



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

S,

Respondent

Docket No. 13-59-WA

Waiver Proceeding

DECISION GRANTING WAIVER

This proceeding comes before the Office of Hearings and Appeals(OHA) through the timely request of Respondent, a former employee of the U.S. Department of Education (Department). Respondent's request arises under 5 U.S.C. § 5584 (Waiver Statute) authorizing the waiver of claims of the United States against debtor due to erroneous payments made to a Federal employee¹and is based on notice of salary overpayment of \$1615.80 based on a Bill of Collection (BoC).²

The legal authorities pertinent to this waiver request from the aforementioned statute, the Department's implementing regulations at C.F.R. Part 32 (§ 32.1 et seq.), and the policy set forth in the Department of Education, Administrative Communications System, Handbook for processing Salary Overpayments (Handbook, ACS-OM-04) (revised January 2012), Taken together, these authorities prescribe procedures for processing debts, authorizing deductions from wages to pay debts, and setting standards for waiving those debts when

¹ General Accounting Office oAct of 1999, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (5 U.S.C. §5584);see also *In re Richard*, Dkt. 04-04-WA, U.S> Dep't of Educ. (June 14, 2005) at footnote 1 (setting forth the statutory framework governing debt collection by salary and administrative offset); 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 procedure may be found on the Office of Hearings & Appeals website at <http://oha.ed.gov/overpayments/index.html>.

² The overpayment is identified as the Debt ID: Q2181083589 specified by the Debt Management Group, OM ,in invoice dated August 27, 2013 for transferred bill of corrected Time & Attendance record for three 2013 pay periods (#13,14 & 15).

appropriate.³ The Handbook, ACS-OM-04, specifically delegates waiver authority involving all former and current employees of the Department to the Office of Hearings and Appeals (OHA), which, thereby, exercises waiver authority on behalf of the Secretary. The undersigned is the authorized waiver official who has been assigned this matter by OHA.⁴

At issue in this case is whether a former employee of the Department should be granted waiver of repayment of a debt arising from Respondent working beyond her Not To Exceed (NTE) date with extensions of her duty time through the affected pay periods, 201313, 201314, 201315. Her NTE appears on an SF-50, Notification of Personnel Action, electronically signed by Christine Reese, approving date 07/23/2013. SF-50 Remarks show: "Employee was given two extensions of her appointment that have been cancelled at the direction of the Director, TRH [sic Training Recruitment Hiring] as we had no authority to do the extensions as result this is an late action due to administrative error." This action created the overpayment of wages for three pay periods, with accompanying changes in deductions for those pay periods, resulting in the \$1615.80 overpayment here.

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 signed and sworn statements⁵, the Department's Bill of Collection (BoC) document, the emails of Ike Gilbert, Team Leader, HCCS, Western Client Services, including his recommendation to resolve the matter in Respondent's favor, letter and email record of Program Manager Meena Chandra, statement of retired OCR employee Mary Grant, both of Respondent's Office, SF-50s, LES forms, Pathways Job Announcement, and separation from job notice.

Based on a review of the record, I find that a waiver of this debt is warranted. Therefore, Respondent's request for a waiver is granted. This decision constitutes a final agency decision.

Procedural History

Respondent was notified of the debt through a BoC dated August 27, 2013, which carried an incomplete address, without apartment number, which caused delay in delivery. Respondent's appeal on September 17, 2013 was deemed timely because she took immediate steps to fax in her waiver request to this office to comply with the required time frame.

³ In addition to regulations promulgated by the Department, standards prescribed by the Department of Justice and the Department of Treasury govern administrative debt collection efforts; those standards are widely known as the Federal Claims Collection Standards (FCCS). See 31 U.S.C. § 3711 (2000) and 31 C.F.R. ch. IX, Parts 900-904 (2000)

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

⁵ Respondent complied with OGP requirement to affirm her supporting statement as returned on October 12, 2013, with supporting documents.

Following Respondent's receipt of the August 27, 2013, BoC, she sought help from Ike Gilbert who knew of the administrative error affecting Respondent and had assisted her by validating the timesheets in the WebTa system for the three pay periods.

Mr. Ike Gilbert has offered clarification on this matter as he had firsthand knowledge of the situation, knew the Respondent continued working after her NTE, and he acted to extend her tour of duty at the request of the Cleveland OCR supervisor and staff. His help was solicited by Respondent's supervisor, Ms. Crisswell, as reflected in email exchanges from June 17-19, 2013, asking Mr. Gilbert his help in getting Respondent paid as the timesheet system would not allow validation of her time worked. He was asked if possible to talk with someone in payroll to reverse the June 5, 2013 cutoff date (NTE) so Respondent could validate her timesheet while new guidance was pending. The new guidance pertained to the Pathways Program and its implementation in all Department offices. By close of business on June 17th, Mr. Gilbert was advising OCR Cleveland that he was extending Respondent and she would be paid for time worked. Ike Gilbert directed time code changes for her time card submissions for the disputed pay periods.

Further email exchanges between OCR supervisor Crisswell and Mr. Gilbert on June 20, 2013, show Respondent worked the June 17 & 18 dates, but Crisswell was advised not to have Respondent report after June 18th. Another email shows the need for Respondent to report on June 20th to fill office needs. Meanwhile, an email from the OCR program manager, Ms. Chandra, to Ms. Crisswell on June 19th mentions Respondent's proof of acceptance of admission (into Pathways) where Respondent commits to attending orientation with start date of June 27, 2013. These exchanges support Respondent's claim that she performed office work and obligated her time to continue reporting to the Cleveland office, despite the NTE problem which remained in effect and continued to be unresolved.

In furtherance of her waiver request, Respondent supplied a detailed statement of how the overpayment arose, of her interactions with others aware of the circumstances and able to verify and their roles in the matters, including Ike Gilbert, Regional HCCS, Meena Chandra, OCR Program Manager, and retired OCR employee, Mary Grant. She supplied documentary materials including: copies of her SF-50s, her LES (pay periods 16 & 17), The ED Agency form to file a UE Insurance claim which ED supplied, for job separation or placement in nonpay status (for being terminated from ED payroll), the Pathways Student Trainee (GS-4) Job Announcement, opened from July 23, 2013-July 30, 2013, to which she applied, made the cert but was not selected; and the email from Ike Gilbert (September 12, 2013) advising her to request a waiver of any overpayment claim.

Respondent made a significant effort to reconstruct the history of her employment as a STEP intern, of her inquiries on how to apply to the new Pathways Program, of her joint efforts with Mary Grant, Acting Executive Officer in the OCR Cleveland office in January 2013 to apply to Pathways well ahead of the June 5, 2013 NTE date. Ms. Grant provided information about trying to get clarification when to have Respondent complete a Pathways Application and recalls a conference call she and Respondent had with Headquarters staff, presumably Ms. Osby, about the application process and how approvals got done to move her into the right status. She recalls advice was get the application done, sooner than later so there would be no worry about

Respondent's existing NTE date. Ms. Grant says she repeatedly tried to move the application forward but recalls she was told by the OCR Cleveland Director there was plenty of time before the NTE. Clearly, Ms. Grant and Respondent were taking proactive measures in early 2013 before the NTE took effect. Had they been successful then, arguably that would have avoided the later erroneous extensions and payments she received. Once Ms. Grant retired, she could not continue helping Respondent on the Pathways course, and she lost track of further steps. She was, however, fully aware of the problems Respondent has had with her NTE extensions and the salary overpayment now generated. Confirmation of Ms. Grant's testimony was done by phone and letter exchange.⁶

Also, Respondent identified her Program Manager, Meena Chandra, as having knowledge of the situation and problems about getting her timesheets verified after the NTE date. She knew and supported extensions granted, and the need for Respondent's ongoing performance of job duties because her services continued to be needed after the NTE date. Ms. Chandra supplied emails tracking the dilemma the office had of getting help for Respondent with coding her timesheets to pay her after the June 5th NTE date as Respondent continued working. She affirms when Respondent reached her NTE date she was asked not to report for some days while decisions makers in HR and elsewhere tried to address her situation and other Stay-In-School interns that were not converted to the Pathways Program. Ms. Chandra ties Respondent's on/off reporting situation to the fact the Pathways Program rules and process had not yet been finalized and implemented. By her account, Respondent did work after her NTE, full or partial days during the disputed pay periods. She verified that her services continued to be needed. Ms. Chandra supplied email chronologies to show that Respondent's services were needed and how she was doing her usual administrative support duties into July 2013 (pay period 15), that there was confusion about her timesheet coding, so she and other supervisors sought the intervention of Regional HCCS personnel (Mr. Gilbert) and Headquarters personnel. With this higher approval, corrective coding for her WebTa timesheets was used to pay her by extensions of her NTE into pay period 15. Mr. Gilbert further notes that top Department Headquarters officials, among them Denise Carter, Principal Deputy Assistant Secretary of OM, made the call to have Respondent continue her reporting duties, as she did.

Respondent's SF-50, received dated July 23, 2013, stated the employee (Respondent) was given two extensions that have been cancelled at direction of the Director, TRH, as we had no authority to do the extensions and as a result this is an late action due to administrative error. This formal action occurred after a directive from Headquarters, TRH Director Brenda Emonds, was issued to all affected offices on July 10, 2013 and ended the practice of extensions. The directive clarifies there was no authority to do the extensions and they had to terminate Respondent on the original NTE. Accordingly, that triggered the overpayment demand. Respondent was identified by name, and it was noted, she would be getting a letter of indebtedness from NBC for payment after working beyond her NTE. Moreover, Respondent was informed to contact this office and would get assistance in requesting a waiver of the indebtedness. That assistance has come through the offices of Ike Gilbert and Meena Chandra who verify Respondent's account and support Respondent's request for waiver of the debt.

⁶ Testimony taken and confirmed, October 23, 2013, as it relates to dealings with Respondent in her capacity as Acting Administrative Officer for Cleveland Office in first quarter of 2013.

Fault Standard

Waiver of a debt under 5 U.S.C. §5548 is an equitable remedy. To secure waiver of an erroneous payment of pay, a debtor must show that he or she is not at fault in accepting or not recognizing an overpayment of salary and that collection of the debt would be against equity and good conscience.

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, and (2) whether Respondent can show that it is against equity and good conscience to recover overpayment.⁷ In applying the first factor to the facts and issues of this case, I find that Respondent shows there is no indication of fraud, misrepresentation, fault, or lack of good faith.

By Respondent's assertions, she did not attempt to bypass her NTE date, to receive unauthorized salary payments. Rather, she was assisted by her superiors to do this and told that it was proper. She had no time code change authority to implement adjustments in the WebTa system and make these changes on her own. She had no reason to suspect the salary payments would ever be deemed unauthorized because she in fact relied on the intervention of her superiors who were telling her to report to work and the pay coding problem was being adjusted. There was nothing that an examination of her leave and earnings statements (LES) and pay records would have shown her that a mistake or unauthorized payment of salary was occurring. It is notable that an employee has a duty to know and is in the best position to determine a mistake or overpayment of pay by examining the LES, but there were no indications there of any problem. There was no likelihood or expectation that Respondent could discover any overpayment by examination of the LES. Furthermore, Respondent appears to have been diligent in her follow up with her superiors as soon as an issue with submitting her timesheet occurred. She promptly called it to their attention, waited for corrective action, and continued to follow their instructions the entire time about reporting and carrying out office duties, despite uncertainties that were occurring with the implementation of the new Pathways Program. Respondent cannot be faulted for relying on their assurances.

Respondent shows her efforts, well ahead, of the June 5, 2013 NTE date, to get clarification and pursue steps to put the Pathways application paperwork in and get approvals for its consideration before the NTE. As support, see the earlier testimony submitted by retired OCR employee Mary Grant. This shows proactive attempts to avoid problems in advance. Ms. Grant and Respondent both show diligence and thoroughness in making timely contacts about how to put the Pathways application in the system and move it forward. They were acting in good faith, moving forward conscientiously, and anticipating how to avoid future problems in trying to address the NTE, not ignore it. In light of these efforts to eliminate an NTE problem

⁷ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

and for her reliance on her superiors' advice and actions, the tribunal concludes that Respondent is not at fault.

Finally, the tribunal recognizes in the totality of circumstances here, Respondent was caught up in the confusion about the implementation of the new Pathways Program, how it would be rolled out, how existing student trainee employees like Respondent should apply, and what consequences would result for existing NTE appointments. This was totally out of Respondent's purview or ability to avoid and she did pursue the conversion steps from her student trainee position by making application to Pathways during the vacancy period, July 23-30, 2013.⁸ Again, this demonstrates her readiness to submit an application and meet requirements, her total compliance with the process and her continuous attempts to deal with matters affecting her employment status.

Equity and Good Conscience

Next, the tribunal must determine whether collection of the debt would be against equity and good conscience. To satisfy equity and good conscience standards, the debtor must have acted fairly without fraud, deceit and in good faith.⁹ The tribunal must balance equity concerns in light of the particular facts of the case. Prior cases are instructive and guide me in this balancing exercise.¹⁰ There are no rigid rules governing application of the equity and good conscience standard. I must balance the competing interests in the recovery of all debts owed to the United States against Respondent's asserted interest in the forgiveness of a debt owed to the United States. Factors to be weighed by the tribunal in this balancing of interests include the following: 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 on the overpayment; and whether collection of the debt would impose an undue financial burden.

The debt is substantial, in the amount of \$1615.80. This amount covers 3 pay periods and for a former GS-Step 4 salary earner, since unemployed and struggling with school and with household support costs for three people, the debt is very substantial.

Respondent argues it is against equity to collect the overpayment because the overpayments were caused by the Department's error and repayment will impose an undue financial burden. Respondent was terminated in July 2013, and demands are for repayment of salary that she earned, working during the affected pay periods. As she says she did what she was told, despite any NTE date problem which she was assured was being taken care of. She worked when called in, did what she was told about reporting as the extensions were given, and she followed her superiors leads, as best she could even when facing schedule irregularities.

⁸ Pathways Vacancy Announcement, Job Anno. CHI-OCR-2013-007, as contained in the record.

⁹ 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).

¹⁰ 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); *In re B*, Dkt. 12-62-WA (Dec. 28, 2012).

From all accounts, there were mixed signals as the superiors tried to grapple with the implementation of the new Pathways program, replacing the STEP program of Respondent's position. In basically her own words, she was only doing what she was told and that was to keep showing up to work until everything got solved. She believes it is not right to perform work and not get paid for it. The tribunal agrees. Absent lack of authority to pay her after her NTE expired, the government gains an unfair enrichment if Respondent is now required to repay. To expect someone to work without compensation after she was told by her supervisors extensions meant continued paychecks and satisfied pay problems, is clearly unfair and unreasonable.

Respondent argues that repayment will impose an undue financial burden. As relevant, Respondent was a Long term Step employee, serving at a GS -04 pay-level. She is a young single mother of two, and currently unemployed, currently in school. She argues she cannot take care of her household with this kind of financial setback and asserts is unable to repay such a sizeable debt. She reviewed that during the disputed pay periods, with the uncertain reporting situation she was facing, she had to use some accrued leave to make ends meet and to support her household. Repayment she contends would present a serious financial hardship for her and her family.

Whether the debtor has relinquished a valuable right because of the overpayment the conclusion must be affirmative for Respondent since she worked with expectation of compensation. Requiring her to repay this debt, amounts to an unfavorable change of position on a two- fold basis because it means loss of both time worked and money earned for it. No supportable conclusion warrants that result.

Based on these factors, the tribunal is convinced that there are significant reasons supporting Respondent's request for waiver, including her asserted financial burden if she was required to repay this debt. Moreover, the record reflects that Respondent acted in good faith, without indication of misrepresentation or malfeasance. The tribunal finds no basis from the evidence in the record to conclude that Respondent was aware the extensions given by her superiors would be retracted. She reasonably relied on the verbal and written instructions of her superiors that they were handling timekeeping coding problems and all was proper for those acts. She would have no reason to question the correctness of adjustments. Plus, all of this was done in the context of implementing a new program, the successor to Respondent's current program, and confusion with the conversion/succession process complicated the entire situation.

CONCLUSION

Because Respondent is without fault regarding her debt and because the circumstances of her case weigh in favor of equitable relief, this tribunal concludes that it would be against equity and good conscience to require Respondent to repay this debt.

ORDER

For the above stated reasons, Respondent's request to waive the entire debt to the United

States Department of Education is GRANTED, and, Respondent's debt in the amount of \$1615.80 is HEREBY WAIVED.

So Ordered this 25th day of November 2013.



Nancy S. Hurley
Nancy S. Hurley
Waiver Official