



UNITED STATES DEPARTMENT OF EDUCATION

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In the Matter of
JOHN,

Docket No. 06-17-WA
Waiver Proceeding

Respondent

DECISION GRANTING WAIVER

The issue in this case is whether a former 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 cash award that was declined by Respondent while he was an employee. For the reasons that follow, I find that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

DISCUSSION

I.

In May 2005, Respondent's supervisor informed Respondent that he would be receiving a performance-based cash award in the amount of \$4,200. Subsequently, Respondent received a cash award of \$750. According to Respondent, his peers informed him that they had received \$4,200. Respondent "protested the shortfall" between what he believed his peers received and the amount he was awarded, but declined to file a grievance. Instead, Respondent sent an email to his supervisor's superior indicating that he "declined the award." Respondent was paid his cash award in pay period 20 of 2005. The Department "canceled" the cash award in pay period 22 of 2005. For reasons that are not apparent, the cancellation of the cash award did not result in a deduction from Respondent's pay of the amount of the cash award while the Department employed Respondent. On February 28, 2006, Respondent retired from federal civil service.

The resolution of this case is based on matters accepted as argument and evidence. The record includes a copy of a July 8, 2006 letter by Respondent addressed to Congressman Frank R. Wolf of the United States House of Representatives,¹ the submission of a written statement dated July 19, 2006 by Respondent, a copy of a notice of debt letter dated July 3, 2006, and a

¹ Respondent's letter to Congressman Wolf ostensibly expresses Respondent's frustration with the Department regarding receiving a debt notice after he retired from civil service.

copy of a Bill of Collection (BoC) dated June 20, 2006.

The pertinent statutory authority for waiver of a salary overpayment is set forth by the General Accounting Office Act of 1996 (the Waiver Statute), which authorizes the waiver of claims of the United States against debtors as a result of an erroneous payment of pay to a Federal employee.² The Department's *Salary Overpayment Handbook*, ACS-OM-04, specifically delegates waiver authority involving all former and current employees of the Department to the Office of Hearings and Appeals (OHA), which, thereby, exercises waiver authority on behalf of the Secretary. The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.³ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. 5584.⁴ In addition, regulations governing contributions and withholdings of health care premiums promulgated by the Office of Personnel Management (OPM) explicitly provide that in cases where an overpayment is "caused by failure to properly withhold employee health benefits contributions" by the agency, the debt is subject to waiver under 5 U.S.C. § 5584.⁵

II.

Respondent argues that collection of the debt should be waived because his financial means have been dramatically reduced from what they were over a year ago when he explicitly declined the cash award. Now, Respondent's financial resources are limited to his retirement income. In addition, Respondent argues that collection of the debt is unfair. To underscore his unfairness argument, Respondent urges that it is unfair to claim as a debt a form of pay to which an employee is entitled, notwithstanding that employee expressed an objection about the amount of payment. For its part, the Department concluded that Respondent's decision to decline his cash award constituted a valid basis to cancel the personnel action authorizing the payment of the award.

The Department employs an "incentive awards" policy that includes an awards program that links cash awards to performance.⁶ Under the program, an annual cash award is based directly on an employee's annual performance rating. Generally, employees who receive an outstanding or highly successful performance appraisal are eligible for a baseline cash award. The Department's policy follows 5 U.S.C. 4505a, which instructs that a federal worker "whose

² General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (the Waiver Statute); *see also 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 all salary overpayment debt collection) and 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). *See also* government-wide regulations issued by the Office of Personnel Management (OPM) (5 C.F.R. Part 550, Subpart K) and overpayment procedures on the Office of Hearings & Appeals website at: www.ed-oha.org/overpayments/

³ *See*, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

⁴ Under the 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).

⁵ 5 C.F.R. § 890.502(c)(2).

⁶ *See, e.g.*, Personnel Manual Instruction, (PMI) 451-1, effective May 26, 2006. Although the 2006 policy supersedes PMI 451-1 dated October 15, 1997, the awards program mandated by the previous policy was not changed by the new policy in any respect relevant to the matter at issue in this case.

most recent performance rating was at the Fully Successful level or higher (or the equivalent thereof) may be paid a cash award.” In this regard, the standards for eligibility for performance-based cash awards are set forth by statute and agency policy.

The standard for determining whether 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, and (2) whether Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment.⁷ Measured against these factors, 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 Guided by the facts and issues pertinent to this case in applying the fault standard, I find that there is no misrepresentation, fraud, fault, or lack of good faith on Respondent’s part.

It is fundamental to the analysis of when waiver may be granted that when an employee fails to review documentary records, including notices of personnel action and/or leave and earning statements, which, if examined, would have shown or identified an overpayment and provided the employee with an opportunity to correct the overpayment, the employee is not free of fault. Applying this standard to the facts, there is no basis to conclude that Respondent accepted an erroneous salary payment that he knew or should have known was erroneous. Indeed, Respondent claims - - and there is no evidence to the contrary - - that he discovered the actual amount of his cash award at the time he received the cash award payment. More to the point, Respondent’s eligibility and, ultimately, entitlement to the cash payment was never in doubt. As indicated above, the standards for eligibility for performance-based cash awards are set forth by statute and agency policy, and there is no disagreement that Respondent met the standard. As such, the payment, itself, could not trigger a corresponding duty of Respondent to correct an overpayment. In such cases, an employee’s duty to know or duty to inquire about the accuracy of his salary payment is presumptively established if the salary payment, itself, prompts the employee to communicate with management regarding the amount of the cash award.¹⁰ This conclusion must be so because Respondent’s email communication to his supervisor’s

⁷ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep’t of Educ. (Dec. 14, 2005).

⁸ Broadly stated, 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).

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 By failing to file a grievance, the Department could have asserted that Respondent did not properly object to the cash award, if so, and, under the circumstances, the Department’s position would not affect the outcome of a waiver proceeding. Moreover, by issuing a debt notice, the Department gave some effect to Respondent’s objection. As such, Respondent’s debt is clearly subject to waiver. Accordingly, it is unnecessary to reach the more general question whether an employee’s decision to inform superiors that he or she did not want a cash award because the amount is insufficient may ultimately transform a payment to which an employee is entitled into a debt.

superior ostensibly both identified the occurrence of an overpayment as well as attempted corrective action for the overpayment.

What is more, it is worthy of note that although federal agencies maintain a level of discretion over the timing and amount of performance-based cash awards, that area of discretion is not encompassed in actions subsequent to the determination that an employee is eligible and entitled to payment.¹¹ As has been made evident by statute, Congress mandated a government-wide rule that federal employees whose most recent performance rating is commensurate with the statutory threshold summary rating level become eligible for a cash performance award.¹² As such, employees awarded cash are entitled to the award as long as they are otherwise eligible to receive it. The Department points out no rule - - and the tribunal does not know of any - - that would alter this result. Accordingly, I find that Respondent satisfies the initial factor for determining whether waiver is appropriate.

Having found no fault or lack of good faith on Respondent's part, the remaining question is whether it is against equity and good conscience for the Federal government to recover Respondent's debt. Our waiver decisions have adopted a number of factors pertinent to determining whether collection of a salary overpayment is against equity and good conscience, including the following: (a) whether recovery of the claim would be unconscionable under the circumstances; (b) whether, because of the erroneous payment, the employee either has relinquished a valuable right or changed positions for the worse, regardless of the employee's financial circumstances; (c) whether recovery of the claim would impose an undue financial burden upon the debtor under the circumstances, (d) whether the time elapsed between the erroneous payment and discovery of the error and notification of the employee is excessive or affects the magnitude of the debt, (e) whether an agency's response to inquiries regarding an overpayment is unreasonably excessive, (f) whether an agency's handling an overpayment case demonstrates gross negligence, and (g) whether the cost of collecting the claim equals or exceeds the amount of the claim.¹³

¹¹ See, e.g., *Department of the Army, Aberdeen Proving Ground v. FLRA*, 890 F.2d 467, 470, 474 (D.C.Cir.1989).

¹² 5 U.S.C. § 4505a(a)(1).

¹³ See, e.g., *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005); *In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (October 19, 2005); *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005), and U.S. Dep't of Energy Order 533.1, *Collection from Current and Former Employees for Indebtedness to the United States*, (September 26, 2003), at <http://www.directives.doe.gov/pdfs/doe/doetext/neword/533/o5331.html>. The aforementioned factors notwithstanding, when reading meaning into the phrase "equity and good conscience" one necessarily draws upon precepts of fairness and justice rather than confining judgment to rigid rules of uncommon meaning. See, e.g., *Perrin v. United States*, 444 U.S. 37 (1979) and *Gilles v. Department of Human Resources Development*, 11 Cal.3d 313 (1974).

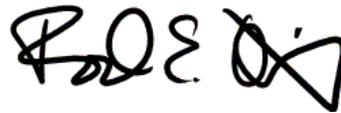
In the case at bar, Respondent states that it is against equity and good conscience to recover the debt because he lacks the financial capacity he maintained while working. In addition, Respondent argues that it is against equity and good conscience to collect the debt because the debt arose as a result of the Department's error. As an additional argument, Respondent claims that the debt arises as part of an apparent animus by a former manager and, therefore, should be waived on that basis. In Respondent's view, the approving official of the performance-based award intentionally and in bad faith reduced the amount of his bonus from \$4,200 to \$750. The proper framework for assessing Respondent's latter argument draws from *In re Cynthia*, wherein the tribunal acknowledged that the "vicissitudes of Respondent's relationship with [a] supervisor" are impertinent to the equitable interests weighed in analyzing waiver requests.¹⁴ As a practical matter, it is not novel or unexpected that employees may have conflicts with managers or supervisors; consequently, this unexceptional occurrence cannot have heavy bearing on the equitable interests weighed in granting waivers. More to the point, this case presents no reasonable basis to depart from the general framework.

More directly, to underscore the fundamental unfairness that should be accorded the collection of the debt in this case, Respondent calls attention to the fact that the Department is attempting to collect a debt more than one year after he declined the cash award, and several months after he has retired. In light of this argument, and the findings noted *infra* concerning Respondent's entitlement to the cash award, I find that the facts tip the balance of equities in favor of Respondent and against recovery of the debt.¹⁵ Accordingly, the collection of Respondent's debt arising from the Department's payment of a cash award that was declined by him is against equity and good conscience, and is otherwise not in the best interests of the United States.

ORDER

Respondent's request for waiver of the entire debt is **GRANTED**. This decision constitutes a final agency decision.

So ordered this 24TH day of August 2006.



Rod Dixon
Waiver Official

¹⁴ Dkt. No. 05-16-WA, U.S. Dep't of Educ. (October 31, 2005).

¹⁵ See, *In re Cynthia*, Dkt. No. 05-16-WA, U.S. Dep't of Educ. (October 31, 2005) (setting forth the factors of unconscionability that support a determination that the collection of the debt would be against "equity and good conscience").