



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202-4616

In the Matter of

BOOKER,

Docket No. 06-16-WA

Waiver Proceeding

Respondent.

DECISION DENYING WAIVER

Respondent, a former U.S. Department of Education (Department) employee, requested waiver of a salary overpayment debt arising from the Department's repayment of his salary for two pay periods after the Department mistakenly believed it stopped two payments it made to the Internal Revenue Service (IRS) pursuant to a subsequently lifted tax levy against Respondent for those two pay periods. Based on the reasons articulated in this decision, I find that waiver of this debt is not warranted. Accordingly, Respondent's request for a waiver is DENIED.

Jurisdiction

Respondent's waiver request arises under 5 U.S.C. § 5584, authorizing the waiver of claims of the United States against debtors as a result of an erroneous payment of pay to a federal employee.¹ 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) (June 2005), specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).²

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 initial

¹ See General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828; see also *In re Tanya*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 18, 2006) at 1, n.1.

² Information regarding the Department's salary overpayment process including the Handbook, ACS-OM-04, is available on OHA's website at: www.ed-oha.org/overpayments.

request for waiver and attached documentation, Respondent's July 12, 2006 statement, documents compiled by the Department's Human Resources office, and a November 2, 2006 statement filed by the U.S. Department of Interior's National Business Center (NBC). This decision constitutes a final agency decision.

Procedural History

According to the June 13, 2006 Notice of Debt Letter and attached Bill of Collection, the \$3,383.02 overpayment arises from 1) the Department's May 17, 2005 and May 23, 2005 repayments, \$1,441.51 and \$1,441.52 respectively, to Respondent for his salary from Pay Periods 10 and 11 of 2005, and 2) two \$250.00 payments it made to the IRS in accordance with Respondent's payment agreement for a delinquent tax debt for these reissued salary payments.³

Respondent's salary was subject to an IRS tax levy at the time the payroll was processed for Pay Period 10 of 2005. Consequently, the Department sent the IRS a payment of \$1,691.51, an amount the IRS was authorized to take under the levy and Respondent received the remainder of his salary, \$315.38. The next day, the Department's payroll contractor, the NBC, received a notice releasing the tax levy. The levy was released because Respondent reached an agreement with the IRS to pay \$250.00 per pay period towards his tax debt. NBC then requested that its \$1,691.51 payment be stopped. On May 17, 2005, believing that it stopped payment to the IRS, the NBC reissued Respondent the balance of his salary, \$1,441.51, and sent the IRS a payment of \$250.00.

In Pay Period 11 of 2005, the NBC mistakenly sent the IRS a payment of \$1,691.52 rather than the \$250.00 per Respondent's agreement with the IRS and Respondent received the remainder of his salary, \$315.38. Again, the NBC requested that the \$1,691.52 payment be stopped. On May 23, 2005, based once again on its mistaken belief that its payment was stopped, the NBC reissued Respondent the balance of his salary, \$1,441.52 and sent the IRS a payment of \$250.00.

The NBC indicates that they were not informed for several months that the two \$1,691.51 and the \$1,691.52 payments to the IRS had not been stopped.⁴ The NBC then tried to retrieve the funds from the IRS.⁵ At a later date, the NBC learned that the IRS refused to return these funds.

By letter dated June 19, 2006, Respondent filed a timely request for waiver.⁶ In a June 27, 2006 Order Governing Proceedings, Respondent was afforded an opportunity to file a statement and any supporting documentation. On July 12, 2006, Respondent filed a one-page statement.

³ The Bill of Collection contains two typographical errors that incorrectly identify the repayments as having occurred on May 17, 2006 and May 23, 2006 rather than May 17, 2005 and May 23, 2005. The tribunal notes that the salary overpayment was created in May 2005 and not in 2006 as Respondent correctly indicated in his June 19, 2006 statement. At the request of the tribunal, the Department's payroll contractor, the NBC, filed a statement on November 2, 2006 confirming the typographical errors.

⁴ See June 16, 2006 Bill of Collection and November 2, 2006 NBC statement.

⁵ The NBC submitted IRS Form 843, Claim for Refund and Request for Abatement.

⁶ On June 26, 2006, at the tribunal's request, Respondent submitted a copy of the June 13, 2006 Notice of Debt Letter and Bill of Collection.

Discussion

Waiver of an erroneous salary payment is an equitable remedy available only when there is no indication of fraud, misrepresentation, fault, or lack of good faith by the debtor.⁷ The debtor also must 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 instant proceeding is whether Respondent's arguments and submissions support a request that a portion or the entire erroneous salary overpayment be waived. There is no dispute that this case involves an erroneous payment of pay.⁸ The Department's error stems from its repayment of Respondent's salary for two pay periods although the IRS had not returned the salary funds the Department paid to the IRS on Respondent's behalf.

Fault Standard

In waiver cases, the fault standard is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. Fault 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 salary.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

Respondent asserts that he was unaware that a refund or payment problem existed between the Department and the IRS until he received the Department's June 16, 2006 Notice of Debt Letter and Bill of Collection over one year after the overpayment was created. Respondent states that he and his accountant worked out a settlement agreement with the IRS to have \$250.00 deducted each pay period and that this overpayment was created by the IRS' refusal to honor the Department's request to return the two incorrect payments. Finally, Respondent states that his resources are extremely limited and he has little, if any, disposable or discretionary income.

In applying the fault standard to this case, the tribunal concludes that Respondent is not at fault. Respondent did not cause the Department's error nor is there any evidence indicating fraud, misrepresentation or a lack of good faith. At the time of the overpayment and for several months afterward, the NBC - let alone Respondent - was not aware that the payments to the IRS were not stopped. Thus, Respondent had no reason to question the Department's repayment of his salary for Pay Periods 10 and 11 of 2005.

This case comes within the clear ruling of *In re Veronce*, which held that in certain circumstances where there is no otherwise indication of fault, an employee who neither knows

⁷ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

⁸ An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to his or her salary. See 34 C.F.R. Part 32 (2005).

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

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

¹¹ See *In re Veronce* at 5.

nor has reason to know that he or she was erroneously compensated lacks fault under the application of the fault standard. In *Veronce*, after the employee's sick leave was exhausted, she was placed in a leave without pay status while she was hospitalized. The tribunal held that the employee could not have known she was erroneously compensated because she could not check her leave statements or other documents to learn that her paid leave was exhausted.

Although this case concerns markedly different circumstances, the facts compel a similar result. The events surrounding this overpayment are so unusual and complex that it is not reasonable to expect Respondent to have recognized that the payments to the IRS were not stopped and that he was, in effect, paid twice for Pay Periods 10 and 11 of 2005. The Department's payroll contractor, the entity responsible for issuing the 2005 payments to the IRS, believed it had stopped the payments for several months after it both requested the stop payments and made a formal request to the IRS to return the funds. It is not reasonable to expect a third party, the Respondent, to know that the NBC's attempts to recover these funds from the IRS were unsuccessful. Therefore, the tribunal concludes that Respondent had no reason to recognize the salary overpayment as an erroneous payment; thus, he is not at fault for the erroneous overpayment.

Equity and Good Conscience

To secure equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.¹² Beyond this framework, 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.¹³ Factors weighed by the tribunal include the following: 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; whether recovery of the claim would impose an undue financial burden on the debtor; and whether the time elapsed between the erroneous payment and the agency's discovery of the error and subsequent employee notification is excessive.¹⁴

Although the tribunal finds that Respondent was not at fault for the overpayment, collection of the debt would not go against equity and good conscience. Given the misinformation received by the NBC and the unusual circumstances surrounding this overpayment, the tribunal finds that the time elapsed between the erroneous payment and the discovery of the error is not excessive. Further, once the error was discovered Respondent was notified within a few months, at most, that the overpayment had occurred.

While Respondent argues that repayment of the debt would create a financial hardship because he has limited financial resources that leave him little, if any, disposable or discretionary income, he did not submit any evidence documenting his financial hardship. Consequently, Respondent has failed to demonstrate that collection of this debt would create a financial

¹² See 5 U.S.C. § 5584 and *In re Veronce*, at 5.005) and 5 U.S.C. § 5584.

¹³ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (December 14, 2005).

¹⁴ See *id.*

hardship. Moreover, Respondent gained the benefit of the two reissued salary payments and the two \$250.00 payments to the IRS. The tribunal further notes that the original two payments of \$1,691.51 and \$1,691.52 to the IRS also benefited Respondent in that these payments reduced his tax debt. As a result, Respondent was, in effect, paid twice for Pay Periods 10 and 11 of 2005. Therefore, Respondent has not shown that recovery of the debt would be unconscionable or otherwise inequitable. Despite Respondent's failure to prevail on the equity portion of the waiver standard, the tribunal recognizes that Respondent's repayment may be financially difficult. In such circumstances, Respondent may wish to avail himself of the various repayment options offered by the Department.

ORDER

Respondent requested waiver of the entire debt. Having found that the circumstances of this case do not conform to the threshold factors warranting waiver, Respondent's request for waiver of the entire debt is **DENIED**.

So ordered, this 8th day of November 2006.

A handwritten signature in cursive script that reads "Greer Hoffman". The signature is written in black ink and is positioned above a horizontal line.

Greer Hoffman
Waiver Official