



UNITED STATES DEPARTMENT OF EDUCATION

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

In the Matter of

ARTHUR,

Docket No. 07-02-WA
Waiver Proceeding

Respondent.

DECISION DENYING WAIVER

At issue in this case is whether Respondent, a former U.S. Department of Education (Department) employee, should be granted a waiver of a \$739.42 salary overpayment debt. The overpayment arose from the Department's erroneous payment of a higher rate of salary to Respondent after the term of his temporary promotion expired. Based on my review, I find that waiver of this debt is not warranted. Accordingly, Respondent's request for a waiver is denied.

Jurisdiction

The Waiver Statute, 5 U.S.C. § 5584, authorizes the waiver of claims of the United States against debtors as a result of an erroneous salary payment 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 request for waiver and documents compiled by the Department's Human Resources office. This decision constitutes a final agency decision.

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, note 1.

² The Handbook, ACS-OM-04, was revised and reissued by the Department on March 30, 2007.

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.

Procedural History

According to the September 24, 1999 Notice of Debt Letter and attached Bill of Collection (BoC), the \$739.42 overpayment arises from the Department's payment of a higher rate of salary for 360 hours of work after his temporary promotion expired. Respondent's temporary promotion from a GS-14, step 10 position to a GS-15, step 6 position began on January 31, 1999 and ended on May 30, 1999. The BoC indicates that Respondent continued to receive the higher pay rate until July 31, 1999.

Respondent filed a request for waiver dated October 12, 1999.⁴ On February 24, 2004, Respondent's request was mistakenly deemed untimely and deductions were scheduled to begin. Soon after, Respondent notified the human resources office that he timely filed his waiver request and the February 24, 2004 notice to begin collection of the debt was rescinded.

In a February 22, 2007 Order Governing Proceedings, Respondent was afforded an opportunity to supplement the record. On May 9, 2007, Respondent stated that he did not wish to submit any additional information in this matter.⁵ Consequently, the record in this proceeding is closed and the tribunal will review Respondent's waiver request on the basis of his and the Department's previously submitted materials.

Discussion

A salary overpayment is created by an administrative error in the pay of an employee in regard to the employee's salary.⁶ The fact that an administrative error created an overpayment does not relieve the overpaid employee from liability.⁷ Instead, an employee who does not contest the validity of the debt may request that the debt be waived or forgiven.

Waiver is an equitable remedy available only when there is no indication of fraud, misrepresentation, fault, or lack of good faith by the debtor.⁸ 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.

⁴ Respondent's request for a waiver was originally filed with the Department's Human Resources office. On February 20, 2007, Respondent's request for a waiver was transferred to OHA.

⁵ Respondent submitted his May 9, 2007 statement after the tribunal contacted him by telephone to ascertain whether he wished to file a statement and/or supplement the record.

⁶ See 34 C.F.R. Part 32 (2004).

⁷ See *In re Robert*, Dkt No. 05-07-WA, U.S. Dep't of Educ. (July 8, 2005), n. 12.

⁸ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

Fault Standard

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

In his October 12, 1999 statement, Respondent asserts that this overpayment was caused by an administrative error with no indication of fraud, misrepresentation, fault, or lack of good faith on his part. He argues that he was *de facto* performing the duties of his temporarily promoted position before, during, and after the temporary appointment expired. Finally, Respondent argues that his office was undergoing a massive and lengthy reorganization and, as of October 1999, he was still performing these duties.

In applying the fault standard to this case, the tribunal concludes that Respondent is at fault. As an initial matter, the tribunal finds there is no evidence of fraud, misrepresentation or lack of good faith in this case. Respondent, however, should have recognized that he continued to be paid at the higher pay rate after his temporary promotion ended. Respondent, like all employees, had a duty to inquire about the accuracy of his pay, especially upon the termination of a temporary promotion – a circumstance that warrants additional scrutiny of his earnings statements or other documentation.

In resolving a waiver case involving the expiration of a temporary promotion, the tribunal's decisions, *In re Richard*,¹² and *In re John*¹³ guide the tribunal's analysis in this proceeding. In *Richard* and in *John*, the employees were temporarily promoted to the GS-15 pay level. At the end of their 120-day appointments, both employees continued to be paid at this higher pay rate. In each case, the hearing official found that the employee failed to inquire about and dutifully track the termination of his temporary promotion, concluding that a review of the payroll documentation would have enabled each employee to determine that the payment of salary for his temporary promotion beyond the 120-day appointment was erroneous. Both in *Richard* and *John*, the employee's failure to inquire and or track the expiration of his temporary appointment was particularly glaring given that he had been promoted to a highly-graded GS-15 position.

Respondent was a GS-14, step 10 employee who was promoted to a GS-15, step 6 position. He also had been employed by the federal government for approximately 20 years when

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 *id.*

¹² Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

¹³ Dkt. No. 07-03-WA, U.S. Dep't of Educ. (May 1, 2007).

this error occurred. Further, Respondent clearly was on notice that his temporary promotion was set to expire on May 30, 1999. In this case, the record contains a January 28, 1999 memorandum signed by Respondent that lays out the terms of his temporary appointment. In this memorandum, Respondent states that he understands the promotion is temporary, that it will not exceed May 30, 1999, and that the expected duration of the appointment will be indicated on the Notification of Personnel Action (SF-50) effecting the promotion. Respondent's SF-50 comports with the expiration date set out in the January 28, 1999 memorandum.

Respondent's argument that he continued to perform the duties of his temporary appointment long after his promotion expired is not relevant to the tribunal's fault analysis. As articulated in *Richard*, "[n]o employee has a reasonable expectation of an entitlement to pay for performing the job functions of a temporary appointment after the time period of the temporary appointment has expired."¹⁴ Although an employee raises an issue of "genuine concern" to an employee who may not be compensated at a pay rate expected or desired for his or her work, the fault standard centers on whether said employee knew or had reason to know that an overpayment had occurred.¹⁵

As a final matter, the tribunal notes that Respondent's waiver request languished for nearly eight years. Delay alone cannot constitute the sole basis for meeting the fault standard.¹⁶ Here, Respondent has not demonstrated that the delay has demonstrably harmed his ability to pursue his waiver request nor has he otherwise argued that the delay mitigates his fault in not recognizing the overpayment. Certainly, if Respondent had met the fault standard, the lengthy delay in adjudicating his waiver request would have been a significant factor in weighing whether collection of the debt would go against equity and good conscience.¹⁷

The evidence in the record establishes that Respondent knew both the effective date and the expiration date of his temporary promotion. Consequently, the tribunal concludes that Respondent should have known that an error in his salary payment occurred when he continued to be paid at the GS-15, step 6 salary after May 30, 1999. In view of Respondent's failure to meet the fault standard, his request for a waiver cannot be granted.

¹⁴ See *Richard*, *supra*.

¹⁵ See *id.*

¹⁶ See *In re Millicent*, Dkt. No. 06-06-WA, U.S. Dep't of Educ. (July 7, 2006)

¹⁷ See *In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006) ("In the balance of equities, it must be regarded that a seven-year delay in adjudicating a waiver request doubtlessly is detrimental to a debtor's interests.") and *In re Cheryl*, Dkt. No. 05-28-WA, U.S. Dep't of Educ. (February 17, 2006) ("[T]he nearly ... [eight]-year time period that elapsed between the overpayment and the current attempt to collect the debt clearly exceeds what is customary or expected.")

ORDER

Pursuant to my authority under the Waiver Statute, 5 U.S.C. § 5584, Respondent's request for waiver in the amount of \$739.42 is **DENIED**.

So ordered, this 10th day of May 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