



UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of

Docket No. 08-01-WA
Waiver Proceeding

SEAN,

Respondent.

DECISION DENYING WAIVER

This proceeding concerns whether Respondent, a U.S. Department of Education (Department) employee, should be granted a waiver of a \$361.49 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

Under 5 U.S.C. § 5584 (the Waiver Statute), the Department has the authority to waive 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 request for waiver, his supplemental statement and attached documentation, 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 February 11, 2008 Notice of Debt Letter and attached Bill of Collection (BoC), the \$361.49 overpayment arises from the Department's payment of a higher rate of salary for 120 hours of work, after his temporary promotion expired. Respondent's temporary promotion was scheduled to end on March 26, 2007, during Pay Period 7 of 2007. The BoC indicates that Respondent continued to receive the higher pay rate until April 14, 2007, the end of Pay Period 9 of 2007.

Respondent filed his request for waiver and attachments on March 1, 2008. In a May 14, 2008, Order Governing Proceedings, Respondent's request for a waiver was deemed timely and Respondent was afforded an opportunity to supplement the record. On June 3, 2008, Respondent filed a statement and copies of emails regarding the overpayment.

Discussion

A salary overpayment is created by an administrative error in the pay of an employee in regard to the employee's salary.⁴ The fact that an administrative error created an overpayment does not relieve the overpaid employee from liability.⁵ 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.⁶ 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.

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.⁷ 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.⁸ Thus, every waiver case must be examined in light of its particular facts and circumstances.⁹

In his March 1, 2008 request for waiver, Respondent states that he was temporarily promoted to a GS-14 position from his GS-13 pay grade. Respondent asserts that after the conclusion of his temporary promotion an administrative error by the Department resulted in an

⁴ See 34 C.F.R. Part 32 (2004).

⁵ See *In re Robert*, Dkt No. 05-07-WA, U.S. Dep't of Educ. (July 8, 2005), n. 12.

⁶ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 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).

⁹ See *id.* at 5.

overpayment of wages to him at the GS-14 pay grade for the following two pay periods. Further, Respondent contends that upon receiving the first overpayment, he promptly notified the Department through his supervisor, on April 10, 2007, and a personnel specialist indicated that she would request that the repayment be waived.

According to Respondent, he was overpaid for a second pay period, and on April 23, 2007, he again notified his supervisor who forwarded the message to a personnel specialist. Respondent states that the specialist did not respond to the inquiry. Respondent asserts that after his supervisor contacted the specialist again, the specialist informed his supervisor that he was not overpaid. However, after Respondent's supervisor questioned the specialist's conclusion, the specialist responded in an email dated May 15, 2007, that Respondent was overpaid, that he would receive a bill for the overpayment, and that he would have to request a waiver from the tribunal.

Respondent asserts that his waiver request should be granted because he timely notified the appropriate officials of the overpayment; the Department indicated it would request that the overpayment be waived; and the overpayment occurred due to the Department's inaction.

In applying the fault standard to this case, the tribunal concludes that the Respondent is at fault. As an initial matter, the tribunal finds that there is no evidence of fraud, misrepresentation, or lack of good faith in this case. In fact, Respondent conscientiously contacted the Department to report the overpayment immediately, which is consistent with his duty to inquire about the accuracy of his salary payment, especially upon the termination of a temporary promotion – a circumstance that warrants additional scrutiny of his earnings statements. However, even if an employee reports an overpayment, he still has a duty to set aside the overpaid amount for future repayment.¹⁰

In resolving a waiver case involving the expiration of a temporary promotion, the tribunal's decision, *In re John*, is on point with the case at bar. In *John*, the employee was temporarily promoted to the GS-15 pay grade. At the end of his 120 day promotion, he continued to be paid at this higher pay rate for two months, when he notified his supervisory officials of the error. The hearing official found that the employee was aware of the dates of his promotion, and that it was his duty to ensure that he was accurately paid upon termination of his promotion. The tribunal concluded that despite notifying the Department of the error in his salary, the employee was required to return the overpayment.

While Respondent submits an additional argument, that he was told by Department personnel that the debt would be waived, the tribunal does not find this argument persuasive. The record only reflects that his personnel specialist would request that Human Resources waive the debt. The Human Resources office does not have the authority to waive the debt; this is within the tribunal's purview.

¹⁰ See *In re Marguerite*, 06-81-WA, U.S. Dep't of Educ. (Apr. 3, 2008) (Acknowledging that while Respondent notified the Department of errors regarding the processing of her pay, when an employee receives an erroneous salary payment, she has a duty to hold onto the overpayment for future repayment) 3.

Furthermore, in my review of the emails between Respondent's supervisor and his personnel specialist, it is apparent that the specialist indicated that she would make "it clear to HR that we want the overpayment to be waived due to their error." The specialist did not, however, state that it would be waived. Indeed, her email made it clear that while she would request a waiver, she had no authority to waive the overpayment herself. In an email dated 25 days later, the specialist informed Respondent's supervisor that Respondent would be billed for the overpayment, which indicates that either she did not actually make the request or HR did not grant the request, given that, as previously stated, it had no authority to do so.

Respondent was a highly-graded employee who was promoted to a GS-14 management position. As in *John*, Respondent knew the effective date and expiration date of his temporary promotion, as well as the fact that he continued to be paid at the higher pay grade upon the conclusion of his temporary office. Typically, when an employee is aware of the overpayment, he remains at fault. The record reflects and Respondent admits that he was aware of the overpayment. Although Respondent notified his personnel specialist and the specialist indicated she would request that the debt be waived, these actions do not obviate his responsibility to pay the debt.

Therefore, the tribunal finds that Respondent's arguments and evidence fall short of establishing that he satisfied the requisites of the fault standard. Given that Respondent has not met the fault standard, it is not necessary to determine whether denying the waiver request would go against equity and good conscience.¹¹ Moreover, Respondent did not argue that denying the waiver would violate the standard of equity and good conscience. In light of the aforementioned, Respondent's request for a waiver cannot be granted.

ORDER

Respondent requested waiver of the entire \$361.47 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 31st day of July, 2009.

Greer Hoffman
Waiver Official

¹¹ In waiver adjudications, there is a two part standard. Respondent must satisfy both the standards of fault and of equity and good conscience to prevail.