UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
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In the Matter of

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Docket No. 15-20-WA
Waiver Proceeding

Respondent

DECISION DENYING WAIVER

This is a request for a waiver of $761.83[1] for erroneous payments to the Respondent for the Washington-Baltimore-Northern Virginia (DC) locality pay rate[2] that the Respondent was not entitled to receive in pay periods (PP) 201420-201503. The Respondent was compensated with the DC locality pay, but the employee's *official worksite*[3] for those PPs was outside the DC locality pay defined area.[4]

A final agency decision[5] has determined that debt outlined in the Bill of Collection (BoC) is valid. The Respondent has now asked for a waiver of the debt because even though the debt is valid, she is not at fault for the creation of the debt. Therefore, it is important to note that this tribunal has no jurisdiction over and it not making any determination on the underlying basis of the debt. Rather, this tribunal is determining if the employee is at fault, as defined in waiver proceedings, for the debt. For the reasons that follow, the tribunal concludes that waiver of the debt is not warranted. Accordingly, Respondent's request for waiver is denied.

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 of pay to a federal

[1] This amount is from Bill of Collection (BoC) Debt ID # 50900553742.
[2] *See* 5 C.F.R. § 531.602 which defines *locality pay* and *locality pay area*.
[3] *See Id* which defines *official worksite*.
[4] *See* 5 C.F.R. § 531.603(b)(33)
[5] *In re Exeter*, Dkt. No. 15-21-WA, U.S. Dep't of Educ. (August 5, 2015).

employee.[6] 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),[7] 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, supplemental documentation, and documents compiled by the Department's Human Resources office including the BoC. This decision constitutes a **FINAL** agency decision.

DISCUSSION

The Respondent has been employed by the Department since November 2000, and is currently working as a GS-13, Human Resource Specialist in Employee and Labor Relations. In 2009, the Respondent requested permission to telework in accordance with the Department's policy regarding telework entitled *Flexiplace Program*.[8] The Respondent's request was approved, and the Respondent has been utilizing the teleworking benefit until present. Appendix B of PMI 368-1 entitled *U.S. Department of Education Flexiplace Work Agreement* (Telework Agreement) is the form completed by Departmental Employees utilizing telework. This is the form the Respondent completed when she first applied for telework in 2009, and the same form the Respondent used when updating her subsequent Telework Agreements. On page b-3 of the Telework Agreement, the employee is required to state the alternative worksite address and telephone number. The Respondent's most recent Telework Agreement, dated September 30, 2014, states the alternative worksite address as the Respondent's residence, and an address in the state of Washington. The Respondent's *official worksite* and residence are located within the DC locality pay rate area.[9] Initially, the Respondent was paid the DC locality pay for the PPs in question, but, for reason(s) unknown to this tribunal, the Department conducted a review of the employee's *official worksite* for PPs 201420-201503. The Department determined, in accordance with 5 C.F.R. § 531.605, the employee's *official worksite* should have been the state of Washington alternative worksite, as listed in the employee's Telework Agreement, for PP 201420-201503. The Department reached this conclusion because the employee did not work at least twice, in a biweekly pay period, at the employee's regular worksite or at the employee's residence (both of which are in the DC locality pay area). The Department corrected the error in

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[6] *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.

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

[8] PMI 368-1 Dated: August 30, 1995.

[9] *See* 5 C.F.R. § 531.603 which list the locality pay rate areas.

the *official worksite* location for the PPs in question. This change in *official worksite* location caused an adjustment to the locality pay the employee was entitled to receive. The locality pay rate for the employee's state of Washington alternative worksite location is less than the DC locality pay rate. Thus, the employee was overpaid for PPs 201420-201503.

Fault Standard

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,[10] and (2) whether Respondent can demonstrate that collection of the debt would be against equity and good conscience, and not in the best interests of the United States. 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 wavier 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.[11] 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.[12] Thus, every waiver case must be examined in light of its particular facts and circumstances.[13]

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 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

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[10] *See In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).
[11] *See In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).
[12] *See In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).
[13] *Id* at 5.

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.[14] 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 in facts and circumstances to *In Re Fernandez*. There are no mitigating factors in this case that preclude the general principle that an employee is responsible for knowing the rules and regulations regarding their compensation. 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."[15] The Respondent is not a new employee to the federal government. In fact, the Respondent possesses specialized knowledge of federal pay regulations. The Respondent has worked for the Department for over 13 years, at the time of the overpayment, as a human resources specialist (labor relations). Thus, the Respondent should be very familiar with the federal pay system, locality pay adjustments criteria, worksite determinations, ED's telework policies, regulations regarding telework and other federal pay regulations. The employee had an additional notice on when she could and could not receive DC locality pay. On page 1 paragraph 3 of the employee's Telework Agreement it conspicuously states "Subject to the provisions in the amendment to this policy dated May 2, 2006 (5 CFR 531.605 (d)), the employee's official duty station is typically not changed by his/her participation in Flexiplace. However, in accordance with 5 CFR 531.605(d), if an employee on a flexiplace work schedule is not scheduled to report to the regular worksite at least once a week on a regular and recurring basis,

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[14] *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.

[15] *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at 5

then the flexiplace (telework) site becomes the official worksite and duty station. If the flexiplace (telework) site is located in a different locality pay area, then the employee's pay must be adjusted for the new locality pay area."

In the Respondent's case, she was given approval for two alternative worksites. The first alternative worksite was the employee's residence, which is within the DC locality pay rate area, and the second alternative worksite was an address in the state of Washington. Therefore, the employee could have known or should have known that when she did not work at least twice at her regular worksite or at her residence, that, in accordance with 5 C.F.R. § 531.605(d)(1), she was not entitled to receive DC locality pay. As such, she should have informed the Department that a change in her *official worksite* needed to occur. The respondent argues that pursuant to 5 C.F.R. § 531.605(d)(2), she was exempt from the requirement to work at least twice in a biweekly period at her regular worksite or her residence for the PP in question. However, the Respondent's belief in this exemption is unfounded. The Respondent had an approved Telework Agreement. There is nothing in that Telework Agreement whereby the Department, on a temporary basis, explicitly exempted the employee under 5 C.F.R. § 531.605(d)(2) from the application of 5 C.F.R. § 531.605(d)(1) and paragraph 3 of her Telework Agreement. Thus, it is unreasonable for the employee to have believed the reporting requirement under 5 C.F.R. § 531.605(d)(1) did not apply to her telework activities.

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The overpayment does not involve an overly complex personnel rule or require special knowledge to understand the application or language of 5 C.F.R. § 531.605. The regulation does not require calculations or understanding of novel terms. The regulation is unambiguous and defines exactly where an employee's *official worksite* is to be determined. Then the employee's pay is based upon the official worksite location. The language and application of 5 C.F.R. § 531.605 is less complex and complicated than the regulations regarding within-grade increases.[16] The tribunal concludes that since prior waiver decisions have held an employee responsible for understanding more complicated regulations[17] than 5 C.F.R. § 531.605, then the employee must be responsible for understanding less complicated regulations.

Guided by *In Re Fernandez*, the facts of this case and the analysis herein, the tribunal concludes that Respondent is at fault as that term is defined under waiver standards. The Respondent could have or should have known that for PPs 201420-201503 her *official worksite* had changed to the employee's alternative worksite address in the state of Washington Thus, she

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[16] *See* 5 C.F.R. § 531 Subpart D, which requires an understanding of terms, calculations to determine credible service, calculations to determine the waiting period between within-grade increases, which will be different according to the current employees step, and calculations to ascertain when the waiting periods starts. In contrast, 5 C.F.R § 531.605(d)(1) simply states "If the employee is scheduled to work at least twice each biweekly pay period on a regular and recurring basis at the regular worksite for the employee's position of record, the regular worksite (where the employee's work activities are based) is the employee's official worksite. . . . the employee need not work at least twice each biweekly pay period at the regular official worksite (where the employee's work activities are based) as long as the employee is regularly performing work **within** the locality pay area for that worksite." *Emphasis added*

[17] *See In re Carolyn*, Dkt. No. 06-04-WA, U.S. Dep't of Educ. (June 28, 2006); *In re Jeanette*, Dkt. Nos. 06-11-WA, 06-12-WA, 06-13-WA, U.S. Dep't of Educ. (September 20, 2006) and 5 C.F.R § 534.408; 5 § C.F.R. 550.184.

had a duty to notify the Department of its error in paying her DC locality pay because her *official worksite* was no longer in the DC locality pay area.

Equity and Good Conscience

To secure a waiver based upon equity and good conscience, an individual must have acted fairly, without fault, fraud or deceit, and in good faith.[18] Although the Respondent has raised arguments that it would be inequitable and against good conscience to require repayment, this tribunal has determined that the Respondent is not without fault for the overpayment. Thus, this tribunal does not reach the equity and good conscience question because the Respondent has failed to meet her burden under the fault standard.

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 $761.83 is HEREBY DENIED. This decision constitutes a final agency decision.

So ordered this 4th day of May, 2016.

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George H. Abbott, III
Waiver Official

[18] *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.