



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

ROBERT,

Docket No. 09-10-WA
Waiver Proceeding

Respondent

DECISION GRANTING WAIVER

The OFFICE OF HEARINGS & APPEALS (OHA)¹ maintains authority and jurisdiction to waive² claims of the United States against a former or current employee of the Department.³ The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁴ At issue in this case is whether an employee of the Department of Education (Department) should be granted waiver of a debt arising from an overpayment of salary occurring as a result of the Department's payment of a total of **\$4,641.42** in regular pay to Respondent, notwithstanding that Respondent was serving military duty and being paid by the military for the same pay period.

¹ The Department's policy is set forth in the U.S. Department of Education, Administrative Communications System Departmental Handbook, HANDBOOK FOR PROCESSING SALARY OVERPAYMENTS (ACS-OM-04, June 2005 (revised Dec. 2006)).

² *Waiver* is defined as "the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee as [provided] by 5 U.S.C. 5584...or any other law." 5 C.F.R. § 550.1103.

³ *See also*, 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) at 1 & n. 1 (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: www.ed-oha.org/overpayments/.

⁴ *See*, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

For reasons that follow, I find that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

In a waiver proceeding, the debtor acknowledges the validity of the debt, but argues that he or she should not be required to repay the debt on the basis of the circumstances of the debt and argues that there is no indication of fraud, misrepresentation, fault, or lack of good faith by Respondent or anyone else having an interest in obtaining a waiver of the claim.⁵ In doing so, 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.

The record in this case constitutes the narrative briefs and what I accepted into evidence, including: a copies of a written statements dated July 29, 2009 and September 9, 2009 establishing Respondent's reasons supporting his request for waiver of the salary overpayment, and a copy of a Bill of Collection (BoC) issued on July 13, 2009.

DISCUSSION

I.

After a review of the record, I find the following facts pertinent to this case. Respondent was called to military service in 2009. Shortly thereafter, in the 12th and 13th pay periods of 2009, the Department paid Respondent his full civilian pay. Apparently, despite his absence from work due to military service, Respondent's timekeeper and supervisor authorized the submission of Time & Attendance forms for Respondent. Once these forms were entered into the Federal Personnel Pay System, Respondent was paid. Respondent recognized the erroneous salary payments on June 15, 2009 and July 6, 2009, and notified the Department of the errors. The debt collection action at issue in this case is the result of the Department's effort to correct the errors and recover the erroneous salary overpayments. There is no dispute that Respondent owes the Department \$4,641.42, however, Respondent argues that collection of the debt should be waived as a matter of fairness and equity.

The standard for determining whether waiver of a debt is appropriate requires a consideration of two factors; namely, (1) whether there is no indication of fraud, misrepresentation, fault,⁶ 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.⁷ Respondent must satisfy both factors to obtain a waiver.

⁵ Under waiver decisions issued by the Comptroller General interpreting 5 U.S.C. § 5584, "pay" has been held to include "nonpay" or nonsalary compensation, which covers recruitment bonuses, accrual of annual leave, health and life insurance premiums, retention allowances, and all forms of remuneration in addition to salary. *See*, U.S. Government Accountability Office, *Scope of Waiver Authority*, B-307681 (May 2, 2006).

⁶ In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

⁷ *See In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

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 factor (1) 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;⁸ (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; or (d) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.⁹

In support of his request for waiver, Respondent argues that he should be granted a waiver because the erroneous payments were the fault of the Department, not his. As such, in Respondent's view, requiring him to repay the debt is tantamount to penalizing him for the errors of the Department. Although the argument that Respondent is not the cause of the erroneous payments is acceptable in light of the facts, the argument has no bearing on the fault standard.

It is commonplace that salary overpayments often, if not usually, involve some type of administrative error by the agency; indeed, an error or mistake in payroll or in the application of a rule or regulation governing pay is the usual vehicle that drives creation of an overpayment. Indeed, the application of the fault standard operates to impose a statutory duty on the employee/debtor to seek correction of the erroneous payment regardless of the government's mistake. In this respect, our waiver cases have consistently recognized that despite the fact that an administrative error by the government may cause an employee to be paid at a rate that exceeds the employee's lawful rate of pay, the error cannot, itself, entitle an employee to waiver.¹⁰ This follows because no employee has an entitlement to pay that he or she obtains as a result of an overpayment.¹¹

Notwithstanding Respondent's argument on the fault standard, it is clear from the facts of this case that the erroneous payments did not result from a failure on the part of the employee to disclose material facts in his possession pertinent to the erroneous payments. To the contrary, once Respondent recognized the overpayments by checking an online account, he contacted human resources in Washington, DC to inform appropriate officials of the errors. Accordingly, I find Respondent's conduct consistent with an employee's duty to resolve an erroneous salary

⁸ 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. (October 19, 2005). As such, in a waiver proceeding, the debtor must either acknowledge the validity of the debt or urge the absence of any reason to recognize the salary payment at issue as an overpayment. *Id.*

⁹ *See generally, Guidelines for Determining Requests* U.S. Department of the Treasury Directive 34-01 (2000), available at <http://www.treasury.gov/regs/td34-01.htm>; Standards for Waiver, 4 C.F.R. § 91.5 (2000).

¹⁰ *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 15, 2005).

¹¹ *Id.*

payment as soon as he knows of the erroneous compensation as required by the fault standard.¹²

II

The remaining question 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 secure a favorable ruling on the equity standard, Respondent must show that he has acted fairly, without fraud or deceit, and in good faith with regard to all matters concerning the overpayment. In addition, although there are no rigid rules governing the application of equity, I must balance equity and appraise good conscience in light of the particular facts of this case; in doing so, I must balance the competing interests in the recovery of debts owed to the United States against Respondent's asserted interests in the forgiveness of a debt owed to the United States. Factors weighed 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 based on the overpayment; and whether collection of the debt would impose an undue financial burden.

Respondent argues that the burden of seeking corrections for multiple salary payment errors made during his recent tours of duty fighting the war on terrorism weighs in his favor for obtaining waiver of this debt. As noted in footnote 12, *supra*, Respondent has been overpaid on multiple occasions during his military service. Although the recurring errors in salary payments do provide Respondent with more than modest cause to be watchful for additional errors, this is clearly a burden for someone mobilized for military service during war. As Respondent notes, when deployed for military service during war, access to personal records and computer systems traditionally used by employees to check the accuracy of salary payments may become unavailable or more burdensome to access for those deployed in combat. Yet, even under such circumstances, Respondent was diligent in alerting the Department to salary payment errors. Indeed, in the case before me, Respondent not only alerted the Department to the erroneous salary payments, but expressed a sense of urgency in requesting that the corrections be made without haste to avoid additional salary overpayments.¹³

Respondent also argues that the financial hardship that he is currently experiencing as well as the financial burden collection of this debt would impose favors granting a waiver of

¹² It is noteworthy that Respondent has shown diligence on other occasions involving salary overpayments. I take administrative notice of the fact-finding in prior waiver proceedings showing that Respondent has been subject to multiple errors similar to the one at issue here involving his pay during military service. Indeed, in *In the Matter of Robert*, 05-07-WA (July 8, 2005), *In the Matter of Robert*, 05-08-WA (July 8, 2005) and *In the Matter of Robert*, 05-09-WA (July 8, 2005) the waiver official recognized that Respondent "sat down with his Payroll Coordinator to coordinate his leave usage for the period he was called away to active military duty." Nonetheless, in those cases, as in this one, Respondent's diligence did not meet success in circumventing payment errors. While employed with the Department, Respondent has served in Operation Enduring Freedom at Guantanamo Bay (Cuba) and the Global War on Terrorism (Iraq).

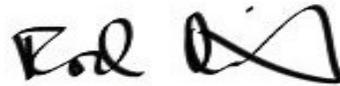
¹³ Although diligence in alerting the Department to errors in pay is accounted for under the fault standard, I consider Respondent's diligence a factor under equity because of Respondent's circumstances: providing military service during war when the errors occur and when he discovers them.

repayment of this debt. I agree. The financial burden that would be concomitant to repayment of this debt is a significant factor supporting Respondent's request for waiver. According to Respondent, as a result of a payroll error canceling his family health insurance while on military service, he has received medical bills that seek payments of which, absent the Department's error, he would not be required to make. Respondent indicates that while attempting to correct the status of his health insurance, the unpaid medical bills adversely affected his credit rating, which has resulted in emotional and financial harm. To underscore the significance of the financial burden that would be imposed by repaying the debt at issue here, Respondent indicates that while attempting to correct the status of his health insurance his family sustained medical bills for reconstructive wrist surgery provided to his wife, which, left unpaid, resulted in a civil judgment against his wife in the State of New Jersey. To date, he has not been able to pay this bill. I am persuaded that Respondent has presented persuasive circumstances showing the sense of unfairness arising from the obligation to repay this debt. Accordingly, the tribunal finds that in the interests of the United States waiver should be granted. This decision 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 in the amount of **\$4,641.42** is **HEREBY GRANTED.**

So ordered this 19th day of November 2009.



Rod Dixon
Waiver Official