



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

In the Matter of

CRUZ,

Docket No. 08-12-WA
Waiver Proceeding

Respondent.

DECISION DENYING WAIVER

This proceeding concerns whether Respondent, a U.S. Department of Education (Department) employee, should be granted a waiver of a \$2,978.35 salary overpayment debt. The overpayment arose from the erroneous payment of salary for two pay periods after Respondent resigned his position. 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 Department's notification letter, the \$2,978.35 overpayment arises from the late processing of Respondent's termination from employment. The Department paid respondent salary for two pay periods after Respondent left the Department's employment. In a December 11, 2008, Order Governing Proceedings, Respondent was given an opportunity to supplement his prior statement. On December 30, 2008, Respondent requested an extension of this waiver action which was granted the following day. In an email dated January 14, 2009, Respondent filed supplementary documents, including the August 14, 2008, Notice of Debt Letter and the August 18, 2008, Bill of Collection.

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 states that after he left the Department, his former supervisor informed him that there might have been a potential problem with payroll, but that he believed the matter was cleared up. For that reason, Respondent contends he was not concerned with monitoring his bank accounts. Respondent further states that his salary payment is directly deposited into his bank account. Respondent also states that he does not routinely check any bank deposits made into his account, but that he does normally check his balance to ensure he has adequate funds to

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.

meet his recurring financial obligations. Additionally, Respondent contends that payment of this debt would go against equity and good conscience because the Social Security Administration (SSA) erroneously overpaid him benefits for one year, which he also must repay, and the current financial downturn has significantly reduced his pre-retirement investments. Respondent argues that to repay both this debt and the debt owed to SSA would render him unable to meet his recurring monthly financial obligations.

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. Yet, fault, as the term is used in the Waiver Statute, is examined in the context of an employee's duty to prevent or discover mistakes and errors in salary payments when doing so if feasible. Employees have a duty to inquire about the accuracy of payments from the Department, especially when the payments are awarded after termination of employment. An employee must also set aside overpaid funds for future repayment.¹⁰

However, the record also reflects that Respondent knew or should have known of the overpayment even before the erroneous payments were made to him. Although Respondent maintains that he believed the matter was resolved, he should have been cognizant of any potential payments and more closely monitored his bank account to see if he continued to be paid after he resigned. When an employee knows or should have known of an overpayment of salary, he is not without fault. Here, Respondent knew of the potential overpayment and he had records (i.e., bank statements), which, if examined immediately, would have alerted him to the fact that the overpayment went from potential to actual.

In view of the aforementioned facts, this case is similar to a case which came before the Department of Defense, Office of Hearings and Appeals (DOHA), the tribunal's equivalent in the Department of Defense.¹¹ In that case, a member continued to receive a salary after separation from the service. The Board denied the member's waiver request on the grounds that she knew or had reason to know she was paid a salary to which she was not entitled. The Board also concluded that the fact that the member had her wages directly deposited into her bank account did not relieve her of the responsibility of verifying her statements and questioning any discrepancies.

This case is also similar to *In re John*, in which the tribunal found an employee liable for a debt that resulted from the continued payment of salary at a higher pay grade upon termination of the employee's temporary promotion.¹² In that case, the tribunal concluded that the employee knew when his temporary promotion expired and had a duty to inquire about the accuracy of his salary payment upon expiration. As a result, the tribunal stated that Respondent should have noticed the error in pay that led to the overpayment. Although the circumstances in *John* differ from those in the instant case, the facts compel the same result.

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.

¹¹ See *In re [Redacted]*, DOHA Claims Case No. 97090810 (Defense Office of Hearings and Appeals [DOHA]) (October 1, 1997).

¹² See *In re John*, Dkt. No. 07-03-WA, U.S. Dep't of Educ. (May 1, 2007).

As in *John* and the DOHA case, Respondent continued to receive a salary after the termination of his position. Respondent had sufficient time to check his bank account statements and to ensure that payments from the Department were accurate, particularly important given his recent leave. The fact that Respondent had his payroll directly deposited into his bank account does not obviate this duty. For these reasons, the tribunal finds that Respondent does not satisfy the fault standard.

Equity and Good Conscience

To secure equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶

Although Respondent does not meet the fault standard and, as a result, is not entitled to 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 argues that denying the waiver would render him unable to meet his recurring monthly obligations, particularly in light of a debt to the SSA to repay a year's worth of benefits which SSA erroneously awarded to him. Respondent also asserts that due to the current financial downturn, his savings have significantly fallen, to the point that he is living from paycheck to paycheck.

The tribunal has found that financial hardship may be considered in determining whether collection of the debt goes against equity and good conscience.¹⁷ The tribunal understands Respondent's difficult circumstances, but acknowledges that Respondent must satisfy both the fault standard and the standard of equity and good conscience to prevail. Thus, while the tribunal recognizes the deleterious effects of the current economy, the tribunal cannot grant Respondent's request for waiver because he does not satisfy the fault standard. The tribunal does, however, recognize that repayment in full may be financially difficult due to Respondent's additional debt to the SSA; thus, Respondent may wish to avail himself of the various repayment options offered by the Department.

¹³ 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).

¹⁴ 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).

¹⁵ See *In re Shelley*, Dkt. No. 06-25-WA, U.S. Dep't of Educ. (November 28, 2006).

¹⁶ See *id.*; *In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006).

¹⁷ See *In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006).

ORDER

Respondent requested waiver of the entire \$2,978.35 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 5th day of August, 2009.

Greer Hoffman
Waiver Official