



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

Eleanor,

Docket No. 09-09-WA
Waiver Proceeding

Respondent

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 Jurisdiction is proper under the Waiver Statute at 5 U.S.C. 5584.

At issue in this case is whether a former employee of the Department of Education (Department) should be granted a waiver of a \$2,019.09 debt. The debt is a result of salary payments for pay periods in which the former employee should have been in a leave without pay (LWOP) status and for health premium payments during periods of LWOP. For the 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*, 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).

Resolution of this case is based on the matters accepted as argument and evidence including: a signed, sworn, written statement by Respondent's agent, submitted on June 29, 2009, Durable Power of Attorney dated September 13, 2008, copies of medical records from May 2008, to June 2009, a copy of a Retirement Transition letter dated June 11, 2009, a copy of a letter from Social Security dated January 4, 2009, a copy of an August 2008 earnings statement, a copy of a Notice from the Department of Interior dated Jun 1, 2009, various medical service invoices, and a copy of a Bill of Collection (BoC) dated June 17, 2009.

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,⁵ 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.⁶ 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.

DISCUSSION

I

The record contains the following pertinent facts. On May 13, 2008 the Respondent suffered a devastating stroke. The medical records show that the stroke caused the right side of the Respondent's body to become paralyzed, and the Respondent to suffer loss of memory, as well as, decreased cognitive functioning, dysphasia and apraxia. From May 2008, to September 2008, the Respondent was hospitalized several times and underwent rehabilitative treatment. The Respondent was placed on the Voluntary leave Transfer Program (VLTP), but because of the Respondent's disability she was not able to manage, review and communicate her leave requests with her supervisor. From the aforementioned period, the Respondent's supervisor placed the Respondent in paid leave status believing that the Respondent had enough transferred leave to pay the Respondent. Also, it should be noted that during this period that no person was authorized to act on the Respondent's behalf. It was not until September 13, 2008, that the Respondent's son, Christopher Marrero was given authority to act on the Respondent's behalf. The Department has asserted authority to collect from Respondent periods in which advanced sick leave and advanced annual leave were converted to leave without pay (LWOP), and for health premiums for periods when the Respondent utilized LWOP.

Fault in the Waiver Statute should be considered in light of the following: (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;⁷ (b) whether the

⁵ In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

⁶ See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

⁷ 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

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.⁸

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. An application of this standard by this tribunal can be seen *In re Joan*, Dkt. No. 06-49-WA, U.S. Dep't of Educ. (January 25, 2007). In that case, 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.⁹ This case is similar facts as *Joan*, and in this case the Respondent was incapacitated in the hospital and could not fully appreciate her leave status. Since that the Respondent was incapacitated she also could not have comprehend and decided health premium payment issues during LWOP status. Guided by *Joan*, these facts and the analysis herein, the tribunal concludes that Respondent is without fault.

II

Since the fault standard has been satisfied, the only issue remaining is whether the 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 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's agent argues that repayment of this debt would impose a financial burden on the Respondent because she is not able to work as she is totally disabled and confined to a bed. In addition, the Respondent's disability income is only \$1,588.00 a month. The Respondent's agent argues that the disproportion of debt to income would prevent payment of the debt, and prevent the Respondent from affording the ongoing medical care she needs. 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. Therefore, based on the

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).

⁸ *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).

⁹ *Id*

aforementioned and 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 \$2,019.09 is **HEREBY GRANTED**.

So ordered this 24th day of March 2011.

George Abbott
Waiver Official