



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

Docket No. 11-47-WA

L,

Waiver Proceeding

Respondent

DECISION DENYING WAIVER

At issue in this case is whether a current employee of the Department of Education (Department) should be granted a waiver of a \$977.24 debt. This debt is a result of a payment for a pay period (pp) in which the employee was compensated by two different pay systems and received premium pay¹ of Law Enforcement Availability Pay² (Availability) while the employee was being concurrently compensated at the Senior Executive Series³ (SES) level. The debt covers two distinct, but interrelated bills of collection (BoC).⁴ For the reasons that follow, the tribunal concludes that waiver of the debt is not warranted. Accordingly, Respondent's request for waiver is denied.

Jurisdiction

Under 5 U.S.C. § 5584 (the Waiver Statute), the Department has the authority to waive claims of the United States against debtors as a result of an erroneous payment of pay to a federal employee.⁵ The Department promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 *seq.*) and its

¹ See 5 C.F.R. § 550.103

² See 5 C.F.R. § 550.181-187 Availability pay is a type of premium pay that is paid to Federal law enforcement officers (LEO's) who are criminal investigators. Due to the nature of their work, criminal investigators are required to work, or be available to work, substantial amounts of "unscheduled duty." Availability pay is generally an entitlement that an agency must provide if the required conditions are met.

³ See 5 C.F.R. § 534.408

⁴ Respondent received Bill of Collection (BoC) M10810610854 for \$977.24 and BoC M1110300002 for \$343.70. In his May 26, 2011, email, the Respondent requested a waiver of BoC M10810610854, but not BoC M1110300002. This decision governs BoC M10810610854.

⁵ 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), (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

Handbook for Processing Salary Overpayments (Handbook, ACS-OM-04) (January 2012),⁶ specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).

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 request for waiver, supplemental documentation, and documents compiled by the Department's Human Resources office including the BoC. This decision constitutes a final agency decision.

DISCUSSION

The record, for the case at bar contains, the following pertinent facts. The Respondent's LES for pay periods (pp) 2010-18, 2010-19, and 2010-20 show two separate line entries for compensation. On line one, the Respondent was compensated for 80 hours of basic pay at the GS 15 step 7 pay rate, and on line two, the Respondent was compensated with premium pay for 32 hours of Availability. During pp 2010-21, the Respondent was promoted to a SES position. Therefore, the Respondent's LES for pp 2010-21 listed 3 separate lines of compensation. Line one compensated the employee for 24 hours at his GS basic pay rate, and line two compensated the employee for 56 hours at his SES pay rate. Then on line three, the employee was compensated for 80 hours of Availability. In pp 2010-22 the Respondent's LES listed a single line of compensation of 80 hours at the employee's SES pay rate. Pursuant to 5 C.F.R § 534.408, an employee is not entitled to receive premium pay while being compensated as an SES member. The sole exception to the aforementioned regulation is compensatory time off for religious purposes pursuant to guidelines in 5 C.F.R. § 550, subpart J. In pp 2010-21, the Respondent received Availability pay while concurrently being compensated at the SES pay rate. The Respondent did not notice the overpayment and therefore did not report the error to HCCS.

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, or lack of good faith on the part of Respondent,⁷ and (2) whether Respondent can 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 the entire overpayment be waived in accordance with standards prescribed by statute and consistent with the case law and regulations promulgated by the Department. Therefore, the Respondent's waiver can only be granted if there is a lack of fault by the Respondent and it would be against equity to collect the debt.

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: <http://oha.ed.gov>.

⁶ The *Handbook*, ACS-OM-04, was revised and reissued by the Department on January 19, 2012.

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

Fault in a waiver case is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. Fault in a waiver case 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 compensation.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

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 the matter of *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 VLTP¹¹ leave, subsequently, she was paid despite her leave status. Due to her incapacity, the employee in *Joan* 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.¹²

Conversely, the tribunal has concluded that the fault standard has not been satisfied when the circumstances of the debt show that the employee could have known he or she was erroneously compensated. An application of this standard by this tribunal can be seen in the matter of *In Re Carolyn*, Dkt. No. 11-02-WA, U.S. Dep't of Educ. (August 10, 2011). In that case, the Respondent transferred from the Transportation Security Administration (TSA) to the Department with a pay increase. When the Respondent transferred from TSA, her health care benefit election should have been transferred, but due to an administrative error on the part of the Department's Human Capital Client Services (HCCS),¹³ Respondent's health care benefits paperwork was not properly transferred. As a result of the administrative error, Respondent continued to receive health care benefits, but no funds were deducted from the Respondent's payroll checks to cover the employee's contribution of the health care premium. This error continued for about a year. Respondent stated that since she received a pay increase when she came to the Department, any increase in her payroll check would explain any increase in her payroll check. The Respondent argued that since it was an administrative error and that she could not have known of the error from her payroll checks, then overpayment waiver should be granted. The tribunal denied the Respondent's waiver request and concluded that the Respondent was not without fault. The tribunal determined that even though the Respondent did not cause the administrative error, she had a duty to review her entire LES for any errors. Had

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 *Id* at 5.

¹¹ See 5 C.F.R. § 630.901 (2007); PMI 630-10, Department of Education, Voluntary Leave Transfer Program (October 2, 1989).

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

¹³ In 2009, the Department changed the name of Human Resource Services to Human Capital and Client Services.

the Respondent reviewed her LES for errors, she would have seen on the face of the LES that deduction for health care premiums was absent. The Respondent expected health care benefits, and therefore she should have expected health care premium deductions. After discovering the error on her LES, the Respondent should have notified the Department's HCCS. The Respondent could not rely upon her payroll checks as an indicator whether an overpayment had occurred.

Not only have prior waiver decisions established the general rule that an employee has a duty to review their LES. Prior waiver decisions have also established the general principle that an employee is expected to know the rules and regulations regarding their compensation. For example within-grade increases and quality step increases.¹⁴ On the other hand, if an employee is new to federal service, does not have specialized knowledge about the federal pay structure, and/or a complex personnel rule regarding pay, then the applicability of this general rule may not be appropriate.¹⁵ Notably, the newness of an employee's federal service has been used as the primary consideration in mitigating the general rule.¹⁶

In this case, there are no mitigating factors that preclude the general principle that an employee is responsible for knowing the rules and regulations regarding their compensation. The Respondent is not new to the federal government. The Respondent should be very familiar with the federal pay system and premium pay as he had over 25 years of service at the time the erroneous payment occurred. Before the Respondent received Availability pay, the Respondent was required to make an initial certification, pursuant to 5 C.F.R § 550.184, that he met the requirements to receive Availability Pay. Then on an annual basis after the initial certification, the Respondent was required to certify his eligibility to receive Availability pay. If during the year the Respondent could no longer comply with the criteria to receive Availability pay, Respondent would have to opt-out of receiving the Availability pay. Respondent is responsible for knowing when he could and could not receive Availability pay.¹⁷ The overpayment does not involve an overly complex personnel rule or require special knowledge to understand the application or language of the statute. The statute does not require calculations or understanding of novel terms. The statute is unambiguous and defines exactly when an employee is entitled to Availability pay and when an employee is not entitled to receive Availability pay.¹⁸ The language and application of the statutes regarding Availability pay is less complicated than the

¹⁴ See *In re Jay*, Dkt. No. 06-01-WA, U.S. Dep't of Educ. (June 23, 2006).

¹⁵ See *id.* at 4, n.21. See also, *In re Jeanette*, Dkt. Nos. 06-11-WA, 06-12-WA, 06-13-WA, U.S. Dep't of Educ. (September 20, 2006). The tribunal held that a long-term employee who received a within-grade increase well shy of the required one-year waiting period and who had documents in her possession indicating the within-grade increase was in error, should have known that an erroneous salary overpayment had occurred.

¹⁶ See *In re Carolyn*, Dkt. No. 06-04-WA, U.S. Dep't of Educ. (June 28, 2006). The employee had only one year of federal service when she received a premature within-grade increase. The tribunal concluded that the employee's short tenure was a key factor in warranting an exception to the general rule holding employees accountable for recognizing erroneous within-grade increases.

¹⁷ 5 C.F.R §§ 550.182(f), 184(c).

¹⁸ 5 C.F.R § 534.408; 5 § C.F.R. 550.184.

statutes regarding within-grade increases.¹⁹ The tribunal concludes that since prior waiver decisions have held an employee responsible for understanding more complicated statutes than the Availability pay statutes,²⁰ then an employee should be responsible for understanding less complicated statutes.

This case is similar in facts as *In Re Carolyn*. The Department's administrative error was on the face of the Respondent's LES and the Respondent had a duty to review every LES he receives. A reasonable person would have wanted to review their LES during a pay period of transition. For example, to ensure they were paid the correct amount of hours or that their deductions were being properly processed. Had the Respondent reviewed his pp 2010-21 LES for errors, he would have noticed something very unusual about his compensation and that should have alerted him to a potential error. The tribunal notes that in pp 2010-18; 2010-19 and 2010-20 the Respondent only received 32 hours of Availability premium pay and then inexplicably in pp 2010-21, the Respondent received 80 hours of Availability premium pay. The Respondent received more hours of Availability premium pay than he ordinarily and customarily received in a pay period. This unusual and significant increase in premium pay in pp 2010-21 should have alerted the Respondent to a potential error in his pay for that pay period. The Respondent has not presented any evidence that shows that he could not access his LES. There is no evidence in the record that indicates that even if the Respondent had reviewed his LES for pp 2010-21, that he could not have readily been alerted to the error. As previously discussed, the Respondent already had a duty to know when he could and could not receive compensation of Availability premium pay. Therefore, the Respondent could have readily discovered the error by reviewing his LES. The Respondent was compensated at the SES level for 56 hours, thus he was not entitled to concurrent compensation for Availability premium pay during the 56 hours. Thus deducting the 56 hours from the Respondent's 80 hours of premium pay would have yielded only 24 hours that the Respondent was entitled to receive for premium pay. The employee should have notified HCCS about the premium pay error, and set aside the overpayment of 56 hours to be repaid at a later date.

In this case the Respondent argues he could not have known of the overpayment. The Respondent states he was expecting a pay increase in pp 2010-21 because of a promotion. To the Respondent, any increase in his paycheck would be as a result of his change to the SES compensation level. Therefore, the Respondent argues he would not have been alerted to any errors by his paycheck. However the Respondent's pay check does not support the Respondent's argument. In pp 2010-20, the Respondent received a net salary payment of \$3,242.72 and in pp 2010-21, the transition pay period, the Respondent received a net salary payment of \$4202.47.

¹⁹ See 5 C.F.R. § 531 Subpart D, which requires an understanding of terms, calculations to determine credible service, calculations to determine the waiting period between within-grade increases, which will be different according to the current employees step, and calculations to ascertain when the waiting periods starts. In contrast, 5 C.F.R § 534.408(a) simply states "Senior Executive Service (SES) are excluded from premium pay," and 5 C.F.R. 103 says "Premium pay means the dollar value of earned hours of . . . administratively uncontrollable overtime work, or availability duty [pay]."

²⁰ See *In re Carolyn*, Dkt. No. 06-04-WA, U.S. Dep't of Educ. (June 28, 2006); *In re Jeanette*, Dkt. Nos. 06-11-WA, 06-12-WA, 06-13-WA, U.S. Dep't of Educ. (September 20, 2006) and 5 C.F.R § 534.408; 5 § C.F.R. 550.184.

Then in pp 2010-22 the Respondent received a net salary payment of \$3,454.43, which is a decrease in compensation as compared to the transition pay period. The Respondent received only \$455.20 each pay period for Availability pay and the difference between pp 2010-21 and pp 2010-22 was \$747.94. Even if the Respondent incorrectly relied upon the amount of his salary deposited into his bank account, the Respondent would have noticed that there was an unexplained increase in pay pp 2010-21 as compared to pp 2010-22. The salary payment in pp 2010-22 should have caused the Respondent to question and ascertain why he was compensated less than the previous pay period.

Had the Respondent reviewed his LES for pp 2010-21, he would have noticed the conspicuous error. Guided by *In Re Carolyn*, the facts of this case and the analysis herein, the tribunal concludes that Respondent is not without fault as that term is defined under waiver standards. The Respondent had a duty to verify the accuracy of his LES and report any discrepancies he discovered in his LES to HCCS.

To secure equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.²¹ There are no rigid rules governing the application of the equity and good conscience standard. The tribunal must balance equity and/or appraise good conscience in light of the particular facts of the case.²² Factors weighed by the tribunal include the following: whether recovery of the claim would be unconscionable under the circumstances; collection of the debt would impose an undue financial burden.²³

The Respondent argues that it would be against equity and good conscious to require him repay the amount owed because he did nothing to cause the error and it was an administrative error. However, the mere fact that an administrative error caused the overpayment does not immediately mean it would be against equity and good conscience of the United States to seek repayment.²⁴

Repayment of unplanned debt can be difficult and unpleasant, but that is not tantamount to showing a financial burden as such that the equity calls for waiver. The Respondent does not argue repaying the debt would cause him a hardship burden. There is nothing in the record to support a finding that repayment would cause the Respondent to lose medical care, housing or other life sustaining needs. Lacking any evidence to the contrary, the tribunal concludes that it would not be a financial hardship under the waiver statutes to repay the debt.

²¹ See 5 U.S.C. § 5584 and *In re Anh-Chau*, Dkt. No. 05-01-WA, U.S. Dep't of Educ. (June 17, 2005) and 5 U.S.C. § 5584.

²² See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (December 14, 2005); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (September 14, 2005).

²³ See *id*

²⁴ See, e.g., DOHA Case No. 02032601 (May 31, 2002), which relies on 5 U.S.C. § 5584, stating that waiver is precluded when an employee is aware that he is being overpaid. The employee does not acquire title to any excess payments merely because the government has committed an administrative error. He has the duty to hold the overpayment for the eventual repayment to the Government.

Respondent did not cause the Department's error nor is there any evidence that Respondent lacked good faith. However, the Department's Availability pay error should have been readily apparent to the Respondent. Therefore, the tribunal concludes there are no mitigating factors to warrant an exception to the general rule that an employee has a duty to examine his LES and report any discrepancies. Therefore, guided by *In Re Carolyn*, the entire record and the analysis herein, I find that a waiver of this debt should not be granted.

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 \$977.24 is **HEREBY DENIED**. This decision constitutes a final agency decision.

So ordered this 27th day of December, 2012.

_____/S/_____
George H. Abbott, III
Waiver Official