 U.S.C. § 5584, Respondent's request for waiver in the amount of \$450.49 is **GRANTED**.

So ordered, this 30th day of July 2009.

Greer Hoffman
Waiver Official