



UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of
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Docket No. 14-16-WA and 14-20-WA

Waiver Proceeding

Respondent

DECISION GRANTING WAIVER

At issue in this case is whether Respondent, a former employee of U.S. Department of Education (Department), should be granted waiver from repayment of \$260.88 arising from the Department's payment of holiday pay and health benefits. For the reasons that follow, I find that waiver of this debt is warranted. Accordingly, Respondent's request for a waiver is granted.

The Office of Hearing and Appeals (OHA), on behalf of the Secretary, maintains authority to waive claims by the United States against current or former employees of the Department from the Department's implementing regulations¹, and policy set forth in the Department of Education, Administrative Communications System, *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (revised January 2012). The undersigned is the authorized waiver official who has been assigned this matter by OHA.² 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 statements, the Department's Bill of Collection (BoC), documents generated by the Federal Personnel Payroll System (FPPS), and Leave and Earnings Statements for Respondent for the 2014 pay periods. This decision constitutes a final agency decision.

In a waiver proceeding, the debtor acknowledges the validity of the debt, but disputes that he or she should repay the amount of funds in question. The debtor further declares that there is no indication of fraud, misrepresentation, fault or lack of good faith on their part or anyone else having a vested interest in obtaining a waiver of the claim.³ In the submission requesting a waiver, the debtor is expected to: (1) explain the circumstances of the over payment, (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.

¹ 34 C.F.R. Part 32 (§ 32.1 *et seq.*).

² *See*, 5 U.S.C. 5584(b) (noting the authority held by the authorized official in waiver cases).

³ *See* U.S. Government Accountability Office, scope of Waiver Authority, B-307681 (May 2, 2006).

Respondent filed a timely request for waiver and met all filing requirements pursuant to the issued Oder Governing Proceedings (OGP) and subsequent extensions. The record in this case constitutes what has been accepted as argument and evidence including: copies of written statements by Respondent, dated April 26, 2014, and June 6, 2014, a copy of Respondent's Leave and Earning Statement as of April 5, 2014, a letter from the Department of Interior (DOI), dated March 17, 2014, a letter from the Department's Office of Management, dated April 17, 2014, notifying Respondent of overpayment and a copy of a Bill of Collection (BOC) issued by the Department's payroll office on March 17, 2014. The overpayment amounts are summarized as followed: Debt ID Q0911272585-paid holiday- \$235.74; Debt ID 40771272585-FEGLI- \$12.54; Debt ID 04912722585- health benefit balance- \$12.60.

Also in the record, included with Respondent's June 26th, 2014 email, was her explanation of her contact with her former office, to verify her closeout and exit work the day after the holiday, and her receipt from them of a time sheet they processed for pay period 2014(05). The time sheet is an official copy of Federal Personnel/Payroll System (FPPS) entitled Amended Time and Attendance. It reflects a change in pay codes from 101 (LWOP) to 010 (regular pay) for 8 hours for the second Tuesday (February 18, 2014). The Amended Timesheet is signed by Ralph LoBosco, Director, Kansas City Regional office, certifying same. As such, this document verifies that her former office considers she was in pay status the day after the holiday at issue.

After a review of the record, the following facts are found pertinent to the case. Respondent was employed by the Department of Education's Office of Federal Student Aid (FSA) until February 18, 2014. In accordance with the Family Medical Leave Act (FMLA), Respondent was required to report for work on February 17, 2014, President's Day after her leave had ended. In recognition of President's Day, Respondent received a call from her supervisor, Jan Brandow, informing her that she should instead return to office on Tuesday, February 18, 2014, to avoid being considered absent without leave (AWOL) or tender her letter of resignation. Respondent reported to work on February 18, 2014, to complete all necessary procedural obligations to exit her position.⁴ Respondent's timekeeper and supervisor were responsible for submitting time sheets on her behalf. Respondent formally resigned from her position to become the primary caregiver for her two young children, including a newborn.

Based on the information provided, Respondent received \$235.74 for holiday pay. The debt in this case involves payment for a holiday which coincidentally fell on the same day the alleged employee was expected to return to work. Additionally, Respondent received a letter on March 17, 2014, from the DOI identifying a debt amount of \$12.54 and \$12.60 for incidental matters including FEGLI and FEHB adjustments made. DOI's letter dated April, 17, 2014, demanded repayment of all the funds totaling \$260.88.

⁴ Copy of Respondent's SF-50 form, Personnel Action-Resignation, shows effective date February 18, 2014.

Determining whether a waiver is appropriate requires consideration of two factors; (1) whether there is no indication of fraud, misrepresentation, fault or lack of good faith on the part of the Respondent, and (2) whether Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment.⁵ Respondent must satisfy both factors to obtain a waiver.

This tribunal's findings begin with an analysis of the fault standard. In this case, the term fault is examined in light of the following considerations: (a) 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;⁶ (b) whether the erroneous 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 (c) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.⁷

Leave Without Pay (LWOP) is an authorized absence from duty holding the employee in a non-pay status during the LWOP period. Respondent was in that status both immediately prior to and immediately following the holiday. 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 the holiday.⁸ Moreover, it is a general assumption that employees who are in a non-pay status before and after a holiday would not have worked the holiday itself and are, therefore, not entitled to compensation for the holiday.⁹

Respondent argues that waiver of the entire debt, including the incidentals matters, is warranted because the Department made an error with the processing dates of her resignation. Respondent notes that she submitted all required documentation and timesheets to her superiors on February 18, 2014 before she permanently resigned. Further, Respondent argues that no one brought the matter to her attention; she only became aware of payroll issues on March 17, 2014, after receiving a demand letter from DOI.

The issue in this case is similar to *In re Vanessa*, Dkt. No. 08-07- WA, U.S. Dep't of Educ. (May 11, 2009) (*Vanessa*). In *Vanessa*, the tribunal held that an employee expecting to receive holiday pay for July 4, 2008, after resigning on July 3, acted reasonably because she expressed her

⁵ See, *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

⁶ See *In re Williams*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (Oct. 19, 2005).

⁷ 4 C.F.R. § 91.5 (2000).

⁸ See U.S. Office of Personnel Management, Federal Holidays, Word Schedules and Pay, available at <http://www.opm.gov/oca/worksch/html/holiday.asp>

⁹ See 70 Fed. Ref. 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).

intention to her timekeeper and superior, none of whom informed her of her mistaken expectations.¹⁰

Drawing on *Vanessa* and other cases such as *In re Francisco*, Dkt. No. 07-154-WA, U.S. Dep't of Educ. (Feb. 15, 2008) (*Francisco*), the fault standard is satisfied, for example when the circumstances of debt show that the employee could not have known he or she was erroneously compensated.¹¹ This tribunal recognizes that an employee inexperienced, or untrained in labor relations should not be held at fault when the rule underlying the existence of a debt is obscure or exclusively set out in Comptroller General waiver opinion.¹²

Applying precedent to the facts, Respondent was unable to return to work as scheduled because she had no one to take care of her new born child. Additionally, Respondent's due date to return to work coincided with a paid holiday. Respondent consulted her superior on both matters and she was advised to either report for regular scheduled work on February 18, 2014 or submit her resignation. Respondent reported to work on February 18, 2014, on a regular schedule, to resign from her post. Respondent submitted her timesheet to her supervisor for processing. Given the clarity of Respondent's intentions, it follows that Respondent would have no reason to know that she would not have been compensated for a paid holiday given that her employee status remained active with FSA until her resignation on February 18, 2014.

The Amended time sheet in evidence with FSA official's signature shows that Respondent's supervisor considered her final day on which she performed closeout duties and managed paperwork as time worked. Specifically, eight hours of regular time (010 code) was worked for February 18, 2014. This corrects any violation of holiday pay rules since Respondent was considered to be in an active pay status for that day, the day following the holiday. Since she was deemed to be in a pay status, Respondent was entitled to the holiday pay and does not owe it back. Therefore, all the requisites of the fault standard have been satisfied.

The remaining factor for consideration here 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 meet this standard, Respondent must show that she has acted, fairly, without fraud, or deceit, and in good faith with regard to all matters concerning the overpayment.¹³ Beyond this framework, there is little guidance on the balance of equities or the appraisal of good conscience.¹⁴

In evaluating equities and good conscience, this tribunal has drawn upon the concept of fairness by exercising judgment in light of the particular facts of the case. In this regard, a number of

¹⁰ *In re Vanessa*, Dkt. No. 08-07- WA, U.S. Dep't of Educ. (May 11, 2009).

¹¹ *See In re Joan*, Dkt. No. 06-49-WA, U.S. Dep't of Edu. (Jan. 25, 2007).

¹² *See In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

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).

¹⁴ *In re Anh Chau*, Dkt. No. 05-01-WA, U.S. Dep't of Educ. (June 17, 2005).

factors have been found pertinent to determining whether collection of the claim against an employee is against equity and good conscience or otherwise not in the best interest of the United States. A few of these factors include whether the recovery of the claim would be unconscionable under the circumstances, whether the employee has relinquished a valuable right or changed his or her position based on the overpayment, and whether recovery would impose an undue financial burden.¹⁵ This tribunal may also consider the employee's position and grade level and whether the employee has records at his or her disposal which would indicate salary overpayment.¹⁶

Respondent argues that since leaving the Department in February 2014, her family has not only grown in size with the addition of a new born, but her family has also experienced a dramatic income reduction. Respondent here held a GS-12 position while earning a salary of \$71,813. Respondent submitted substantial evidence identifying a reduction in the family's income by 60%. Upon resigning from this position, Respondent's gross year to date pay for 2014 is \$4,980.45. Respondent's husband, a secondary school teacher, is now the sole bread winner for a family of four. Respondent presents persuasive evidence to show that repaying the amount in question will cause an undue hardship and financial burden to the family. Consequently, waiver of the aforementioned overpayment would not be against equity and good conscience. Accordingly, waiver of Respondent's debt is 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 \$260.88 is **HEREBY GRANTED**.

So ordered, this 8th day of July 2014.



Nancy S. Hurley
Nancy S. Hurley
Waiver Official

¹⁵ See *In re Anh-Chau* at 5.

¹⁶ See *In re Veronce*, *supra*.