



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

In the Matter of

Docket No. 08-06-WA
Waiver Proceeding

JOSEPH,

Respondent.

DECISION GRANTING WAIVER

This proceeding concerns whether Respondent, a U.S. Department of Education (Department) employee, should be granted a waiver of a \$55.15 salary overpayment debt. The overpayment arose from the Department's failure to collect Federal Employment Retirement System (FERS) payments when Respondent changed his retirement classification. Based on my review, I find that waiver of this debt is warranted. Accordingly, Respondent's request for a waiver is granted.

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 Bill of Collection (BoC), the \$55.15 overpayment arises from the Department's failure to deduct FERS payments from Respondent's salary for five pay periods when Respondent changed his retirement classification. Respondent's classification was changed from the Federal Insurance Contributions Act (FICA) only to the FERS plus FICA. On July 23, 2008, the tribunal received a request for waiver of the overpayment from Respondent. In a September 4, 2008, Order Governing Proceedings, Respondent was given an opportunity to supplement his prior statement. In a letter received on September 23, 2008, Respondent filed a supplementary statement.

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

Respondent argues that the Department caused the salary overpayment. Respondent also asserts that he did not request a waiver immediately because the Department's letter informing him of the overpayment was mailed to the wrong zip code, delaying his notification. Further, Respondent contends that he did not have a reason to recognize the error and that personnel specialists informed him that he had no way of knowing that he was overpaid. Finally, Respondent avers that collection of the debt would go against equity and good conscience.

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.

In applying the fault standard to this case, the tribunal concludes that Respondent lacks 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. Additionally, this is not the type of case where an employee reasonably should know that an erroneous overpayment has occurred. The change in Respondent's retirement classification did not result in any significant change to his pay.

In view of the aforementioned facts, this case comes within the clear ruling of *Travis*, which held that an employee was not liable for an overpayment of salary resulting from an erroneous retirement classification. As in the instant case, the employee in *Travis* was overpaid because his retirement classification was changed from FICA only to FERS plus FICA. Although the Department in *Travis* changed the employee's retirement classification without his knowledge, the facts compel the same result here.

The data codes created by U.S. Office of Personnel Management to represent different retirement classifications do not correspond to or otherwise serve as abbreviations of the categories they represent. Consequently, the classifications represented by these data codes are not readily apparent. Certainly, these data codes are not well-known, especially to employees not involved in personnel or human resources matters. Respondent's prior leave and earnings statements identified his retirement classification as code "2," which represents FICA only. When Respondent changed his retirement code to FERS plus FICA, his classification code changed to "K". It is not reasonable to expect an employee to suspect that his retirement deductions are incorrect on the basis of a one digit retirement code, especially when, as in this case, the Department changed the code based on Respondent's request but did not make the proper additional deduction and the deduction would have made only a slight difference in his salary.

Equity and Good Conscience

To secure equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.¹⁰ Beyond this framework, there are not 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.¹¹ Factors weighted 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 of collecting the claim equals or exceeds the amount of the claim.¹² 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

¹⁰ 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).

¹¹ 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. Dept' of Educ. (September 14, 2005).

¹² See *In re Shelley*, Dkt. No. 06-25-WA, U.S. Dep't of Educ. (November 28, 2006).

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.¹³

Respondent had no means of knowing that despite the accurate code change of his retirement classification, the Department failed to deduct an additional \$11.03 per pay period reflecting this change of classification. It is not fair to impose a burden on Respondent that would be impossible for him to fulfill, that is, to hold him responsible for detecting the overpayment under these circumstances. For these reasons, the tribunal finds that ordering Respondent to pay this debt would go against equity and good conscience.

ORDER

Respondent requested waiver of the entire \$55.15 debt. Having found that the circumstances of this case conform to the threshold factors warranting waiver of this debt, Respondent's request for waiver is **GRANTED**.

So ordered, this 4th day of August, 2009.

Greer Hoffman
Waiver Official

¹³ See *id*; *In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006).