



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

Docket No. 18-24-WA

J,

Waiver Proceeding

Respondent.

DECISION GRANTING WAIVER

At issue in this case is whether an employee of the Department of Education (Department) should be granted a waiver of \$1,836.12¹ for salary overpayments. These overpayments occurred because the Department erroneously changed the Respondent's Duty Station. The change in Duty Station 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

¹ This amount is the sum of two Bills of Collection (BoC): Debt ID # 81281579636 for \$1,394.04 and Debt ID # M1822500001 for \$442.08.

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.

request for waiver, supplemental documentation provided by the Respondent, documents 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

On May 21, 2018, OHA received a waiver request from the Respondent for an overpayment identified in a May 10, 2018 BoC (Debt ID 81281579636). On May 22, 2018, the Respondent was informed that the Department collected another overpayment without providing proper notice to the Respondent as required under 34 C.F.R. § 32.3. The Respondent requested the return of the collected funds. On August 13, 2018, the Department issued a BoC for Debt ID MI822500001 to collect the funds refunded to the Respondent. At the request of the Respondent, the two BoCs are consolidated into this one waiver proceeding.

The Respondent is a current GS-12 employee of the Department. At the time the overpayments started, the Respondent had just completed one year in federal service at the GS-9 level. During the 1st year of service, the employee notified the Federal Student Aid Human Resource department (FSA HR) that the Department listed an incorrect social security number (SSN) in the electronic personnel file. Despite numerous attempts by the employee, the Department did not resolve the SSN problem until pay period (PP) 02-2018. It was during the correction process for the SSN problem that the Department discovered other errors in the employee's personnel record. The Department had also erroneously changed the employee's Duty Station⁴ from Philadelphia, PA to Washington, DC. A change in an employee's Duty Station can cause an increase or decrease in an employee's salary. An employee's salary is the sum of the base pay rate plus any Locality Pay Adjustment (Locality Pay).⁵ The Locality Pay rate for Washington, DC is more than the Locality Pay rate for Philadelphia, PA. The erroneous change in Duty Station for the employee caused an overpayment from PP 05-2017 to PP 10-2018.

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.⁶ Some of the information presented on an SF-50 may be novel to that particular employee. One such example is the label "Duty Station," in box numbers 38 and 39 of the SF-50. The label "Duty Station" actually means the employee's determined official worksite location.⁷ The SF-50 is a complex form as it contains 50 data fields. For example, in box number 38 of the form, Duty Station of the employee is given a nine digit numeric code. A human resource specialist or an individual with specialized knowledge of the federal pay system would be readily able to translate the numeric code into a geographic location. Neither an

⁴ See 5 C.F.R. §§ 531.602 and 605 (2012) for a definition of worksite location (Duty Station) and how to determine an employee's worksite location.

⁵ See Federal Employees Pay Comparability Act of 1990 (FEPCA), Pub. L. No. 101-509 (Nov. 5, 1990). FEPCA establishes a locality pay system for General Schedule (GS) employees. The employee's official worksite location determines the entitlement to a particular locality pay rate.

⁶ See *In re Robert*, Dkt. No. 06-77-WA, U.S. Dep't of Educ. (Nov. 7, 2006).

⁷ See 5 C.F.R. § 531.605 (2012).

untrained individual nor an individual with no familiarity of federal pay would be readily able to decipher the Duty Station geographic code. In box number 39 of the SF-50, the Duty Station is listed in a city and state format. The data contained in boxes 38 and 39 should match. The SF-50 also lists in box numbers 18 and 19 the name and location (city and state) of the employing agency. The employing agency location may also be the same as the employee's Duty Station in boxes 38 and 39. An employee would need a basic understanding of the federal pay system, the type of personnel action and the employing agency's organization structure in order to determine if box numbers 18, 19, 38 and 39 should match. The complexity of data presented on the SF-50 could be confusing to a new federal employee who possesses no specialized knowledge of the federal pay system.

This tribunal notes that the Department completed five personnel actions between PP 05-2017 and PP 10-2018 which all contained errors. It appears to this tribunal the following is the sequence of errors by the Department which led to the entire overpayments. On January 24, 2016, the Department generated an SF-50 to hire the Respondent. This 1st SF-50 already contained an error. The SSN for the employee was incorrectly entered in box number 2 of the SF-50. However, this SF-50 did correctly identify the employee's Duty Station (Philadelphia, PA) in box numbers 38 and 39. Then a year later, in PP 04-2017, the Department authorized a within-grade pay increase for the employee (from GS-9 Step 1 to Step 2). This SF-50 also contained the wrong SSN for the employee, but the employee's Duty Station was correctly identified. In the very next pay period (PP 05-2017), the Department authorized a promotion for the employee from a GS-9 Step 2 to a GS-11 Step 1. This SF-50 contained the wrong SSN for the employee as well as the incorrect Duty Station (Washington, DC) for the employee. Then another year later, in PP 02-2018, the Department finally issued an SSN corrective SF-50 for the initial hiring SF-50. Then, in PPs 05-2018 and 06-2018, the employee was given a within-grade increase and a promotion from a GS-11 Step 2 to GS-12 Step 1. The SF-50s for these actions incorrectly identify the Duty Station of the employee, but the employee's SSN was now correct. Then, in PP 08-2018, the Department issued six corrective SF-50s for all the SF-50s that incorrectly identify the employee's Duty Station. However, two of the corrective SF-50s also contained errors and erroneously relisted the employee's Duty Station as Washington, DC. In PP 11-2018, the employee's Duty Station was finally correctly listed for all prior SF-50s. The employee's Leave and Earnings Statement (LES) did mirror the Duty Station as listed on each SF-50. When the employee's Duty Station changed in PP 05-2017 to Washington, DC, the employee's LES listed the duty station as Washington, DC. However, the LES does not display the employee's position type which was incorrectly coded in twelve SF-50s. This tribunal notes the gross salary amount difference for Locality Pay between Washington, DC and Philadelphia, PA created a \$74.00 overpayment per pay period. However, the net salary amount difference between those two locations was a \$34.00 overpayment per pay period.

The employee asserts they had no knowledge of the overpayments because of the numerous personnel actions processed so close in time. The employee states they anticipated an increase in salary because of the within-grade increase and promotions. When the employee's salary increased, the employee believed the salary increase was accurate and had no reason to question the amount of salary increase. There is nothing in the record to indicate the employee reviewed their LES or SF-50 for errors after receiving the within-grade pay increases or the promotions. The employee's Duty Station has never changed since the initial determination of the employee's Duty Station (January 2016), and the employee's Duty Station was correctly

displayed on the SF-50 and LES when hired. Therefore, the employee believes there was no reason to suspect an error regarding the Duty Station data. Neither the Respondent nor the Department was aware of the overpayment problem until PP 02-2018.

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 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,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 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 unable to satisfy the fault standard.

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

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.

The fault standard is satisfied, for example, when the circumstances of the debt show that the employee could not have known he or she was erroneously overpaid. An application of this standard by this tribunal can be found in the matter of *In Re E.*, Dkt. No. 16-18-WA, U.S. Dep't of Educ. (Feb. 9, 2018). In that case, a newly hired employee's mandatory contribution to a retirement system was erroneously calculated resulting in insufficient deductions from the employee's earnings. The Department only deducted 3.1% of the Respondent's gross salary for contribution to the Federal Employees Retirement System (FERS) Basic Benefit Plan.¹² The Department should have deducted 4.4% of the Respondent's gross salary for contribution to FERS. This insufficient payroll deduction caused the employee to be overpaid. The employee expected a payroll deduction for retirement, and based on the LES, the employee saw a retirement deduction. However, the employee did not realize or understand that a wrong percentage was used to calculate the deduction, and that an overpayment had occurred.

That tribunal found that an employee has a duty to review his or her LES and that the employee should know an overpayment occurred if there is an indication of the overpayment on the employee's LES.¹³ However, there were mitigating factors that prevented the employee from recognizing an overpayment on the LES. The tribunal found that the employee would need to have an understanding of the regulations regarding an employee's mandatory contribution to a federal retirement system to recognize the overpayment on the LES. The regulations regarding an employee's mandatory contribution to a federal retirement system were confusing and, therefore, the employee would be unfamiliar with the federal pay system. The employee did not possess any specialized knowledge of the federal pay system, and since the erroneous information present on the SF-50 and LES would not readily be apparent to a new employee, then the employee was not at fault for the overpayment because of the mitigating factors.

Conversely, 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 can be seen in the matter of *In Re M.*, Dkt. No. 16-12-WA, U.S. Dep't of Educ. (May 11, 2016). In that case, the employee's Duty Station was listed as Atlanta, GA on the initial hiring SF-50. When the employee received a promotion, the employee's Duty Station was erroneously changed. The SF-50 for the promotion identified the employee's Duty Station as Washington, DC. The employee's actual Duty Station was Atlanta, GA and not Washington, DC. The employee did not review the promotion SF-50 until several months after receiving notification of the promotion SF-50. When the employee reviewed the promotion SF-50, the employee discovered the erroneous change in Duty Station. The erroneous change in Duty Station caused an overpayment. That tribunal found no mitigating factors to the employee's duty to review the LES and SF-50, and found the employee at fault for the overpayment.

¹² See 5 U.S.C. § 8402 which defines FERS and Basic Benefit Plan. As a limited overview, FERS is a retirement plan that provides benefits to a retiree from three different sources: a Basic Benefit Plan, Social Security and the Thrift Savings Plan (TSP). The Basic Benefit and Social Security parts of FERS require the employee to pay a contribution each pay period. As a result, an agency withholds the cost of the Basic Benefit and Social Security from an employee's pay as payroll deductions.

¹³ See *In Re Danae*, Dkt. No. 13-28-WA, U.S. Dep't of Educ. (Oct. 24, 2013) at 3, 4; *In re Lester*, Dkt. No. 11-47-WA, U.S. Dep't of Educ. (Dec. 27, 2012) at 4; *In re April*, Dkt. No. 12-23-WA, U.S. Dep't of Educ. (July 11, 2012) at 7.

This case is similar to *In Re E*, and unlike *In Re M*, there are mitigating factors in this case that reasonably prevented the employee from identifying and understanding an overpayment had occurred. More specifically the mitigating factors are the newness to federal service, the employee's lack of experience and understanding of the federal pay system, and for this particularly employee, the overpayment was not readily apparent. It is reasonable to conclude that because of newness to federal service and lack of specialized knowledge of federal pay, the new employee may not have understood the definition of Duty Station, why the Duty Station location is important and the correlation of Duty Station to Locality Pay. In addition, this tribunal finds that in this particular case, the employee would not be able to readily identify an overpayment from review of the SF-50 or LES. Thus, 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.

To secure a waiver based upon equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.¹⁴ 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 recovery of the claim would be unconscionable under the circumstances and whether collection of the debt would impose an undue financial burden.¹⁶

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 seven dependents, with one of the dependents needing managed care and constant supervision. The Respondent has submitted a detail monthly income and expense statement. This statement shows income only exceeds expenses by \$100.00. 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, guided by *In Re E*., the entire record and the analysis herein, I find that a waiver of this debt should be granted.

¹⁴ 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).

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 See *id.*

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 \$1,836.12 is **HEREBY GRANTED**. This decision constitutes a final agency decision.

So ordered this 5th day of November 2018.

George H. Abbott, III
Waiver Official

