



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

Docket No. 18-03-WA

V W,

Waiver Proceeding

Respondent.

DECISION GRANTING WAIVER

At issue in this case is whether an employee of the U.S. Department of Education (Department) should be granted a waiver of \$1,724.89¹ for salary overpayments. These overpayments occurred because the Department rescinded a within-grade step increase (WIGI) for the employee. This retroactive personnel action caused an incorrect increase in the employee's salary. For the reasons that follow, this tribunal concludes that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is 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.² 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),³ 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 provided by the Respondent, documents

¹ This amount is from the Bills of Collection (BoC): Debt ID 80021633777.

² 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>.

³ The *Handbook*, ACS-OM-04, was revised and reissued by the Department on Jan. 19, 2012.

compiled by the Department's payroll office and the Bill of Collection (BoC). This tribunal has reviewed all the submissions that are in the record. This decision constitutes a **FINAL** agency decision.

Discussion

This tribunal has reviewed the submitted evidence, and has determined that the record contains sufficient evidence to determine whether to grant Respondent's waiver request. The record is now closed and the matter is ready for decision.

Currently before this tribunal in this matter are the following documents:

- (1) Respondent's request for a waiver dated January 19, 2018;
- (2) Bill of Collection from the Department of the Interior (DOI) dated January 3, 2018;
- (3) SF-50 Notification of Personnel Action with Effective Date of November 13, 2016, and an Approval Date of November 25, 2016, with Nature of Action identified as REG WRI;
- (4) SF-50 Notification of Personnel Action with Effective Date of November 13, 2016, and an Approval Date of December 7, 2017, with Nature of Action identified as CANCELLATION;
- (5) Six Earnings and Leave Statements (ELS) for Pay Periods (PPs) 201723 to 201802;
- (6) Respondent's supplement sworn statement dated August 17, 2018.

On January 23, 2018, OHA received a waiver request from the Respondent for an overpayment identified in a January 3, 2018, BoC as Debt ID 80021633777. This tribunal requested additional documentation regarding this debt from the Respondent and the Department. On August 20, 2018, the Respondent filed additional documentation and a supplemental statement. The Department did not respond to this tribunal's numerous requests and attempts to receive additional information regarding the debt and the nature of the error.

The Respondent is a current GS-13 employee of the Department. At the time the overpayments started, the Respondent had 23 years of creditable federal service. In November of 2016, the Department issued a SF-50, with an approval date of 11/25/16, to the employee for a WIGI from a GS-12 Step 6 to a GS-12 Step 7. The SF-50 states, in box # 45, that the Respondent's last pay increase was 10/5/14. As expected, the employee started to receive the pay increase in PP 201625. The employee continued to receive compensation at the GS-12 Step 7 rate until PP 201725. The employee inquired about an anticipated promotion to a GS-13 in November of 2017. After researching the matter, the Department informed the Respondent that it had discovered the WIGI from a year ago was processed in error. The Department did not provide any additional documentation to the Respondent as to why the Respondent was not entitled to the November 2016 WIGI and the processing error. The Department then issued a SF-50, with an approval date of 12/7/17 and effective date of 11/12/16, which rescinded the WIGI. In box # 45 of the cancellation SF-50, the only justification given for the cancellation of the WIGI was "WGI processed in error." No additional information was provided on the SF-50 regarding the error. The Department then issued a SF-50, with an approval date of 12/11/17, for a promotion from a GS-12 Step 6 to a GS-13 Step 3. The Department now seeks to recover the overpayment resulting from the cancellation of the November 2016, WIGI.

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.⁴ A WIGI is a periodic increase in an employee's basic rate of pay from one step of the grade to the next higher step of that grade.⁵ Each grade is comprised of 10 Steps. For advancements between Steps 1-4, an employee must wait 52 weeks (1 year) of service from the date of the last Step increase. Advancements between Steps 5-7 require a waiting period of 104 weeks (2 years) of service from the date of the last Step increase. Advancements between Steps 8-10 require 156 weeks (3 years) of service from the date of the last Step increase.⁶ It is well established that an employee is expected to know the required waiting periods between WIGIs and to inquire about increases that do not conform to those waiting periods.⁷

There is no clearly identifiable error(s) on the face of the SF-50 which authorized the WIGI for the employee. From the record, it appears that the appropriate waiting period had occurred before the WIGI was authorized for the employee. There is nothing in the record that contradicts the Respondent's well placed belief that the WIGI was appropriate. There is also nothing in the record that indicates that the employee should have known the WIGI was erroneously processed. There is nothing in the record to indicate why the WIGI was erroneous.

There is nothing in the record to indicate the overpayments in this matter were a result of the Respondent's fraud, actions, statements, or failures to disclose information. There is nothing in the record which contradicts the Respondent's sworn statement or indicates that at any time the Respondent had actual knowledge of the overpayments, until the Respondent was notified by the Department about the overpayments.

Fault Standard

In a waiver proceeding, the debtor acknowledges the validity of the debt, but 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,⁸ 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

⁴ See *In re Robert*, Dkt. No. 06-77-WA, U.S. Dep't of Educ. (Nov. 7, 2006).

⁵ See 5 C.F.R. § 531.405(a).

⁶ See *id.*

⁷ See *In re J*, Dkt. No. 15-50-WA, U.S. Dep't of Educ. (Nov. 9, 2015); *In re Nicole*, Dkt. No. 09-07-WA, U.S. Dep't of Educ. (July 30, 2009); *In re Pedro*, Dkt. No. 06-78-WA, U.S. Dep't of Educ. (April 13, 2007); *In re Jeanette*, Dkt. No. 06-11-WA, U.S. Dep't of Educ. (Sept. 20, 2006); *In re Jay*, Dkt. No. 06-01-WA, U.S. Dep't of Educ. (June 23, 2006).

⁸ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005).

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 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.⁹ 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.¹⁰ Thus, every waiver case must be examined in light of its particular facts and circumstances.¹¹ Waiver cannot be granted if a debtor is unable to satisfy the fault standard.

The Respondent argues that they did not know, and had no reason to suspect that the WIGI was processed erroneously. The employee would have received numerous WIGIs, during their 23 years of federal service. As the appropriate waiting period for the next WIGI had expired, and the employee had not received any notice that a WIGI would not be given, the employee would have no reason to question the WIGI at issue. Consequently, Respondent had a reasonable basis to believe the WIGI was valid. This tribunal also finds that the Respondent could not have known the WIGI was otherwise erroneous, in particular since there is no evidence by the Department of the error. Therefore, this tribunal concludes 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.¹² Factors weighed by the tribunal include whether recovery of the claim would be unconscionable under the circumstances and whether collection of the debt would impose an undue financial burden.¹³

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

¹⁰ See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

¹¹ *Id.* at 5.

¹² 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).

¹³ See *id.*

The Respondent argues that it would be against equity and good conscious to require repayment of the amount owed because it would be hardship. The Respondent has submitted documentation to support the claim that it would be hardship for the Respondent to repay the debt. The Respondent's household is comprised of three dependents, with one of the dependents being disabled. The Respondent is the sole income earner for the household. After careful review of the Respondent's submitted hardship documentation, the tribunal finds that collection of the debt would cause undue hardship for the Respondent. Therefore, the collection of the debt is against equity and good conscience.

CONCLUSION

Respondent has requested a waiver of the entire debt. In light of the foregoing, the tribunal finds: (1) that Respondent has met the burden of proof and satisfied the fault standard and (2) that the collection of Respondent's debt is against equity and good conscience. Therefore, I find that a waiver of this debt should be granted.

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 \$1,724.89 Debt ID 80021633777 is HEREBY GRANTED. This decision constitutes a final agency decision.

So ordered this 14th day of January 2019.

X

George H. Abbott, III
Waiver Official