



UNITED STATES DEPARTMENT OF EDUCATION

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

TELEPHONE (202) 619-9700

FACSIMILE (202) 619-9726

In the Matter of

JEANNE,

Respondent

Docket No. 06-67-WA
Waiver Proceeding

DISMISSAL

At issue in this case is whether an employee of the Department of Education (Department) should be granted waiver of a debt arising from an overpayment of salary in the amount of **\$800.00**. The debt resulted from an erroneous payment of salary paid to Respondent after the personnel action authorizing a special act award was cancelled. For the reasons that follow, I find that waiver of the debt is not warranted. Accordingly, Respondent's request for waiver is denied.

I.

The resolution of this case is based on matters accepted as argument and evidence. The record includes copies of two Notices of Personnel Action relating to the personnel action at issue, copies of notices of debt dated October 28, 1998 and January 15, 1999, and a copy of a Bill of Collection (BoC) dated October 22, 1998. On July 20, 2006, Respondent's case was transferred to the OFFICE OF HEARINGS & APPEALS for resolution.

The debt in this case arises from an error concerning two personnel actions. On August 21, 1998, the Department approved an \$800.00 "special act award" pursuant to 5 U.S.C. 4503 for Respondent. Subsequently, on October 8, 1998, the special act award was cancelled and a Quality Step Increase or QSI was awarded Respondent. Notwithstanding the latter personnel action, Respondent was also paid the special act award, which resulted in a salary overpayment. Respondent has repaid this debt through an involuntary salary offset; hence, if Respondent prevails in a waiver proceeding, she would be entitled to a refund of her payment.

II.

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 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.² Jurisdiction is proper under the Waiver Statute at 5 U.S.C. 5584.³

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; consequently, issues regarding the existence or the accuracy of debt are not before the tribunal. 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,⁴ 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, and guided by the facts and reasoning in *Richard*, I find that Respondent is at fault, thus precluding the application of waiver. To reach a determination on fault, the aforementioned factors are examined in light of the scope of Respondent's on-going duty to know and a duty to inquire, when appropriate, about the accuracy of her salary payments. The scope of Respondent's duty includes the obligation 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.⁶

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).

⁴ In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

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

⁶ *See, e.g.*, DOHA Case No. 97052111 (September 30, 1997) (holding that a "financial officer is expected to be familiar with the regulations" and regardless of a supervisor's mistake "a finance officer should have questioned the [over]payment").

Under the Department's waiver policy, a request for a pre-offset hearing or waiver must be made within 15 calendar days from the receipt of the initial notification letter.⁷ An employee may request an extension of time to file, if the employee can demonstrate in writing that the delay in his/her request was due to circumstances beyond his/her control and/or because of a lack of knowledge of the time due to not receiving the debt letter, the BoC, or the Email Notification of Salary Offset.⁸ Consequently, a threshold issue in this case is whether Respondent filed a timely request for waiver.

Respondent argues that her waiver request should be deemed timely because the notice of debt letter does not state: "untimely requests will be denied, without further consideration." In addition, Respondent argues that since she received a debt letter in October 1998 and January 1999 as well as a copy of the January 1999 debt letter on April 7, 2003 and June 4, 2003 these letters created multiple time periods for her to file a timely waiver request. Finally, Respondent argues that her "continuing health issues...prevented [her] from responding earlier" than August 6, 2003, which is the date she requested that her debt be waived.

The Human Resources Team, Debt Collection Coordinator, Linda Barnes (Barnes), initiated an involuntary salary offset in 2004, which resulted in full repayment of the debt. Barnes concluded that Respondent's request for waiver was untimely. I agree.

The Department sent notices to Respondent regarding the debt in this case on no less than four different dates: October 28, 1998, January 15, 1999, April 7, 2003, and June 7, 2003. Notwithstanding that the notices could have resulted in some confusion for Respondent as to how to calculate the time of appeal since the letter was re-dated at least once, Respondent's August 7, 2003 request significantly exceeds the 15-day time period provided by the Department's waiver policy.

Assuming that her waiver request would be denied, Respondent also requests reconsideration of a denial of her request for waiver because "continuing health issues" prevented her from pursuing a waiver request earlier than August 7, 2003. Respondent argues that the debt letters she was issued do not preclude reconsideration of a waiver request, and that her circumstances meet the waiver standard. Although it is the policy of the Department to allow employees to request an extension of time to request a waiver, if good cause is shown, Respondent's circumstance does not meet that standard. First, Respondent has not identified, with appropriate specificity, good cause for accepting her untimely request for waiver. More important, Respondent was provided with a de facto extension of time when Barnes sent the June 4, 2003 debt notice, which, even according to Barnes, provided Respondent with an additional 15-day period.⁹

If an employee does not timely file a request for waiver, the Department is

⁷ See 34 C.F.R. § 32.6.

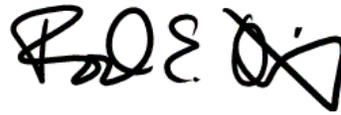
⁸ The Department's *Salary Overpayment Handbook*, ACS-OM-04, specifically identifies "employee" rather than debtor, but, presumably, this standard extends to debtors who are no longer employed by the Department as well.

⁹ Respondent concedes to receiving at least one of the prior notices.

authorized to initiate collection of the debt via administrative offset of 15 percent of the employee's disposable income 30 calendar days after the date of the initial notice of the debt. Moreover, only debtors who have made timely waiver requests are entitled to a stay of the collection activity pending the resolution of the waiver proceeding. Even if Respondent relied upon the most recently received debt letter, June 4, 2003, the timing of her August 6, 2003 request is untimely and, therefore, Respondent's waiver request must be dismissed. This decision operates as adjudication on the merits, and constitutes a final agency decision.¹⁰

Accordingly, this proceeding is **DISMISSED**.

So ordered this 21ST day of November 2006.

A handwritten signature in black ink, appearing to read "Rod Dixon", with a stylized flourish at the end.

Rod Dixon
Waiver Official

¹⁰ The dismissal is with prejudice, and Respondent may not re-file a request for waiver on the same debt. *See, e.g., In re Mary*, Dkt. No. 06-64-WA, U.S. Dep't of Educ. (October 19, 2006) (citing cases recognizing that under federal common law, a dismissal *with* prejudice directly relates to the jurisdiction of the dismissing tribunal).