



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

In the Matter of

ROBERT,

Respondent.

Docket No. 06-71-WA

Waiver Proceeding

DECISION DENYING WAIVER

Respondent, a U.S. Department of Education (Department) employee, requested waiver of a \$1,793.31 salary overpayment debt arising from the Department's failure to place him on unpaid leave due to his furlough status. 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 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 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)², specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).³

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 5 U.S.C § 5584 and the General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828 (Waiver Statute); see also *In re Tanya*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 18, 2006) at 1, n.1.

² The Handbook, ACS-OM-04, was revised and reissued by the Department on December 12, 2006.

³ 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 supplemental statement, and documents compiled by the Department's Human Resources office. This decision constitutes a final agency decision.

Procedural History

According to the August 10, 2006 Notice of Debt Letter and attached Bill of Collection (BoC), the bulk of the \$1,793.31 overpayment arises from the Department's failure to place Respondent in a non-pay furlough status due to his recall to active military duty for Pay Period 8 of 2006. A small portion of the overpayment is attributable to the Department's error in paying Respondent for eight hours of annual leave, rather than placing him in a non-pay furlough status for the entirety of Pay Period 6 of 2006.

By letter dated August 29, 2006, Respondent filed a request for waiver and documentation in support of his waiver request. In a September 22, 2006 Order Governing Proceedings, Respondent's request for a waiver was deemed timely. On October 26, 2006, Respondent filed an additional statement.⁴

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.⁵ 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 proceeding is whether Respondent's arguments and submissions support a request that a portion or the entire overpayment be waived in accordance with standards prescribed by statute and consistent with the case law and regulations promulgated by the Department.

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. For the most part, if a debtor is aware of an error, he or she cannot reasonably expect to retain the overpayment.⁶ Fault also 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.⁷ An employee who neither knows nor has reason to know that he or she was erroneously compensated lacks fault under the application of this standard.⁸ 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

⁴ Due to Respondent's deployment overseas, Respondent's wife filed a statement on his behalf.

⁵ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

⁶ See *In re Danielle*, Dkt. No. 05-18-WA, U.S. Dep't of Educ. (October 11, 2005).

⁷ See *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

⁸ See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005) at 5.

salary overpayment.⁹ Thus, every waiver case must be examined in light of its particular facts and circumstances.¹⁰

In applying the fault standard to this case, the tribunal concludes that Respondent does not lack fault. As an initial matter, the tribunal recognizes that this salary overpayment was the result of an administrative error that does not reflect any fraud, misrepresentation, or lack of good faith by Respondent; however, the tribunal finds that Respondent was aware of the error in that he knew his military leave was exhausted and that he was in a non-pay furlough status due to his recall to active military duty.

On April 10, 2006, a few days after Respondent received the salary overpayment, he notified his payroll coordinator and his Department supervisor via email that two errors existed with regard to his leave and earnings.¹¹ In his email communication, Respondent noted that he was placed in an absent without leave (AWOL) non-pay status instead of his furlough non-pay status.¹² Second, Respondent stated that he received a salary payment for Pay Period 8 of 2006 and that he believed that the Department was not paying him while he was in an active military status. In response, Respondent's payroll coordinator sent an email later that same day indicating that she would ask the timekeeper to change his AWOL status to a furlough status and have the timekeeper do a corrected time and attendance report. The payroll coordinator also stated that Respondent was to let her know if the errors were not corrected.

Although Respondent's initial communication with his payroll coordinator stated that he believed the salary payment he received was in error, he argues that upon reflection he believed he was entitled to a salary payment because "...otherwise why would he have received it after being gone for a year."¹³ Respondent also argues that he was not informed timely of the overpayment and if he had been, he would not have elected to use the monies he received while in a non-pay status. Respondent adds that he waited a judicious period of time before using the overpayment funds.

Given Respondent's immediate recognition of the Department's error and the length of time he was already in a non-pay status since being recalled to active duty, Respondent's belief that he was entitled to the money is not reasonable. Further, the tribunal notes that a debtor who is aware of the overpayment cannot reasonably expect to retain these funds nor does he or she acquire title to these funds.¹⁴ Finally, the tribunal notes that the BoC was issued four months after the overpayment occurred and that Respondent was on notice that the Department was intending to correct the error. Consequently, Respondent's statement that he waited a judicious period of time before spending the money is not persuasive.

Respondent's statements did not address the portion of the overpayment attributable to the Department's error in placing Respondent in a paid leave status (i.e. annual leave) for eight hours

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See* Attachment to Respondent's August 29, 2006 statement.

¹² The Department's error in placing Respondent in an AWOL status did not create an overpayment.

¹³ *See* Respondent's October 1, 2006 statement.

¹⁴ *See* 5 U.S.C. § 5584. *See also, In re Danielle, supra* note 6.

during Pay Period 6 of 2006. Respondent was in a non-paid leave furlough status for many months prior to Pay Period 6 of 2006. A federal employee has the option of using annual leave in order to retain both civilian and military pay and may use annual leave intermittently with periods of leave without pay (LWOP).¹⁵ Respondent did not argue that he was using annual leave intermittently with periods of LWOP and the record does not contain any evidence to that effect. In fact, Respondent's furlough non-pay status suggests the opposite – that Respondent was not using paid leave intermittently with periods of LWOP. Therefore, Respondent should not have expected to receive any salary payments from the Department including eight hours of paid leave for Pay Period 6 of 2006.

Equity and Good Conscience

To secure equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.¹⁶ 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.¹⁷ Factors weighed by the tribunal include the following: 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 cost collection the claim equals or exceeds the amount of the claim.¹⁸ The tribunal also may consider whether recovery of the claim would be unconscionable under the circumstances. In assessing whether collection of the debt would be unconscionable, the tribunal examines whether collecting a debt is beyond what is customary or reasonable. Such unconscionable circumstances include an agency's failure to respond in a reasonable amount of time to a debtor's challenge of an overpayment and an agency's gross negligence in handling an overpayment case.¹⁹

Although Respondent has failed to meet the fault standard and, as a result, is not entitled to a waiver of the overpayment, the tribunal will briefly consider whether collection of this debt would go against equity and good conscience. To support his position, Respondent reiterates that he would not have used the overpayment if he knew it was in error and if he had been informed timely of the overpayment. Respondent also argues that his frequent deployments overseas have caused him great stress and have been financially burdensome.

The tribunal has held that financial hardship may be considered in determining whether collection of the debt goes against equity and good conscience.²⁰ The tribunal understands the great personal and financial sacrifices made by Respondent and other federal civilian employees called away to active military duty and it acknowledges that collection of this debt may constitute a financial hardship. Once Respondent exhausted his military leave, as is the case here, he does not earn the equivalent of his federal civilian salary. For that reason, the tribunal notes that

¹⁵ See 5 U.S.C. § 6323(b) and (c); *In re Robert*, Dkt. Nos. 05-07-WA, 05-08-WA, and 05-09-WA, U.S. Dep't of Educ. (July 8, 2005).

¹⁶ 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).

¹⁷ See *In re Carolyn*, Dkt. No. 06-04-WA, U.S. Dep't of Educ. (June 28, 2006); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (September 14, 2005).

¹⁸ See *In re Shelley*, Dkt. No. 06-25-WA, U.S. Dep't of Educ. (November 28, 2006).

¹⁹ See *id.*; *In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006).

²⁰ See *In re Jay*, *supra* note 19; *In re Shelley*, *supra* note 18.

Congress is considering legislation known as the Reservist Pay Security Act of 2005.²¹ This legislation addresses concerns that federal employees who are military reservists suffer a loss of income when mobilized for long periods of active military duty because their military pay is less than their civilian pay.

ORDER

Respondent requested waiver of the entire \$1,793.31 debt. Having found that the circumstances of this case do not conform to the threshold factors warranting waiver of this debt, Respondent's request for waiver is **DENIED**.

So ordered, this 29th day of March 2007.

A handwritten signature in black ink that reads "Greer Hoffman". The signature is written in a cursive style with a large, sweeping flourish at the end.

Greer Hoffman
Waiver Official

²¹ See Reservists Pay Security Act of 2005, S.981, 109th Cong. (2005).