



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202
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In the Matter of

W T,

**Docket No. 20-28-WA
20-36-WA**

Salary Overpayment
Waiver Matter

Respondent.

DECISION GRANTING WAIVER

The Respondent has filed a request of waiver of \$6,108.14 from Debt ID: 01961681769,¹ and a request of waiver of \$2,813.49 from Debt ID: 02101681769² for salary overpayments. The total amount requested to be waived is \$8,920.63. As the bases for both of these waiver requests are similar, the waiver requests were consolidated into Docket No. 20-28-WA.

These overpayments occurred because of the Department's initial processing of a personnel action to convert the employee from a General Schedule (GS) appointment to an Executive Series (ES) appointment and, thereafter, paying the employee more than the maximum allowable rate. For the reasons that follow, I conclude that waiver of the debts meets the waiver standards. Accordingly, Respondent's requests for waivers are GRANTED.

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 to a federal employee.³ The Department promulgated regulations at 34 C.F.R. § 32.1 *et seq.* and its

¹ The request for waiver for this debt was docketed in the Office of Hearings and Appeals (OHA) as 20-28-WA. A corresponding request for pre-offset hearing was docketed with OHA as 20-30-OF.

² The request for waiver for this debt was docketed in OHA as 20-36-WA. A corresponding request for pre-offset hearing was docketed with OHA as 20-37-OF

³ 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 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:

Handbook for Processing Salary Overpayments (Handbook, ACS-OM-04) (January 2012),⁴ which specifically delegates the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).

The authority to waive a salary overpayment is limited to those overpayments covered by 5 U.S.C. § 5584, identified in the Debt ID issued and have been requested to be waived by the Respondent. During the pendency of this request for waiver, the Respondent requested that I waive the Department's overcontribution to the Respondent's Thrift Savings Plan (TSP) because of the Respondent's decrease in pay rate. The Respondent has not provided a Notice of Debt Collection whereby the Department alleges the Respondent owes a debt to the Department for the Department's overcontribution to the Respondent's TSP. Further, any corrections and overcontributions to a TSP are controlled by 5 C.F.R. Part 1605 and not 34 C.F.R. Part 32. As a result, I have no jurisdiction to subsume any overcontribution by the Department to the Respondent's TSP.

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. In support of the waiver request, Respondent has filed a brief and exhibits, including personnel actions (SF-50s), and financial records. This tribunal has reviewed all the submissions in the record and has determined that the record contains sufficient evidence to determine the Respondent's waiver requests. The record is now closed, and the matter is ready for decision. This decision constitutes a **FINAL** agency decision.

Discussion

In a waiver proceeding, the validity of the debt is not within the determination of the Waiver Official. The waiver of a salary overpayment is an equitable remedy, in which the debtor argues that he or she should not have to repay the debt. The standard for determining whether a 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,⁵ and (2) whether Respondent can demonstrate that collection of the debt would be against equity and not in the best interests of the United States.

To determine whether these requirements are met, the debtor, upon requesting a waiver hearing, is required 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.

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

<http://oha.ed.gov>.

⁴ The *Handbook*, ACS-OM-04, was revised and reissued by the Department on Jan. 19, 2012.

⁵ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005).

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 waiver 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.⁶ 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.⁷ Thus, every waiver case must be examined in light of its particular facts and circumstances.⁸ A waiver cannot be granted if a debtor is unable to satisfy the fault standard.

Fault Standard

Section 738 of Division E of the Consolidated Appropriations Act 2018, Pub. L. No. 115-141 (March 23, 2018) contained provision that froze the payable pay rates for certain covered senior political appointee employees and the Vice President at the 2013 pay rate through calendar year 2018. The official rates for the Vice President and the Executive Schedule continued to be adjusted annually in accordance with applicable law, but because of the pay freeze, senior political appointee employees and the Vice President would continue being paid at the 2013 pay rates. For employees who are not covered by the pay freeze, there is an indirect impact on their pay rate as well. The 2013 pay rates, not the 2019 pay rates, are used in establishing maximum pay rates for employees not covered by the pay freeze. To implement the complicated pay provisions of the Consolidated Appropriations Act 2018, the Office of Personnel Management (OPM) issued guidance to agencies' head(s) and human resource director(s).⁹

On December 28, 2018, OPM advised agencies that the President had issued an Executive Order 13856 establishing the 2019 pay schedules for certain Federal civilian employees.¹⁰ OPM advised agencies that unless extended by legislation, the pay freeze for the Vice President and certain senior political appointees at the 2013 level would end on the last day of the last pay period that begins in calendar year 2018 and the first pay period in calendar year 2019, pay rates could increase to the 2019 pay schedule. In addition, if the pay freeze ended, the corresponding maximum pay rate for other non-covered pay freeze employees could increase. OPM advised agencies that the maximum rate of basic pay for Senior Level (SL) employees covered by an OPM certified SL performance appraisal system would be \$189,600 (EX-II). SL employees not covered by an OPM certified SL performance appraisal system would be \$174,500 (EX-III).¹¹

On January 4, 2019, OPM advised agencies that Congress had not yet acted as to whether

⁶ See *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (Nov. 9, 2005).

⁷ See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

⁸ *Id.* at 5.

⁹ See Off. of Pers. Mgmt., CPM 2018-08, Continued Pay Freeze for Certain Senior Political Officials (Apr. 6, 2018).

¹⁰ See Off. of Pers. Mgmt., CPM 2018-23, Executive Order for 2019 Pay Schedules (Dec. 28, 2018).

¹¹ See *id.*

to continue a freeze on the payable rates for certain senior political officials. Agencies were advised that it would be prudent for agencies, but not required, to continue to pay senior political officials at the 2013 rate until the 2019 appropriations legislation was enacted that would clarify the status of the pay freeze.¹² If an agency were to follow OPM's advice, they would apply the prior 2018 maximum pay rate limitations to covered and non-covered employees in calendar year 2019.

The Respondent states they were advised that they were eligible for SL status within the Department if they choose to convert from the GS pay schedule to the ES pay schedule. The Respondent was told that their new SL appointment salary would be \$170,000. Respondent was later informed approval had been given to raise the pay rate to \$172,500. A personnel action with an effective date of January 20, 2019, was processed and converted the Respondent's pay rate from a GS-15 Step 10 to an SL at \$172,500 annually.

The pay freeze at 2013 rates for certain senior political appointees, as well the corresponding maximum pay limitations for non-covered employees, was not in effect from January 6, 2019 to February 15, 2019. However, with the enactment of the Consolidated Appropriations Act 2019, Pub. L. No. 116-6 (Feb. 15, 2019) and issuance of Executive Order 13866 (Mar. 28, 2019) the pay freeze and maximum pay limitations were reinstated with retroactive applicability beginning with the first pay period commencing in 2019, which was January 6, 2019. OPM issued guidance on this subject on March 28, 2019.¹³

However, the Department did not apply the maximum pay limitations retroactively to the Respondent's pay. Then based upon the Respondent's 2019 pay rate, the Department processed a 3.02% pay increase for performance effective January 5, 2020. For unknown reasons, the Department did not discover that Respondent's 2019 pay rate exceeded the maximum allowable amount until OPM questioned the Respondent's pay a year later in 2020. The Department does not have an OPM certified SL performance appraisal system, and as such the maximum the employee could be paid was \$165,300.

When a personnel action is authorized for an employee, the employee is issued a form entitled SF-50 Notification of Personnel Action. This form provides notice to the employee of the authorized personnel action. The employee has a duty to review any SF-50 issued for clearly identifiable errors.¹⁴ In this matter, there was no error on the SF-50 for the Respondent to identify. The Department was permitted to pay the Respondent at \$172,500, albeit for a short period of time. Respondent was compensated at the level at which they had agreed to convert from the GS pay schedule to the ES pay schedule.

In this case, understanding the maximum pay rate for an SL employee would require the Respondent to possess specialized knowledge of personnel terms, OPM's guidance to agency heads, and multiple federal pay regulations. There is nothing in the record that the employee had or should have had specialized knowledge of complex federal pay regulations relating to the

¹² See Off. of Pers. Mgmt., CPM 2019-01, Pay Freeze for Certain Senior Political Officials during Lapse in Appropriations (Jan. 4, 2019).

¹³ See Off. of Pers. Mgmt., CPM 2019-14, Modified Pay Freeze for Certain Senior Political Officials (Mar. 28, 2019).

¹⁴ See *In re Robert*, Dkt. No. 06-77-WA, U.S. Dep't of Educ. (Nov. 7, 2006).

maximum pay rate for an SL employee. There is nothing in the record to indicate that the employee had or should have known that their pay rate had to be retroactively adjusted and that the performance pay increase they received was incorrect. There is nothing in the record to indicate the overpayments are the result of fraud or from the Respondent's actions, statements, or failures to disclose information. Thus, I conclude that the Respondent could not have known that their pay rate was erroneous, and the Respondent is without fault as defined under waiver standards.

Equity and Good Conscience

If the Respondent is without fault for the overpayment, the Respondent may successfully obtain waiver of a debt after the Respondent shows that it is against equity and good conscience to recover the overpayment.

There are no rigid rules governing the application of the equity and good conscience standard. The tribunal must balance equity and/or appraise good conscience in light of the particular facts of the case.¹⁵ Factors weighed by the tribunal include whether the debt is substantial; whether repayment would be unconscionable in the Respondent's unique circumstances; whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment; and whether the collection of the debt would impose an undue financial burden.¹⁶

The Respondent argues that it would be against equity and good conscience to require repayment of the amount owed because they changed their position based on the reliance of the incorrect pay rate and repayment would also be a significant financial hardship. When a change debtor's position for the worse based on the overpayment is established, it can be against equity and good conscience to require repayment of the overpayment.¹⁷ Prior waiver decisions have also found that it can be against equity and good conscience to require repayment of overpayment when there is change in the debtor's position for the worse based on the overpayment.¹⁸

In Respondent's waiver request, Respondent explains their decision to accept the conversion from the GS pay schedule to the ES pay schedule was because the offered rate of pay was more than their current rate of pay. However, without the overpayment, the Respondent was actually now in a worse position than before their pay plan conversion. The Respondent was a GS-15 with a pay rate of \$166,500 and the correct SL pay rate for the Respondent was \$165,300. Respondent attests that they would not have accepted the pay plan conversion if their correct SL pay rate was lower than their GS pay rate. In addition, Respondent's living expenses and financial responsibilities were made in reliance of the rate of pay offered from the pay plan conversion.

¹⁵ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (Sept. 14, 2005).

¹⁶ *In re K*, Dkt. No. 16-05-WA, U.S. Dep't of Educ. (May 11, 2017) at 3, and cases cited.

¹⁷ See *King v. Off. of Pers. Mgmt.*, 730 F.3d 1342 (Sept. 13, 2013).

¹⁸ See *In re EF*, ID: 20111820389, U.S. Dep't of Educ. (Apr. 5, 2022); *In re RB*, Dkt. No. 14-31-WA, U.S. Dep't of Educ. (May 18, 2015).

Prior waiver decisions have found that repayment of a large debt, like in this matter, could impose an undue hardship and repayment would be against equity and good conscience.¹⁹ The Respondent has also submitted a financial hardship narrative and substantial documentation including a monthly income and expenses statement with corresponding bills. In addition, the Respondent is responsible for five dependents, including care for two dependents with special needs. In addition, the Respondent has attested to unexpected extra expenses and loss of family income related to the COVID-19 pandemic. After careful review of the Respondent's submitted hardship documentation, the tribunal finds that collection of the debt would cause financial hardship for the Respondent and their family.

I find that, without question, it would be against equity and good conscience to now require Respondent and Respondent's family to face financial hardship by repaying a portion of the salary that they were promised in their conversion to an SL appointment and due to an administrative error beyond their control – and without their knowledge – are now not entitled to receive. The Respondent has satisfied both the fault and equity standards, and I grant the requested waivers.

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 \$8,920.63 is **HEREBY GRANTED**. This decision constitutes a **FINAL AGENCY** decision.

So ordered this 20th day of February 2024.

George H. Abbott, III
Waiver Official

¹⁹ See *In re DA*, Dkt. No. 21-20-WA, U.S. Dep't of Educ. (Jul. 1, 2021); *In re M*, Dkt. No. 16-30-WA, U.S. Dep't of Educ. (Oct. 14, 2016).