



UNITED STATES DEPARTMENT OF EDUCATION

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

In the Matter of

TAISHA,

Docket No. 11-77-WA

Waiver Proceeding

Respondent.

DECISION DENYING WAIVER

Respondent, a U.S. Department of Education (Department) employee, requested waiver of a salary overpayment debt arising from the Department's premature award of Respondent's within-grade salary increase. Based on the reasons articulated in this decision, I find that waiver of this debt is not warranted. Accordingly, Respondent's request for a waiver is denied.

Jurisdiction

Respondent's waiver request arises under 5 U.S.C. § 5584, authorizing the waiver of claims of the United States against debtors as a result of an erroneous payment of pay 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), specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).²

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

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, n.1.

² 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.

request for waiver and attached documentation, Respondent's November 1, 2011 statement and attached documentation, Respondent's December 16, 2011 response to the tribunal's request,³ and documents compiled by Federal Student Aid's (FSA) Human Resources office.⁴ This decision constitutes a final agency decision.

Procedural History

According to the October 17, 2011 Notice of Debt Letter and attached Bill of Collection, the \$1,869.90 overpayment concerns Pay Periods 2 through 15 of 2011. The Notice of Debt Letter and attached Bill of Collection do not explain the basis for the overpayment. Consequently, the tribunal sought clarification both from the Department's payroll contractor, the U.S. Department of Interior's National Business Center⁵ and FSA's Human Resources office. The overpayment arises from the Department's premature award of Respondent's within-grade increase which is also commonly referred to as a "step increase" in a federal employee's salary from GS-14, step 2 to GS-14, step 3. Respondent's within-grade increase was processed 14 pay periods early during Pay Period 2 of 2011. Respondent's within-grade increase was cancelled by FSA's Human Resources office.⁶

Specifically, the facts surrounding the overpayment are as follows: On August 1, 2010, Respondent was promoted to the GS-14, step 1 level. On December 5, 2010, Respondent received a quality step increase award to the GS-14, step 2 level. On January 2, 2011, Respondent received a within-grade increase to the GS-14, step 3 level.

By letter dated November 1, 2011, Respondent filed a timely request for waiver. In a November 16, 2011 Order Governing Proceedings, Respondent was afforded an opportunity to file a statement and any supporting documentation. Respondent was granted an extension until December 12, 2011 to file her statement. By letter dated December 6, 2011, Respondent filed a response. On December 16, 2011, at the tribunal's request, Respondent filed an additional statement. On December 16, 2011, Respondent sought additional documentation from FSA's human resources office. Also on December 16, 2011, after a conference call with the tribunal Respondent was granted an extension of time until January 9, 2012 to file an additional response. On December 19 and 20, 2011, FSA's Human Resources office filed statements explaining the basis for the overpayment. Respondent did not file an additional response on or before January 9, 2012.

³ On December 14, 2011, the tribunal asked Respondent to file a statement amplifying her submission and specifically addressing the following questions: (1) Did you receive a quality step increase (QSI) in addition to your cash award?; (2) If it wasn't a QSI but a regular time-in-grade step increase, was the step increase prematurely received; and (3) On what date were you either hired or promoted to the GS-14, step 1 level?

⁴ These documents consisted of emails to the tribunal explaining the nature of the salary overpayment debt filed by Ms. Paula Garner on December 19 & 20, 2011.

⁵ DOI's NBC was contacted by telephone by the tribunal. While the information received was correct, it did not fully illuminate why the salary overpayment occurred. Thus, further clarification was sought from FSA.

⁶ On July 31, 2011, Respondent's within-grade increase to GS-14, step 3 subsequently was processed.

Discussion

Waiver of an erroneous salary payment 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 instant proceeding is whether Respondent's arguments and submissions support a request that a portion or the entire erroneous salary overpayment be waived.⁸

Fault Standard

In waiver cases, 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.⁹ 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.¹⁰ Thus, every waiver case must be examined in light of its particular facts and circumstances.¹¹

Respondent states that she received two increases in 2011, one of which was noted as irregular performance pay.¹² Respondent asserts that she thought her second step increase was the result of irregular performance pay and she did not question it. According to Respondent, she received two awards in 2011: a cash award¹³ and a quality step increase. Consequently, she was unaware that the timing of her within-grade increase was in error. Respondent argues that she did not know the step increase from the GS-14, step 2 level to the GS-14, step 3 level was premature because it was her understanding that a QSI allowed for a step increase outside your scheduled increase.

Within-grade increases are periodic increases in an employee's basic rate of pay from one step of the grade of his or her position to the next higher step of that grade.¹⁴ For advancements between each of the first four steps, an employee must wait one year or 52 weeks.¹⁵ Advancements between steps five through seven require a waiting period of two years or 104

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

⁸ An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to his or her salary. See 34 C.F.R. Part 32 (2005). It is apparent that the overpayments constitute erroneous payments of pay. The Department's error stems from its premature award of Respondent's within-grade salary increase.

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

¹⁰ See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

¹¹ See *In re Veronce* at 5.

¹² The Notification of Personnel Action (SF-50) cites the legal authority for the step increase as 5 C.F.R. § 531.501, which is the regulatory section covering quality step increases. See Respondent's Exhibit 2a.

¹³ See Respondent's Exhibit 2.

¹⁴ See 5 C.F.R. § 531.405(a).

¹⁵ See *id.*

weeks of service and steps eight through ten require three years or 156 weeks of service.¹⁶ A within-grade increase is effective on the first day of the pay period beginning on or after the completion of the required waiting period.¹⁷ For most within-grade increases, the waiting period begins upon the date of the employee's last equivalent increase.¹⁸ There are several bases for determining when an employee's last equivalent increase has occurred, including the one pertinent to this matter - the date an employee was promoted to a new career ladder position.¹⁹

Quality step increases (QSIs) also are increases in an employee's basic rate of pay from one step of the grade of his or her position to the next higher step of that grade. Unlike within-grade increases, quality step increases are designed to provide appropriate incentives and recognition for excellence in performance by granting faster than normal step increases.²⁰

Prior waiver decisions have established the general rule that an employee is expected to know the required waiting periods between within-grade increases and to inquire about increases that do not conform to those waiting periods.²¹ On the other hand, if an employee is new to federal service, does not have specialized knowledge about the federal pay structure, has no prior experience with an erroneous within-grade increase, and has no specific knowledge or reason to know a particular within-grade increase was erroneous, the applicability of this general rule may not be appropriate.²² Thus, there may be mitigating circumstances which warrant an exception to this general rule. Notably, the newness of an employee's federal service has been used as the primary consideration in mitigating the general rule.²³

In applying the fault standard to this case, the tribunal concludes that Respondent is at fault. Respondent was awarded a QSI from the GS-14, step 1 level to the GS-14, step 2 level. Respondent then received another step increase less than one month later. Respondent initially was promoted to the GS-14, step 1 level on August 1, 2010. Thus, she was not entitled to receive a within-grade increase until one year later. Although Respondent states that she believed the step increase was not in error due to her award, Respondent should have recognized that she already had received her QSI and moreover, that one year had not elapsed since she was promoted. Thus, she was not eligible to receive a within-grade increase until after July 31, 2011. Additionally, Respondent's Notification of Personnel Action (SF-50) stated that the QSI was an increase to the

¹⁶ See *id.*

¹⁷ See 5 C.F.R. § 531.412. See also, *Office of Personnel Management's Q & A on General Schedule Within-Grade Increases*, available at <http://www.opm.gov/oqa/pay/HTML/wgiqa.asp>.

¹⁸ See 5 C.F.R. § 531.405(b).

¹⁹ See 5 C.F.R. § 531.407.

²⁰ See 5 C.F.R. §§ 531.502 and 531.503.

²¹ See *In re Jay*, Dkt. No. 06-01-WA, U.S. Dep't of Educ. (June 23, 2006) at 4, n.20.

²² 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.

²³ 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.)

GS-14, step 2 level; consequently, a subsequent increase to the GS-14, step 3 level should have alerted Respondent to the error.

Unlike the tribunal's previous decisions finding mitigating circumstances when the employee was relatively new to federal service and/or complex personnel rules impacted the required waiting period for a within-grade increase, such circumstances do not exist here.²⁴

Respondent did not cause the Department's error nor is there any evidence that Respondent lacked good faith. However, the Department's error should have been readily apparent to Respondent. Therefore, the tribunal concludes there are insufficient mitigating factors to warrant an exception to the general rule holding an employee accountable for recognizing an erroneous within-grade increase.

Equity and Good Conscience

To secure equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.²⁵ 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.²⁶ Factors weighed by the tribunal include the following: 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.²⁷

Respondent has failed to meet the fault standard and thus is unable to secure a waiver. However, the tribunal also notes that Respondent's submissions do not address whether collection of the debt would go against equity and good conscience.

²⁴ See *In re Carolyn* (The tribunal found mitigating circumstances given the employee had only been employed at the Department for one year and her within-grade increase was premature by only one pay period.) and *In re Jay*, Dkt. No. 06-01-WA, U.S. Dep't of Educ. (June 23, 2006) (The tribunal found mitigating circumstances given the complex personnel rules governing when the time served during a temporary promotion may be counted as part of the required waiting period when the employee is later promoted to that same higher grade.)

²⁵ 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.

²⁶ 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).

²⁷ See *id.*

ORDER

Respondent requested waiver of the entire debt. Having found that the circumstances of this case do not conform to the threshold factors warranting waiver, Respondent's request for waiver of the entire debt is **DENIED**.

So ordered, this 12th day of January 2012.

Greer Hoffman
Waiver Official