



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

MEGAN,

Respondent

Docket No. 11-89-WA
Waiver Proceeding

DECISION GRANTING WAIVER

At issue in this case is whether an employee of the Department of Education (Department) should be granted waiver from repayment of an erroneous **\$320.69** salary payment for a Federal holiday. For reasons that follow, I find that waiver of this debt is warranted. Accordingly, Respondent's request for waiver is granted.

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 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 equitable circumstances connected to the debt as well as because there is no indication of fraud, misrepresentation, fault, or lack of

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, January 2012).

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: oha.ed.gov/overpayments/.

⁴ *See*, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

good faith by Respondent or anyone else having an interest in obtaining a waiver of the claim.⁵ In the submission requesting waiver, 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 comprises what I have accepted in evidence, including: copies of written statements by Respondent, dated December 20, 2011, and February 1, 2012, copies of email messages from Respondent sent to human resource officials regarding the nature of debt, a copy of Respondent's unsigned Flexible Schedule Certification Form for pay period ending on October 22, 2011, a copy of Respondent's Leave and Earning Statement for pay period ending on October 22, 2011, and a copy of a Bill of Collection (BoC) issued by the Department's payroll office on December 12, 2011.

After a review of the record, I find the following facts pertinent to this case. Respondent's office director authorized Respondent's use of two days of Leave Without Pay (LWOP) per week, pursuant to the Family And Medical Leave Act, to care for her daughter who suffers from chronic health conditions. Respondent typically used Mondays and Fridays for this purpose. However, during the week of the Columbus Day holiday, Respondent was off for the holiday, which occurred on a Monday. For the day immediately following the holiday Respondent used LWOP because that day coincided with the date of her daughter's birthday. As a result, Respondent used LWOP for the work day prior to the holiday (Friday) as well as immediately following the holiday (Tuesday).

DISCUSSION

I.

Broadly stated, determining whether waiver is appropriate requires 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, and (2) whether Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment.⁶

Although *fault* is often used in a conventional sense to refer to blunder, mistake or responsibility, *fault*, as the term is used in the Waiver Statute and in factor (1) above, has specialized and particular meaning. Rather than its conventional use, fault is examined in light of the following considerations: (a) whether there is an indication of fraud; (b) 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 (c) whether the erroneous

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, *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 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

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 (d) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.⁸ Given the aforementioned considerations, the application of the fault standard is critical to the ultimate determination of whether to grant or deny waiver. More precisely, waiver may be granted only if a debtor succeeds in showing that he or she can satisfy the fault standard.

Despite the undeniably frustrating aspect of experiencing payroll errors, it is commonplace that salary overpayments often, if not usually, involve some type of administrative error by the agency; indeed, an error or mistake in payroll or in the application of a rule or regulation governing pay is the usual vehicle that drives creation of an overpayment. In this respect, it is axiomatic that despite the fact that an administrative error by the government may cause an employee to be paid at a rate that exceeds the employee's lawful rate of pay, the government's error cannot, itself, entitle an employee to waiver.⁹ This follows because no employee has an entitlement to pay that he or she obtains as a result of an overpayment.¹⁰

The application of the fault standard imposes a statutory duty on the employee/debtor to seek correction of the erroneous payment regardless of the government's mistake. Fault is examined in the context of an employee's duty to prevent or discover mistakes and errors in salary payments when doing so is feasible. This duty comports with the employee's unique ability to know of the antecedents that may give rise to changes in pay that could result in erroneous payments as well as the fact that the employee is often in the best position to recognize a mistake in his or her pay. Employees are not only often informed of a personnel action that affects pay before the pay change is implemented (e.g., promotions, pay increases, monetary awards or bonuses), but it is often the employee who initiates a change in status that results in a pay change (e.g., change in FEGLI coverage, health benefit coverage, or a change in a retirement benefit). As such, the employee is uniquely able to scrutinize the subsequent pay change for erroneous under *or* over payments, and alert the employer to potential errors in pay.

Applying the fault standard to the facts in this case, Respondent argues that waiver of the entire debt is warranted because Respondent did not know or have reason to know that she could not be paid for Columbus Day. LWOP is a non-pay status, and Respondent was in that status both immediately prior to Columbus Day and immediately following the holiday.¹¹ The Office of Personnel Management (OPM) has established that Federal employees who are in a non-pay status for the workdays immediately before and after a holiday may not receive compensation for

from salary payments, and (3) set funds aside for repayment when appropriately recognizing a salary overpayment. *See, In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (October 19, 2005). As such, in a waiver proceeding, the debtor must either acknowledge the validity of the debt or urge the absence of any reason to recognize the salary payment at issue as an overpayment. *Id.*

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 *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 15, 2005).

¹⁰ *Id.*

¹¹ LWOP is an authorized absence from duty in a nonpay status.

that holiday.¹² This follows, according to OPM, because “employees normally are paid on a holiday on which they do not work under the assumption that, but for the holiday, they would have worked and received pay.”¹³ Conversely, it is assumed that employees who are in a nonpay status before and after a holiday would not have worked on the holiday itself and are, therefore, not entitled to compensation for the holiday.¹⁴

In light of OPM’s rule and the facts of this case, I find the issue in this case relevant to the decision in *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 default rule that an employee is accountable for recognizing that he or she has received an erroneous salary payment, a waiver official may find that there are sufficient factors in the case satisfying the fault standard. Drawing on *Francisco*, the fault standard is satisfied 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, I turn 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, but was paid despite her leave status. The employee, due to her incapacity, was unable to access her pay account at the time the erroneous payment was made. As a result of the employee’s incapacity, the hearing official reasoned that since the employee was paid while the employee was in the hospital recovering from an illness, the employee could not have known of the overpayment. The employee had no access to bank statements, pay statements, or any other indicia of an erroneous salary payment. Similarly, a hearing official recognized in *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep’t of Educ. (July 22, 2005), that an employee, untrained or inexperienced in personnel rules, employee relations or labor law, should not be at fault when the rule underlying the existence of a debt is so obscure that the rule only may be gleaned from decisions issued by the Comptroller General. These cases are illustrative of the circumstances found in this case, and I find that the same analysis from the cases applies here. By all indications, this is a case where Respondent would not have been able to discover the erroneous payment or otherwise would have known of the inaccuracy of her pay.¹⁵

More directly, I am persuaded by Respondent that the Federal government personnel policy on holiday pay articulated by OPM was unfamiliar to her, and that under the circumstances, she would not have recognized that it was improper to pay her for Columbus Day. Indeed, Respondent’s supervisor’s and timekeeper’s conduct seem to bolster Respondent’s

¹² See U.S. Office of Personnel Management, FEDERAL HOLIDAYS, WORK SCHEDULES AND PAY, available at <http://www.opm.gov/oca/worksch/html/holiday.asp>

¹³ See 70 Fed. Reg. 1070 (2005) (proposing to issue a clarifying regulation to be codified at 5 C.F.R. § 610.204). OPM’s failure to promulgate a final regulation, without more, does not indicate a change in its position since the policy is long-standing. See, e.g., OPM Compensation Policy Memorandum 99-4, www.opm.gov/flsa/oca/compmemo/1999/NEWYRQA.asp

¹⁴ See 70 Fed. Reg. 1070 (January 5, 2005). This is OPM’s articulation of this rule, which will be codified at 5 C.F.R. § 610.204; see also *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep’t of Educ. (July 22, 2005) (noting OPM’s guidance that an employee in nonpay status before a holiday is not entitled to compensation for the holiday).

¹⁵ See also, *In re Russell*, Dkt. No. 05-19-WA, U.S. Dep’t of Educ. (June 23, 2005).

assertion that the holiday pay rule is obscure because neither recognized the error in Respondent's Flexible Schedule Certification Form and, ultimately, the supervisor authorized the holiday payment. As such, I am persuaded by Respondent's evidence and arguments showing that the requisites of the fault standard have been satisfied.

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 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 equity, I must balance equity and appraise good conscience in light of the particular facts of the case and against the competing interests of the debtor and 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.

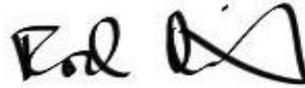
Respondent argues that it is against equity and good conscience to require her to repay the debt "given the amount of time that has passed since [she] received that pay." Although the amount of time between October 2011 (the month Respondent received the overpayment) and December 2011 (the month the bill of collection was sent to Respondent) is clearly insignificant, I find additional factors weighing in Respondent's favor.

First, there is no evidence in this case suggesting Respondent intended to defraud or deceive the government with regard to any matter concerning this debt. To the contrary, the facts suggest that Respondent accepted the holiday pay based on a good faith and genuine belief that she was entitled to the payment. In addition, it is clear that Respondent had a reasonable and acceptable basis for rearranging her schedule; Respondent arranged her LWOP in light of her daughter's birthday following a Federal holiday. Further, OPM has not codified the particular holiday pay rule involved in this case in a regulation, which heightens the potential lack of guidance available to employees regarding holiday pay when in LWOP status. Consequently, Respondent is not likely to have recognized or anticipated that she would not be entitled to pay for the holiday when she decided to rearrange her work schedule in light of her daughter's birthday. On the basis of the foregoing factors, I conclude that Respondent demonstrated that it is against equity and fairness for the Federal government to recover the debt in this case. Accordingly, Respondent's request for waiver is 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 **\$320.69** is **HEREBY GRANTED**.

So ordered this 24th day of April 2012.

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

Rod Dixon
Waiver Official