



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS

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In the Matter of

Docket No. 14-33-WA and 14-34-WA

B,

Respondent

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 employee¹ and is based on notice of salary overpayment of \$ 2789.71 based on a Bill of Collection (BoC).² and of \$5192.15 based on a second Boc. The BoC(s) identify the overpayments as based on fact Respondent had as a re-employed annuitant an offset equal to value of the annuity, to be subtracted from the basic pay hourly rate. The December 1, 2012 and December 1, 2013 annuity increases were not provided to personnel and input in FPPS until recently (6/25/14). Therefore, employee had been overpaid since December 1, 2012. The hourly rate used since that date was not offset by the increased annuity amount but instead by an older (lower) annuity amount. BoC M1417800001 is for pay periods (PPs) covering December 1, 2012 – November 30, 2013). Same basis for BoC 41751300481 covering PPs Dec. 1, 2013-May 31, 2014).

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

¹ General Accounting Office Act 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: #41751300481 and #M1417800001 by the DOI.

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 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 current employee of the Department should be granted waiver of repayment of a debt arising from inconsistent application of annuity offsets yielding offset increases from system code changes made by Department personnel, with retroactive corrections implemented by DOI. Beyond the payroll coding matters, a multitude of payroll problems plagued Respondent including a major mistaken refund (\$22,000) now corrected, bargaining unit status corrections, leave shortage(s) and paycheck shortage(s). The ongoing coding changes and failure to account for offset increases created the overpayment of wages for multiple years 2012, 2013,2014, with accompanying changes in deductions for those pay periods, resulting in the two overpayments, \$2789.71 and \$5192.15 here. Respondent filed a timely request for waiver on July 23,2014, following receipt of the two BoCs dated June 23, 2014, and met the filing requirements of the OGP issued on September 8, 2014.

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, the payroll evidence Binder submitted by Respondent (more fully described below) and her LES forms, phone confirmation with DOI payroll staff about BoC records, process steps, and chronology of Department and DOI personnel meetings and exchanges which occurred in Respondent's behalf.

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 is a re-employed Annuitant who was the subject of a prior waiver proceeding⁶, decision granting waiver issued December 28, 2012, based on problems with her hours limitation applicable at that time. Respondent was subsequently converted from a temporary, not to exceed hours status, and is a full time employee since 2012. Respondent's

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 September 17, 2014, with supporting documents.

⁶ Dkt. 12-62-WA (December 28, 2012).

conversion to full time employee followed decision meetings by multiple OM managers and senior HCCS staff. She reports she was relieved when this occurred thinking this conversion meant the end of overpayment problems.

Respondent has experienced multiple payroll problems in 2014, beginning to surface in March 2014, regarding her annuitant status. On March 18, 2014, she received deposit of \$20,646.79 deposited into her checking account which included her regular pay amount (Pay period 2014(06)). DOI auditor Hanson identified the refund as due because Respondent's pay was offset for many years and she is due the \$22 K gross as a result of automated refunds for 2013 and 2014.⁷ Same day she notified her supervisor of the overpayment who in turn notified the HCCS Director and met with two other senior HCCS people to research the problem. She met further with HCCS senior managers in March, and was told the overpayment resulted from repeat human error. Respondent acted in good faith, calling attention to and mitigating the problem from the outset, set the money aside and returned it.⁸

Respondent's response to and resolution of that problem, however, was just the beginning of the multiple payroll problems she has faced. Around the time of that windfall deposit (March 14th) she was addressing other annuitant coding problems. As illustration, she submitted an email from DOI auditor Linda Hanson to ED Debt Management Coordinator Naomi Sanchez on March 14, 2014, the substance of which stated that records in TRAC (payroll tracking) for her are conflicting. Sometimes Respondent's annuitant indicator is "A", sometimes it is "G" This makes a big difference reports DOI auditor⁹. DOI auditor Hanson then requests from Ms. Sanchez if she can find out what (code) Respondent should be, from what effective date, and get someone to fix any FPPS records. She further qualifies that after that happens, she will need to audit the pay and see if Respondent is in debt for offsets not taken or due refunds of offsets taken. Subsequent email by ED's Atlanta HCCS specialist Rodney Russell of March 18th, says Respondent's records have been corrected to reflect the proper annuitant indicator, "G." (emphasis added). This message was sent to four senior Department HCCS persons, at ED Atlanta, Seattle and Headquarters, including Ike Gilbert. An end to the problem was not forthcoming since another 4 months later, July 2014 when HCCS Ike Gilbert is still asking for DOI clarification and finality of Respondent's case, hoping to have answers for questions asked. Gilbert's specific questions to another DOI payroll specialist (Holly Hunter) are finally answered in the July 1, 2014 email correspondence Respondent includes in her documentation. Clearly Department HCCS persons could not give Respondent guidance which she sought since March 2014 when the salary problems first surfaced. Despite her best efforts, Respondent had no ability to address the mounting overpayments that resulted in the BoCs here.

⁷ DOI email about Respondent's \$22K gross refund had subject line- (Respondent) annuitant indicator- resulted from "input of corrections" by ED HCCS Rodney Russell (cc: Ike Gilbert and other ED managers).

⁸ Following DOI clarification, Respondent paid back \$17,294.20 on April 25, 2014.

⁹ Respondent included email logs by DOI Auditor L. Hanson (Resp. Binder). Waiver Official confirmed auditor's retirement with DOI supervisor, Carolyn Harris, September 17th phone interview. During conversation, Ms. Harris clarified the fact that DOI is strictly a reactive party to what the Department inputs to the system (FPPS). DOI does not initiate and does not flag or monitor employees accounts for inconsistencies, or repeat payroll problems. She deferred to the Department's handling of the Code changes. She was aware that during auditor Hanson's time, the Respondent was actively engaged in trying to resolve her payroll matters.

Respondent responded to the OGP and submitted extensive documentation, reflecting contacts both within the Department and with Department of Interior (DOI) personnel, as DOI serves as the Department's payroll handler. This history of email messages and exchanges with internal and external payroll and human capital/ resource (HCCS) personnel and DOI payroll covers from March-August 2014.

In submitting documents, Respondent collected extensive records into a Binder with Table of Contents, reconstructing the history of all her payroll contacts and documentation, including extensive emails (31 pages), including Leave and Earning Statements (LES) 14 with notations and issues raised, and summary of personnel actions from March 2011-March 2014. This documentation included a Matrix with 21 personnel actions identified, showing 17 instances of annuitant Code changes placed on her account. This reflects constant changing of Respondent's Annuitant Code from "A" (offset required) to "G" (no offset required) and the reverse. This payroll Binder, which Respondent compiled and prepared, was also presented by Respondent in August 2014 to DOI, in an effort to identify and resolve the ongoing problems the payroll system was generating with Respondent's account¹⁰. It is a very thorough presentation of the ongoing approval dates of personnel actions and the actual effective dates of those. Respondent had multiple parties –first and second line supervisors, HCCS personnel both Headquarters and Regional, and DOI payroll representatives, auditors, and others investigating the situation and attempting to do corrective action along the way. Confirmation of testimony was done by phone and letter exchange.¹¹

Respondent made a significant effort to reconstruct the history of her employment, of her inquiries, of her joint efforts: Respondent's inclusion of a 2-page Matrix providing chronological summary of personnel actions, showing constant changing of Annuitant Codes (A=offset required),(G=no offset) and the reverse shows she had no ability to know what triggered the changes and which ones were correct. Respondent's Matrix is a graphic display of her "moving target" payroll experience.

In support 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 the support of her first line supervisor who wanted to get corrective action from earliest stages of the problem. Documentation of Respondent's supervisor's role and concern to obtain corrective action is shown by an email by Ms. Bennett to HCCS -PM, on 4/28/14. There the supervisor comments that "as part of the concern for feedback, perhaps they should be made aware of the psychological and emotional impact this has on an employee when they receive continuous messages on owing a debt, uncertainty if their net

¹⁰ Respondent's proffer of her payroll issues Binder to DOI is referenced by email from Department's HCCS Director (V Johnson) (VJ) to Linda Rihel of DOI (August 6, 2014). VJ summarizes Respondent's situation as a serious and ongoing payroll matter. VJ cites Respondent as having been subject to several (sic)(payroll) mishaps and the need to get this situation cleared up. She goes on to note that because of the severity of this case, Respondent has graciously put together a binder of all the things that have taken place since brought to work at the Department. VJ asks for the proper mailing address for delivery of Respondent's documents binder for review prior to a future meeting.

¹¹ Emails summary beginning (March 2014/DOI auditor) through (August 2014, HCCS' Gilbert call for documentation) traces numerous meetings over Respondent's Annuitant Coding, and how it was or continued to be erroneously applied in this case.

payment is correct, and little assurance corrections will remedy this matter. This is the invisible impact.” Her statement really sums up the detriment to the employee beyond the potential fiscal impact. Additional emails by her supervisor follow through into August 2014 and are supportive of any way to favorably resolve and bring closure to Respondent’s serious payroll situation. Collection of testimony was done by phone and email exchange.¹²

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.¹³ Respondent must satisfy both to obtain a waiver. 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.

The resolution of this matter begins with an analysis of the fault standard. 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 accordance with the first factor 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;¹⁴ (c) 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; of (d) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.¹⁵

¹² Emails summary beginning (March 2014/DOI auditor) through (August 2014, HCCS’ Gilbert call for documentation) traces numerous meetings over Respondent’s Annuitant Coding, and how it was or continued to be erroneously applied in this case.

¹³ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep’t of Educ. (Dec. 14, 2005).

¹⁴ Under the fault standard, the scope of Respondent’s duty extends to include the obligations to: (1) verify bank statement and/or electronic fund transfers of salary payments, (2) question discrepancies or unanticipated balances 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).

¹⁵ See generally, *Guidelines for Determining Requests*, U.S. Department of Treasury Directive 34-01 (2000).

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 was always proactive in trying to resolve her situation. She did not understand why Code changes were being made on her LES. She called it into question. She asked for multiple meetings. She engaged her first line supervisor (D. Bennett) who repeatedly called for meetings with superiors and HCCS staff to get the clarification as repeated problems arose with this employee. Her supervisor even questioned guidance and notice principles given to annuity recipients and whether an employee is not aware of reporting requirements for changes in their annual annuity and what the reporting process is—who receives the statement, when is it to be provided, and what (written) guidance does DOI or HCCS provides rehired annuitants like Respondent that gives them the particulars of this type of appointment. Her supervisor presented assurances of Respondent's good reporting skills and ability to meet requirements that can be clearly understood. HCCS representatives did not have answers to satisfy either Respondent or her supervisor on this.

Respondent dutifully examined her leave and earnings statements (LES) and pay records and when she saw that mistakes and changes in hourly rate payments were occurring, she called it to the attention of Department payroll persons and DOI. She has traced the chronic fluctuations from LES records beginning PP2012(01) through PP2014(14)¹⁶. While it is clear 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, Respondent was confused and could not get clarification why Code changes kept happening. Despite Department HCCS person Russell's representation (March 18th) that all was set and Code "G" was applicable to Respondent, that is not what happened and Code fluctuations kept occurring. Respondent was confused, raised this with supervisors and HCCS personnel, but got no cessation of the inconsistencies or corrective action. Respondent could not discover the basis for the continuing LES inconsistencies nor any defined overpayment by examination of the LES. Respondent was truly caught in a "moving target" payroll situation. As soon as one correction was made, additional ones were being generated. There was no ability to address, recognize, and minimize valid salary overpayments as they were occurring under these extremely difficult conditions.

Further, Respondent appears to have been diligent in her follow up with her superiors as soon as she discovered issues in her pay. She promptly called it to their attention, waited for corrective action, and continued to supply them with information and follow their instructions. Respondent immediately notified her supervisor and DOI when the \$22,000 overpayment hit her account in April 2014. She was conscientious in doing all the followup with DOI to rectify the matter and correct their errors in the amount to be returned after deductions were applied. Respondent immediately wrote DOI the refund check to settle the matter. This behavior fully resolved that overpayment matter and was classic textbook procedure on Respondent's part.

¹⁶ 2012(01) rate decreased to lowered amount (54.89); PP(06) 4 different hour rates (65.53 to 55.54); PP2012(17) annuity up almost \$400; PP 2014(07) hourly rate up to 66.19; PP 2014(08) hourly rate down to 55.54; PP 2014(10) rate at 55.54; PP2014(11) Fed& State Tax, FERS adjustments noted but not explained; PP2014(13) hr rate down to 52.42, annuity (52B) up; PP2014(14) Annuity (52B) down to PP913 level); PP2014(15) miscalculation error, Federal Debt identified was greater than BoC. Other examples offered, for ten 2011 PPs, Respondent's annual leave was miscalculated.

Respondent has supplied cumulative records and forwarded a Binder to Department HCCS staff and to DOI to support the variety of problems she has had with her payroll matters. Respondent's scrutiny of her earnings statements, reporting of overpayments and questions on inconsistencies reflects good faith. The Binder she created is a testament to the diligence and scrutiny she gave to her ongoing payroll problems and reflects salary shortfalls, refunds, repayment demands, inaccurate accounting for annual leave matters, ongoing annuitant code and amount changes, and more.

Finally, the tribunal recognizes in the *totality of circumstances* here, Respondent was caught up in the confusion about the implementation of the coding, how it was applied, what the inconsistencies in her LES meant. In consideration of her continuous attempts to deal with matters affecting her salary issues, major and minor fluctuations, the changing codes, and her overall annuitant status, Respondent cannot be faulted for relying on her superiors' assurances that the matter was being reviewed and handled.

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.¹⁷ 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.¹⁸ 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 \$7981.86. This amount is the combined two BoC totals which cover multiple pay periods, multiple years¹⁹. The ongoing problems with identifying payroll problems has caused Respondent significant stress and taken an emotional toll. This is evidenced by emails by her first line supervisor to ED's HCCS supervisors and OM's DPAS, as early as in April 2014. Respondent's supervisor notes that continuing identification of overpayments is causing Respondent significant concerns. DOI has now potentially identified two additional overpayments and not yet resolved the initial one. The supervisor asserts Respondent is currently dealing with a serious medical situation and this

¹⁷ 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).

¹⁸ 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).

¹⁹ Debt ID 41751300481 and Debt ID M1417800001

overpayment issue is impacting her.²⁰ Unequivocally, Respondent asserts that her health has suffered during this long, tense process of her payroll issues. She says she suffered a minor stroke, among other stress related ailments, because of these ongoing concerns. She has had to devote extensive time and energy, time both in and out of the office, to try and rectify the payroll errors and involve others in meeting and discussing her pay issues.

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. As relevant, Respondent represents that she is the primary financial provider for her household and family. She provides critical support for her college age grandson and is assisting him to continue his full time schooling. She has been providing support for this grandson who is a senior at Hampton University. She has been providing his overall support for food, spending money and some book expenses at Hampton for the past three years and through this senior year. She is fully invested in supporting him through graduation in May 2015, and this would be impossible to continue if she has to modify her present budget by any amount. Under all these circumstances, she contends repayment would present a very serious financial hardship for her and her family.

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 of offset increases that she had to report, and these were only discovered late in 2014 and pushed back through the FPPS system causing this extensive debt.

Finally, during the several months between the initiation of this case to the BoC stage and its aftermath, the confusion and constant stress placed on Respondent and time consuming efforts she had to make to address the multiple payroll problems impacting her, was intensified by ongoing personnel changes of Department staff and even the retirement of the DOI auditor pursuing Respondent's case. This personnel change-up significantly added to the difficulty and the hardship for Respondent to clarify matters and present her best case. Hardship of this kind must be considered and count in Respondent's favor in terms of equitable considerations overall.

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. Accordingly, I find that in the interests of the United States Respondent's request for waiver should be granted. This decision constitutes a final agency decision.

²⁰ Supervisor in trying to effectively assist Respondent then proposed an action plan be implemented to bring closure to the initial overpayment and get a clearer understanding of the annuity matters and engage a higher DOI leadership level to do this.

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 \$7981.86, (\$2,789.71 and \$5192.15), is **HEREBY WAIVED**.

So Ordered this 15th day of October 2014.



Nancy S. Hurley
Nancy S. Hurley
Waiver Official