



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

Docket No. 14-15-WA

R,

Waiver Proceeding

Respondent.

DECISION GRANTING WAIVER

At issue in this case is whether a former employee of the Department of Education (Department) should be granted a waiver of \$20,463.47¹ for salary overpayments. These overpayments occurred because the Respondent was given advanced annual and sick leave in pay periods (PP) 201312-201317. Because of her disability, she then retired before liquidating the advanced leave. For the reasons that follow, this tribunal concludes that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is GRANTED.

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 to a federal employee.² 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) (January 2012),³ which specifically delegates 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, medical notes, supplemental documentation provided by the Respondent, and

¹ This amount is the amount stated in the Bill of Collection (BoC) Debt ID # 40350983688.

² 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 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>.

³ The *Handbook*, ACS-OM-04, was revised and reissued by the Department on January 19, 2012.

documents compiled by the Department's payroll office and Bill of Collection (BoC). This decision constitutes a FINAL agency decision.

Discussion

The Respondent is a former Department employee who had been in the federal government service since September 1996. In March of 2013, the Respondent suffered sudden vision loss because of hemorrhagic posterior vitreous detachment with pooling blood.⁴ The Respondent's residence is approximately 125 miles from her *official worksite*.⁵ The Respondent was instructed by her doctor not to read, use the computer or drive.⁶ The substantial distance from the Respondent's residence and her official worksite prevented the Respondent from reporting to work. There was no public transportation option available for the Respondent to travel from her home to her official worksite. The Respondent's eye condition did not improve as expected, and by June of 2013, the Respondent had exhausted all of her accrued leave.

The Respondent requested telework as a reasonable accommodation for her disability. The Respondent's supervisor denied the reasonable accommodation request to telework. The Respondent states the reason her supervisor denied the reasonable accommodation request to telework was because Respondent could not perform any duties of her job remotely from her residence. The doctor had ordered the Respondent not to read text or read a computer screen, but there were no other physical restriction placed upon the Respondent.

Since the Respondent had utilized all of her accrued leave, she enrolled in the Department's donation leave program, and subsequently received donated leave. The Respondent also requested the approval of advance leave for those hours not covered by donated leave. The supervisor approved the Respondent's advance leave request, and the advancement of leave continued until September of 2013. The supervisor then notified the Respondent that she would be placed in leave without pay (LWOP) status. The Respondent states she was told by her supervisor that she would lose health insurance if she was placed in LWOP status. This information greatly worried and scared the Respondent. The Respondent's eye condition was not improving. The Respondent's doctors informed her that additional surgeries would be needed very soon to prevent the Respondent from losing her vision. The Respondent told her supervisor she could not afford the upcoming surgeries, and therefore she could not afford to be without health insurance while she was in LWOP status. The Respondent's supervisor suggested the employee retire.

The Respondent had three option available to her regarding this situation. The Respondent could resign from work, retire or accept LWOP status. The Respondent needed to immediately make a decision regarding her employment. The Respondent states she was not planning to retire before the medical emergency occurred, and that she was planning to repay any advanced leave she was given by working. The dilemma presented to the Respondent required her to make an immediate decision that would greatly impact her future. The Respondent was advanced 116 hours of annual leave and 258.6 hours of sick leave. The Respondent informed

⁴ Respondent's Letter dated May 30, 2013 from Dr. Surajit Saha of the Wilmer Eye Institute

⁵ See 5 C.F.R. § 531.602 which defines official worksite.

⁶ Respondent's Letter dated May 30, 2013 from Dr. Surajit Saha of the Wilmer Eye Institute

her supervisor that because of her continued disability, her need for health insurance and her lack of any other source of income, she would have to retire at the end of September 2013.

Fault Standard

In a waiver proceeding, the debtor acknowledges the validity of the debt, but argues that they should not have to repay the debt. The standard for determining whether a 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 not in the best interests of the United States.

To determine whether these requirements are met, the debtor, upon requesting a waiver hearing, is required 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.

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.

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 Waiver cannot be granted if a debtor unable to satisfy the fault standard.

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 found in the matter of *In re Francisco*, Dkt. No. 07-154-WA, U.S. Dep't of Educ. (February 15, 2008). In that case, an employee received a promotion from GS-9 to a GS-11 and within-grade pay increase. However the Department did not process the personnel actions in the proper order. When an employee is entitled to a within-grade increase that is effective at the same time as a promotion, the Department must process the within-grade increase before processing the promotion. The order of priority ensures that within-grade

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

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.

increases are processed in compliance with the minimal waiting periods required before step increases take effect. However, the Department processed both personnel actions simultaneously, which resulted in an effective date for each independent personnel action to occur on the same date. Thus, the employee was promoted from a GS-9 to a GS-11 Step 1 pay rate and then a within-grade action increased the employee's salary to a GS-11 Step 2 pay rate. The employee's SF-50s did not disclose that the Department must process the within-grade increase before processing the promotion to maintain the employee's entitlement to the within-grade increase. The fault standard was satisfied because the employee did not possess any specialized knowledge relating to federal pay regulations, and the regulations were complex and intersecting, thereby preventing the employee from knowing an overpayment was occurred.

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 Fernandez*, Dkt. No. 11-47-WA, U.S. Dep't of Educ. (December 27, 2012). In that case, an employee was receiving Availability Pay.¹¹ The employee was subsequently promoted to another position but continued to receive Availability Pay. The employee was statutorily prohibited from receiving Availability Pay in his new position. The employee 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 annually, the employee was required to certify his eligibility to receive Availability Pay. If during the year the employee could no longer comply with the criteria to receive Availability Pay, the employee would have to opt-out of receiving the Availability Pay. The tribunal noted the employee was responsible for knowing when he could and could not receive Availability Pay. The overpayment did not involve an overly complex personnel rule or specialized knowledge to understand the application of the regulation. The regulation did not require calculations or the understanding of novel terms. The regulation was unambiguous and defined exactly when an employee was entitled to Availability Pay. The language and application of the regulations regarding Availability Pay are not as complicated as the regulations regarding within-grade pay increases.

This case is similar to *In Re Francisco*. The retirement of the Respondent was atypical of the retirement process encountered by a majority of Department employees. Until her sudden vision loss, the employee had the ability to drive, read and use a computer. This dramatic sudden vision loss incapacitated the employee. The employee did not have access to a computer with software that would make the computer accessible for use by a blind or low vision individual. The employee also did not have specialized training in utilizing any accessible software on a computer. The employee was required to rely upon the information others told her, such as her supervisor and other ED staff. The employee was unable to conduct her own independent research on the information given to her by Department staff. The employee was unable to access her leaving and earnings statements (LES), her donated leave balances and her time and attendance records.

¹¹ 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.

The tribunal notes there are accessibility programs for computers that make the reading of a computer screen by a user unnecessary, which makes a computer usable for individuals who are blind. The text and pictures displayed on a computer screen are converted into an audio output for a user to hear. The user can then provide input via the keyboard to the computer. Any input keystrokes on a keyboard are audibly announced to provide feedback to the user. There are also programs that convert paper into an electronic format so that the contents of paper can also be read by the computer to a user. These programs would have allowed the Respondent to use a computer to perform her job duties even with her disability. Such readily available program would have enabled the Respondent to continue working, and may have eliminated the need for advanced leave during the PPs in question.

In assessing the reasonableness of Respondent's beliefs and actions, the tribunal finds that the rules for retirement are very complex and due to the Respondent's unique circumstances arising from her sudden loss of vision, could not be readily apparent or known to the Respondent. There are several ways for an employee to retire from federal service (Voluntary Retirement, Disability, Early Retirement, Deferred Retirement), and there are two separate types of retirement systems currently in operation. The regulations governing all these types of retirement systems and types of retirement, intersect and intertwine with many other regulations, including advanced leave. The application and interpretation of the relevant regulations requires computations of complex mathematical formulas and an understanding of specialized terms. Retirement is an activity that an employee typically only participates once in their federal government career. Only a select few employees within the Department's Human Capital Client Services (HCCS) possess the specialized training and knowledge to interpret relevant regulations regarding retirement, including those regulations that require complex calculations. Respondent was not employed as a personnel specialist nor did she have any specialized knowledge or training regarding the regulations relevant to federal retirement.

The employee states she was retiring because she had become disabled. The employee had never retired before and believed that the medical documentation she submitted to request advanced leave notified the Department she was retiring because of her disability. She believed that she would not have to pay back her advanced leave because pursuant to 5 C.F.R. § 630.209(b)(3) which states in relevant part "When an employee who is indebted for unearned leave is separated, the agency shall: (1) Require him to refund the amount paid him for the period covering the leave for which he is indebted. . . . (b) This section does not apply when an employee: (1) Dies; (2) Retires for disability; or (3) Resigns or is separated because of disability which prevents him from returning to duty or continuing in the service, and which is the basis of the separation as determined by his agency on medical evidence acceptable to it." The Respondent was retiring because her disability was forcing her to retire. The Respondent was not retiring because she desired to retire. Unfortunately, the Respondent possessed a mistaken belief, retiring because of disability listed in 5 C.F.R. § 630.209(b)(3) means the employee has elected the disability retirement type. However, electing voluntary retirement type because one has become disabled does not trigger protection under 5 § 630.209(b)(3). The language used in 5 C.F.R. § 630.209(b)(3) is not plain when "Retires for disability" actually means electing the retirement type called disability retirement. Under these extraordinary circumstances, the Respondent did not know the meaning of the aforementioned regulation.

It is unclear what type of counselling the Respondent received regarding retirement and retirement election type. There is nothing in the record to indicate that the employee knew or should have known that any advanced leave would be required to be paid back once the Respondent retired.¹² In addition, there was time pressure for the Respondent and the Department to complete the retirement process. The Respondent had to make an immediate decision to retire, and the Respondent may not have had in her possession complete information necessary to make a quick and fully informed decision regarding retirement. The Respondent started the retirement process in September as Department personnel were busily engaging in activities to close out the fiscal year, as well as simultaneously engaging in necessary activities to shut down the Department on October 1st because of an expected furlough. The Respondent relied upon her supervisor/s statement regarding LWOP, and the Respondent needed continued health coverage even if the government went into furlough status. The employee was still incapacitated and unable to do her own independent research to verify information provided by Department personnel. The Respondent's retirement package was submitted just as the Department was placed into furlough status.

Employees are generally required to know the rules and regulations regarding the use of advanced leave. However, the Respondent's incapacitation and disability, along with the atypical retirement process, the complexity of the regulations regarding retirement and the lack of specialized knowledge on retirement and leave, are all mitigating factors in the application of the aforementioned general principle. Thus, the tribunal concludes it is reasonable under the circumstances the employee could not have known an overpayment would occur with her retirement or selection of voluntary retirement type. The tribunal concludes the Respondent is without fault as defined under waiver standards.

Equity and Good Conscience

If Respondent is without fault for the overpayment, Respondent may successfully obtain waiver of a debt, if Respondent also can show that it is against equity and good conscience to recover the overpayment.

To secure a waiver based upon equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.¹³ 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.¹⁴ Factors weighed by the tribunal include whether recovery of the claim would be unconscionable under the circumstances and whether collection of the debt would impose an undue financial burden:¹⁵

The Respondent argues that it would be against equity and good conscious to require her to repay the amount owed because she would be financially unable to repay the debt. The

¹² This tribunal requested but did not receive documentation from the Department on what counseling the Respondent received prior to her retirement and the Respondent's retirement package.

¹³ 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.

¹⁴ 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).

¹⁵ See *id*

Respondent is now retired with limited income each month. The Respondent has submitted documentation to support her claim, including her income, the cost for housing and sustenance, and other required expenses that she must pay monthly. The tribunal finds from reviewing the submitted documentation that collection of \$20,463.67 would cause the Respondent to be unable to pay the cost of medical care, housing or other life sustaining needs. Therefore, the collection of the debt would create an unreasonable financial burden, and is against equity and good conscience.

CONCLUSION

Respondent has requested a waiver of the entire debt. In light of the foregoing, tribunal finds: (1) that Respondent has met her burden of proof and satisfied the fault standard and (2) that the collection of Respondent's debt, is against equity and good conscience. Therefore, guided by *In Re Francisco*, the entire record and the analysis herein, I find that a waiver of this debt should 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 \$20,463.47 is **HEREBY GRANTED**. This decision constitutes a final agency decision.

So ordered this 4th day of May 2016.

George H. Abbott, III
Waiver Official