



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of
DAWN,

Docket No. 06-61-WA
Waiver Proceeding

Respondent

DECISION DENYING WAIVER

The question this case resolves is whether an 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 erroneous payment of a duplicate cash award in the amount of **\$985.50**. For the reasons that follow, I find that waiver of the debt is not warranted. Accordingly, Respondent's request for waiver is denied.

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.¹ 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 & APPEALS (OHA), which, thereby, exercises waiver authority on behalf of the Secretary. On July 20, 2006, Respondent's case was transferred to OHA for resolution. The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.² Jurisdiction is proper under the Waiver Statute at 5 U.S.C. 5584.³

¹ 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/.

² *See*, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

³ 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).

The resolution of this case is based on matters accepted as argument and evidence. The record includes a copy a signed and sworn written statement dated February 6, 2004 (and updated on November 16, 2006) by Respondent regarding the waiver request, a copy of a notice of debt letter dated January 30, 2004, and a copy of a Bill of Collection (BoC) dated December 23, 2003, and a copy of a check paid to the order of the United States Department of Education in the name of Respondent dated February 6, 2004 in the amount of \$985.50.

DISCUSSION

In August 2003, Respondent was paid a cash award of \$1000. In the following month, September 2003, Respondent received a second cash award of \$1000. The second cash award was paid to Respondent as a result of an administrative error. In February 2004, Respondent repaid the second cash award, but requested a waiver of the salary overpayment and a refund. According to Respondent, although, at the time, the receipt of the second cash award was “perplexing,” she concluded that it was proper because “it is within the scope of the Department to give an adjusted second award for the merits of the award that was given originally.” Respondent also argues that a waiver of the salary overpayment is appropriate because the honor of receiving the initial award is diminished when the second award is determined to be a debt rather than a payment reflecting on the merit of the initial award. In essence, Respondent appears to argue that recovery of the improper second payment has the effect of reducing or eroding the goodwill generated by the initial award.⁴

In a waiver proceeding, the debtor acknowledges the validity of the debt or urges an absence of any reason to recognize the overpayment as an erroneous payment. 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.⁵ 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;⁶ (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.⁷

⁴ Respondent’s latter argument is cast within a framework that may carry some rhetorical appeal, but, given the tribunal’s finding identified below, it is completely beside the point.

⁵ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep’t of Educ. (Dec. 14, 2005).

⁶ 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).

⁷ 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).

As noted in *In re John*,⁸ the Department employs an “incentive awards” policy that includes an awards program that links cash awards to performance.⁹ The standards for eligibility for cash awards are set forth by statute and agency policy. In the record of this case, there is no indication that Respondent met the standard for the second cash award payment. As such, the second payment, itself, triggered 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, and the employee should communicate with management regarding the amount of the cash award. Employees awarded cash are entitled to the award only if they are otherwise eligible to receive it.¹⁰ Respondent points out no rule - - and the tribunal does not know of any - - that would alter this outcome.

Guided by the facts and issues pertinent to this case, there is no dispute that the employee knew or should have known the payment to be erroneous. The employee concedes to having been “perplex[ed]” by the second payment of the cash award; notwithstanding that Respondent, nonetheless, had hoped for the best of circumstances by viewing the second payment as an appropriate response to her work performance. What is more, Respondent had a duty to examine documentary records, including notices of personnel action and/or leave and earning statements, which, if examined, would have shown or identified the payment as an overpayment. Applying this standard to the facts, the tribunal must conclude that Respondent accepted an erroneous salary payment that she knew or should have known was erroneous. More to the point, the employee’s failure to alert the Department to the “perplexing” circumstance of the second cash award ostensibly demonstrates that Respondent ignored an opportunity to correct the overpayment. Therefore, Respondent is not free of fault. Accordingly, I find that Respondent failed to satisfy the initial factor for determining whether waiver is appropriate.

CONCLUSION

The tribunal finds that Respondent should have known that an error in salary payment existed; as such, waiver cannot be granted in this case. This decision constitutes a final agency decision.

⁸ Dkt. No. 06-17-WA, U.S. Dep’t of Educ. (August 24, 2006).

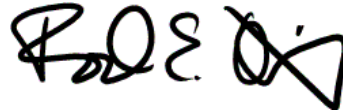
⁹ *See, e.g.*, Personnel Manual Instruction, (PMI) 451-1, effective May 26, 2006. Although the 2006 policy supersedes PMI 451-1 dated October 15, 1997, the awards program mandated by the previous policy was not changed by the new policy in any respect relevant to the matter at issue in this case.

¹⁰ *See, In re John*, Dkt. No. 06-17-WA, U.S. Dep’t of Educ. (August 24, 2006).

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 **\$985.50** is **HEREBY DENIED**. Respondent's request for a refund is **DENIED**.¹¹

So ordered this 12^H day of December 2006.



Rod Dixon
Waiver Official

¹¹ The debt in this case was repaid in February 2004.