UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202-4616
TELEPHONE (202) 619-9700 FACSIMILE (202) 619-9726

In the Matter of

S,

Respondent

Docket No. 15-13-WA

Waiver Proceeding

DECISION GRANTING PARTIAL WAIVER

On March 13, 2015, Respondent, a Department employee, requested a waiver of debt in response to receipt of a debt letter providing notice that the Payroll Operations Division of the Department of the Interior (DOI) identified an overpayment of salary to Respondent in the amount of $7,827.19. The overpayment accrued as a result of the Department's erroneous calculation of Respondent's locality pay between Pay Period 5 of 2014 and Pay Period 4 of 2015. On May 1, 2015, Respondent sought to incorporate an additional debt letter for an earlier period of time encompassing Pay Period 16 of 2013 through Pay Period 4 of 2014 for the same erroneous calculation of locality pay in the amount of $4,505.16. This second bill includes overpayments that DOI discovered manually after the initial bill was released. It is common practice for DOI to investigate earlier pay periods upon uncovering employee overpayments, because the automated payroll system may not detect erroneous payments older than one year. Overpayments are therefore often discovered in reverse order, as is the case here.

As explained in *In re Edward*,[1] the Federal Employees Pay Comparability Act of 1990 (FEPCA) establishes a locality pay system for General Schedule (GS) employees. To make Federal pay more comparable to private sector pay, FEPCA provides for pay adjustments based on comparisons with non-Federal pay rates on a locality basis. Locality pay rates are set forth by regulation, and use of salary surveys conducted by the Department of Labor, Bureau of Labor Statistics (BLS). An employee's actual locality pay will depend on the geographic area of the employee's official duty station, which is usually where the employee primarily works. To determine an employee's locality rate at the Department, human resource officials and the payroll office annually increase the employee's scheduled annual rate of pay by the locality pay percentage authorized by the President. Here, Respondent was receiving a locality pay rate for

[1] Dkt. Nos. 10-05-WA, 11-15-WA, U.S. Dep't of Educ. (Mar. 17, 2011).

an employee with an official duty station in Washington, DC, at a rate of 24.22 percent. During the time in question, however, Respondent was located in North Little Rock, Arkansas, a duty station classified as "Rest of United States" and where the locality pay rate is 14.16 percent. This 10.06 percent difference in locality pay rate resulted in an overpayment of $12,332.35 over the entire period in question.

PROCEDURAL HISTORY

On March 25, 2015, the Office of Hearings and Appeals (OHA) issued an Order Governing Proceedings directing Respondent to file a short sworn statement on or before April 9, 2015, explaining why Respondent believed a waiver should be granted and to file necessary supporting documents. Additionally, the email correspondence accompanying the Order urged Respondent to review waiver decisions issued and posted on the OHA website. At Respondent's request, an extension was given until April 27, 2015. On April 10, 2015, Respondent sent an email to the Waiver Official seeking clarification about the process and OHA responded to her inquiry by phone. Respondent submitted no further response or additional information until an Order to Show Cause was issued on April 30, 2015.

The Order to Show Cause instructed Respondent to submit documentation and information on or before May 18, 2015 demonstrating why the record should not be closed. On May 1, 2015, Respondent filed a sworn statement and supporting documentation by hand. Subsequently, the waiver official lifted the Order to Show Cause, issuing an Order Extending an Opportunity to Supplement the Record. The Order outlined the documents that were before the Tribunal at that point and instructed Respondent that if she wished to submit any further documentation in support of her waiver request, she was to do so by May 20, 2015. The Order again encouraged Respondent to review the waiver decisions on the OHA website. No additional information was submitted after May 1st.

The following documents are currently before this Tribunal:

(1) Respondent's March 13, 2015 request for waiver with Bill of Collection;
(2) Military Orders for Respondent's husband;
(3) Email from Melissa Hatfield, dated May 21, 2013;
(4) Respondent's email to Thomas Purple, dated October 30, 2013;
(5) Respondent's letter dated January 2, 2014 requesting to extend telework agreement and update duty station;
(6) Respondent's email dated January 24, 2014 to Jennifer Myers;
(7) Respondent's April 30, 2015 waiver request (5 pages) incorporating an additional debt in the net amount of $4,505.16, for Debt ID# M1509800004, dated April 8, 2015, for erroneous pay (overpayment) based on a difference in locality pay from Washington, D.C. to "Rest of United States" from 2014 to 2015, which Respondent received on April 21, 2015. A DOI Request for Bill Collection is attached. The DOI bill is signed by approving payroll supervisor, Judy Burke, dated March 31, 2015, and lists the two debts #50621116199 ($7,827.19) net amount owed for System Debt, and ($4,505.16) net amount owed for Manual Debt #M1509800004, the follow on second debt. At the top of DOI Bill is a handwritten notation "Combined Billing" with initials LW (presumably acknowledged by DOI payroll personnel Lance Westfall);

(8) Respondent's list of enclosures on page 5, waiver request letter supra, including enumerated items at (2)–(5) here and her valid Maryland driver's license, as previously submitted;
(9) Respondent lists 7 enclosures (Liabilities) to support financial hardship;
(10) Respondent lists 3 enclosures, Sources of Income;
(11) Respondent lists 2 enclosures, other financial information on bank accounts.

Resolution of this case is based on applicable Code of Federal Regulations (C.F.R.) language regarding pay administration and OPM's guidance as well as matters accepted as argument, evidence, and/or documentation in this proceeding when considered as a whole, including the Respondent's statements, the Department's Bills of Collection, and documents generated by the Federal Personnel Payroll System (FPPS). This decision constitutes a final agency decision.

JURISDICTION

Respondent's waiver request arises under 5 U.S.C. § 5584 (the Waiver Statute), authorizing the waiver of claims of the United States against debtors as a result of an erroneous payment of pay to a federal employee. In 34 C.F.R. Part 32 (§ 32.1 *seq.*) and the *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04, revised January 2012), the Department specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to OHA. The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.

DISCUSSION

In a waiver proceeding, the debtor acknowledges the validity of the debt in question, but argues that he or she should not be required to repay that debt because of equitable considerations and because there is no indication of fraud, misrepresentation, fault, or lack of good faith by Respondent or anyone else having an interest in obtaining the waiver. Here, Respondent has repeatedly acknowledged the validity of the debt for both bills of collection. When requesting a 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.

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.[2]

Fault as is used in both the Waiver Statute and in factor (1) above has a specialized and particular meaning. Rather than its conventional use, fault is examined in light of the following considerations: (1) whether there is an indication of fraud; (2) whether the erroneous payment resulted from an employee's incorrect, but not fraudulent, statement that the employee under the

[2] *See In re Leslie*, Dkt. No. 07-295-WA, Dep't of Educ. (Nov. 13, 2008).

circumstances should have known was incorrect;[3] (3) 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 (4) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous. Waiver may only be granted if a debtor succeeds in showing that he or she can satisfy the fault standard.

It is well established that "[a]n employee who knows or *who should know* that he or she is receiving erroneous overpayments cannot acquire title to the erroneous amounts under any condition."[4] When determining whether an employee is charged with the knowledge that his or her payment was erroneous, this Tribunal examines "pertinent factors such as an employee's position, grade level, education, and training."[5]

Applying this standard to the present facts, Respondent argues that waiver of the entire debt is warranted because Melissa Hatfield and Quasette Crowner, Director of Workforce Relations and acting Director of Human Capital and Client Services, respectively, approved her initial proposal for 100 percent telework between May 28, 2013 and December 31, 2013, followed by a year of Leave Without Pay. Furthermore, Respondent asserts that starting in October 2013, after agreeing to remain in 100 percent telework status for the duration of her husband's military assignment, she requested that her duty station be updated to "Rest of United States" to reflect her location. According to Respondent, her superiors did not take any action and she was told on numerous occasions that a change in duty station was unnecessary. Thus, Respondent contends that she was operating in good conscience with regard to her locality pay and that her reasonable reliance on her superiors' approval should exempt her from fault and liability.

Respondent indicates that when they approved her telework arrangement, her supervisors considered several Federal Initiatives that focused on recruiting and retaining military spouses on Federal Service. Specifically, she mentions Executive Order 13473 and the White House Initiative on Joining Forces. A review of these Initiatives shows they are pertinent to job retention in military families but not to the issue of locality pay.

In past waiver cases, the Tribunal has determined that the error giving rise to the overpayment was "far too obscure for an employee, *not an expert in personnel or pay rules*, to detect or be alerted of the possible error,"[6] thereby relieving that individual of fault. In this matter, however, Respondent is [redacted], [an HR manager]. Her situation is therefore analogous to the respondent's in *In re L*, in which this Tribunal denied waiver of debt, reasoning that because the respondent was a human resource specialist, he was charged with more

[3] 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 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. (Oct. 19, 2005).
[4] *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at 5.
[5] *Id.*
[6] *In re Francisco*, Dkt. No. 07-154-WA, U.S. Dep't of Educ. (Feb. 15, 2008) at 4 (emphasis added).

knowledge about proper retirement classifications.[7] Similarly, Respondent is charged with more knowledge about proper duty station classifications and locality pay rates, as HR regulates employee locality pay and payment in general.

In her letter to OHA explaining why waiver is appropriate, Respondent admits that she is familiar with the Office of Personnel Management's (OPM) regulations governing official worksites for employees and locality pay rates. However, she points out that these regulations allow for exceptions for employees in temporary situations and argues that, with her supervisor's consent, she reasonably believed that she fell within the "temporary" category, allowing her to earn Washington, DC locality pay despite her inability to work at least twice each biweekly pay period in that locality.[8]

OPM's Changes in Pay Administration Rules for General Schedule Employees regulate locality pay rates for government employees. Paragraph (d)(1) of these Rules state that an employee must work at least twice each biweekly pay period on a recurring basis at the regular worksite for the employee's position of record or regularly perform work within the locality pay area for that worksite.[9] Paragraph (d)(2) of the regulation lists five specific exceptions to the twice-in-a-pay-period rule,[10] none of which describe Respondent's situation. The regulation also states, "If an employee covered by a telework agreement does not meet the requirements of paragraphs (d)(1) or (d)(2) of this section, the employee's official worksite is the location of the employee's telework site,"[11] suggesting that the list of exceptions in paragraph (d)(2) is exhaustive rather than illustrative. As such, if an individual does not fit within one of these narrow exceptions, that individual must either work at least twice each biweekly pay period at his or her official worksite or regularly perform work within the locality pay area for that worksite, as outlined in paragraph (d)(1).[12] According to this regulation, an employee's official worksite, which determines the appropriate locality pay area, is documented on his or her Notification of Personnel Action, most commonly a Standard Form 50.[13] OHA was not provided with a copy of Respondent's Standard Form 50. However, Respondent's recent Earnings and Leave Statements list her North Little Rock address as her home address.

As mentioned, Respondent justifies her reasonable belief that her situation fell within OPM's "temporary" category because she received initial approval from Melissa Hatfield and Quasette Crowner, her supervisors in HR. Respondent also asserts that she later received approval from Pam Malam and Thomas Purple, Chief Human Capital Officer and acting Director of Workforce Relations, respectively, to extend her telework agreement. It should be noted that employment within HR changed substantially over the period in question, with both Hatfield and

[7] Dkt. No. 14-70-WA, U.S. Dep't of Educ. (Feb. 9, 2015) at 3 ("An employee who works in human resources is charged with more knowledge about proper retirement classifications, as it is HCCS who oversees the proper retirement classification of employees.").
[8] *See* Determining an employee's official worksite, 5 C.F.R. § 531.605(d)(4) (2008) ("An agency must determine a telework employee's official worksite on a case-by-case basis. A determination made under this paragraph (d) is within the sole and exclusive discretion of the authorized agency official, subject only to OPM review and oversight.").
[9] *Id.* § 531.605(d)(1).
[10] *Id*. §§ 531.605(d)(2)(i)–(v).
[11] *Id.* § 531.605(d)(3).
[12] *Id.* § 531.605(d)(3).
[13] *Id*. § 531.605(a)(3).

Malam leaving the Department in 2013. Respondent provided OHA with email correspondence from Hatfield, indicating that Hatfield believed Respondent's initial situation, which entailed teleworking from North Little Rock, Arkansas from May 28, 2013 to December 31, 2013, to fall within the "temporary" category as outlined in OPM's rules. She did not, however, provide correspondence from Crowner, who remained an HR supervisor through mid-2014. Nor did she provide any written approval from Malam or Purple.

In her May 2013 email, Hatfield mentioned another Department employee's presumably similar telework agreement, indicating that the Office of General Counsel (OGC) may have approved that agreement and so Respondent's agreement should also fall within the Department's parameters for temporary telework arrangements. Respondent did not, however, provide any correspondence with OGC regarding either her agreement or the other employee's agreement.

While Hatfield indicated that Respondent's initial telework arrangement should fall within the Department's "temporary" category, her email also includes a portion of OPM's Fact Sheet regarding employees' official worksites for location-based pay purposes, which suggests that Respondent's relocation did not adhere to the OPM's parameters for temporary telework arrangements. The Fact Sheet states,

> An exception is not appropriate in all time-limited situations. For example, assuming there are no additional circumstances such as those described [in 5 C.F.R. § 531.605(d)(2)(i)–(v)] that would make an exception appropriate, an agency should designate the employee's telework site as the official worksite in situations such as the following…An employee changes his or her place of residence to a distant location where commuting at least twice each biweekly pay period on a regular and recurring basis to the regular worksite is not possible (i.e., the employee no longer has a residence in the commuting area for the regular worksite and thus cannot reasonably be viewed as being part of the local labor market for the regular worksite).[14]

Hatfield's memo, with reference to the above, shows that a change of residence excludes an individual from the "temporary" category with respect to locality pay area. Respondent did in fact change her place of residence to a distant location where commuting to the Washington, DC locality twice each pay period was not possible, as evidenced by her Arkansas mortgage.[15] According to this Fact Sheet, the Department should therefore have designated her telework site, Arkansas, as her official worksite for the purposes of locality pay. Furthermore, the Fact Sheet explicitly states that the intent of any exception to the twice-in-a-pay-period-standard is to "address certain situations where the employee is retaining a residence in the commuting area for the regular worksite but is temporarily unable to report to the regular worksite for reasons

[14] Office of Personnel Mgmt., Fact Sheet: Official Worksite for Location-Based Pay Purposes, *available at* https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/official-worksite-for-location-based-pay-purposes/.

[15] Respondent submitted evidence, labeled Mortgage #2, listing her and her husband's ownership of the North Little Rock address which appears on her Leave and Earning Statement, as submitted.

beyond the employee's control."[16] There is no indication that Respondent retained a residence within the Washington, DC locality during the period in question. Since she appears to have replaced her home in that locality with a residence in Arkansas, Respondent's situation does not warrant an exception to OPM's locality regulations.

Additionally, Respondent provided OHA with emails she sent to Purple (but not Malam) requesting to extend her full-time telework agreement until November 2, 2014 and to update her duty station to Arkansas.[17] She did not, however, provide Purple's replies. As such, OHA has no means of reviewing Malam or Purple's responses to determine whether they provided approval upon which Respondent could have reasonably relied.

Considering Respondent's prominent position within HR as well as her access to and correspondence with other HR officers, a high duty of care is ascribed to her in recognizing errors in pay and locality pay assignments.[18] As such, this Tribunal concludes that Respondent is partially at fault and cannot satisfy the fault standard once the initial temporary telework period passed. On this basis, I will address the two time periods as distinct and subject to separate analysis.

For the period between May 28, 2013 and December 31, 2013, Respondent was operating with a reasonable, good-faith understanding that her original full-time telework agreement adhered to OPM's regulations. However, once she extended her agreement[19] through the majority of 2014 and requested that her duty station be updated, her belief that the arrangement followed OPM's rules was no longer reasonable. Rather, her request for a change in duty station points to her recognition that her situation was permanent in nature for the purposes of her locality pay rate and that Washington, DC was no longer the appropriate locality. Her October 2013 email to Purple is therefore a crucial turning point for determining whether Respondent was at fault and for undermining the reasonableness of her understanding that her telework agreement constituted a temporary arrangement as proscribed by OPM.

Because Respondent initially operated according to her supervisors' approval, there is no indication of fraud, misrepresentation or lack of good faith on her part for the period between May 28, 2013 and December 31, 2013. Consequently, she was acting reasonably and without fault between these dates. Since Respondent satisfies the fault standard for this first period, we turn to examine whether the Federal government's collection of the debt arising between these dates would go against equity and good conscience.

To secure equity and good conscience, an individual must have acted fairly and without fraud or deceit, and in good faith.[20] There are no rigid rules governing the application of the equity and good conscience standard. This Tribunal must be convinced that it would be either inequitable or not in the government's interest to recover the debt. The Tribunal must balance

---

[16] *Id*.
[17] It should be noted that Hatfield left the Department shortly after Respondent relocated, and so while Respondent likely would have approached Hatfield to discuss an extension of her telework arrangement, this was not an option.
[18] *See In re L*, Dkt. No. 14-70-WA (finding that an HR specialist is charged with more knowledge about proper retirement classifications, as compared to an employee not in HR).
[19] Per Respondent's October 30, 2013 email to Purple.
[20] *See* 5 U.S.C. § 5584; *see also In re Norman*, Dkt. No. 12-52-WA, U.S. Dep't of Educ. (Oct. 26, 2012) at 5.

equity and/or appraise good conscience in light of the particular facts of the case. Factors weighed by the Tribunal include the following: 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.[21] The Tribunal notes that Respondent has brought in evidence of her current liabilities as well as her family's monthly income, with extensive detail that her relocation to the Washington, DC Metropolitan area in April 2015 has been accompanied by significant expenses including housing renovation and construction costs, incurring a new construction loan, temporary apartment rental costs, childcare, and other expenses, to show that collection of this debt would be financially burdensome. I agree that Respondent has produced sufficient evidence in this regard. Consequently, the Tribunal finds that collection of the overpayments arising between May 28, 2013 and December 31, 2013, the period for which Respondent lacks fault and in the amount of $3,388.38, would go against equity and good conscience. This value consists of the debt accrued between Pay Period 16 of 2013 and Pay Period 1 of 2014 (the final pay period of 2013). This represents the second Bill of Collection less the overpayments for Pay Periods 2 through 4 of 2014.[22] Accordingly, this portion of the debt will be waived.

Turning to the period after Respondent's initial agreement, between January 1, 2014 and April 4, 2015, the Tribunal finds that Respondent did not have a reasonable basis to believe that her extended telework agreement still adhered to OPM's regulations. The agreement's major change in duration establishes an element of permanence that Respondent should have recognized. In fact, her repeated requests for a change in duty station, starting with her October 30, 2013 email to Purple, demonstrate her acknowledgement that an extension rendered the agreement permanent in nature for the purposes of OPM's locality pay regulations and that she was aware that her locality should have been "Rest of United States." While her salary overpayment was the result of an administrative error, Respondent's requests for a change in duty station establish that she was in fact aware of the error. In situations in which Respondent is aware of an administrative error resulting in overpayments, seeking approval from supervisors is not enough. Instead, an individual with such knowledge has a duty to set aside funds for repayment in the event the error is ultimately corrected. As such, this Tribunal concludes that Respondent knew or should have known that the overpayments that arose after her initial agreement were erroneous and she is therefore at fault for the debt accrued between January 1, 2014 and April 4, 2015. Consequently, Respondent does not meet the threshold fault standard for this period. We therefore do not reach the equity analysis for the debt accrued after January 1, 2014. Because we conclude Respondent is at fault, she remains liable for the overpayments arising between January 1, 2014 and April 4, 2015, amounting to $8,943.99. This value consists of the debt accrued between Pay Period 2 of 2014 (which began January 1, 2014) and Pay Period 4 of 2015.

Respondent requested waiver of the entire debt. Having found that between May 28, 2013 and December 31, 2013 the circumstances of this case conform to the threshold fault and equity factors warranting waiver, Respondent's request for waiver of the debt is partially granted. For the period after December 31, 2013, she fails to meet the fault standard. The

[21] *Id*.
[22] Overpayments for Pay Periods 2, 3 and 4 of 2014 amount to $1,116.80 per the DOI's April 8, 2015 manual BoC.

question of equity is therefore not considered for the period following this date. Respondent remains liable for $8,943.99. Consequently, a waiver of the balance, $3,388.36, is hereby granted. This 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 is **HEREBY GRANTED, in part,** in the amount of $3,388.36, and **HEREBY DENIED, in part,** in the amount of $8,943.99.

So ordered this 19th Day of June, 2015.