



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

SPENCER,

Docket No. 11-01-WA
Waiver Proceeding

Respondent

DECISION GRANTING WAIVER

On February 10, 2011, the tribunal received Respondent's complete submissions regarding his request for waiver of a **\$786.74** debt owed to the U.S. Department of Education.¹ For the reasons that follow, the tribunal concludes that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

In adjudicating this case, the tribunal's findings and conclusions are based on matters accepted as argument and evidence, including: copies of statements, dated August 5, 2009 and February 10, 2011, from Respondent indicating the: (1) circumstances of the overpayment and (2) the reasons why Respondent believes a waiver should be granted.

DISCUSSION

The waiver authority involving all former and current employees of the agency was delegated to the OFFICE OF HEARINGS & APPEALS (OHA),² which, thereby, exercises waiver

¹ For unknown reasons, Respondent's request was not docketed by OHA until January 3, 2011 when the Department's payroll office inquired about the status of Respondent's request; that notwithstanding, Respondent was granted additional time to locate documents supporting his timely request for waiver.

² The agency's policy is set forth in the U.S. Department of Education, Administrative Communications System Departmental Handbook, HANDBOOK FOR PROCESSING SALARY OVERPAYMENTS (ACS-OM-04, June 2005 (revised April 2008)).

authority on behalf of the Secretary of Education. The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.³ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. 5584.⁴

Broadly speaking, determining whether waiver is appropriate requires consideration of two factors; namely, (1) whether there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of Respondent, and (2) whether Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment.⁵ 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 is feasible. This duty comports with the employee's particular capacity to know of the antecedents that may give rise to changes in pay - - any of which, as a practical matter, could result in erroneous payments due to mistakes. In addition, the duty comports with the reality that the employee is often in the best position to recognize a mistake in pay; that is, not only is the employee aware of the personnel action that affects pay before the pay change is implemented (e.g., promotions, pay increases, monetary awards, or bonuses), but it is the employee who often initiates a change in status that results in a pay change (e.g., a change in insurance coverage, a change in health benefit coverage, or a change in a retirement benefit).

The initial step in the standard employed to determine whether Respondent is at fault in accepting an overpayment is whether, under the particular circumstances involved, a reasonable person would have been aware that he or she was receiving more than entitled, or, stated differently, whether the debtor had no reasonable expectation of payment in the amount received. Since waiver determinations are based, in part, on the facts and circumstances giving rise to the erroneous payment and the employee's knowledge of the matter, a debtor's job position, grade level, education and training may be taken into consideration in applying the fault standard. Therefore, where a reasonable person would have made inquiry about the accuracy of a salary payment, but the debtor did not, then the debtor is not free from fault.

Even so, there are circumstances that run counter to the foregoing. For instance, although an employee is expected to review his or her leave and earnings statements, and is considered to be at fault, if a debt accrues due to failure to review them, waiver may still be granted to an employee who provides convincing evidence of a medical condition that prevented the employee's routine review of leave and earning statements. Similarly, convincing evidence of a medical condition that prevents an employee from being aware of the circumstances surrounding an overpayment also may serve to preclude a finding of fault. This is not to say that an employee can shirk their obligation to ensure the accuracy of their pay by merely assuming their pay is accurate. An employee must present convincing evidence showing that he or she was unable to know of the circumstances of the overpayment or otherwise discover the erroneous payments.

³ See, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

⁴ See, General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (the Waiver Statute); U.S. Government Accountability Office, *Scope of Waiver Authority*, B-307681 (May 2, 2006).

⁵ See, e.g., *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

In applying the fault standard to this case, I find Respondent's statement that he was unaware of the erroneous payment, and unaware of what leave status he was put on during this absence persuasive. The basis of the debt in this case is the Department's conclusion that during the 13th pay period of 2009, Respondent was paid for 13½ hours instead of placed in Leave Without Pay (LWOP) status. At Respondent's rate of pay, this error resulted in the Department overpaying Respondent \$863.87.⁶ Respondent argues that waiver is warranted because he was unaware of the overpayment at the time it occurred due to his illness and absence from work for an extended period of time. The evidence shows that during Respondent's period of absence in 2009 he frequently requested LWOP status and lacked the capacity to routinely monitor his Leave and Earning Statements.

Respondent's absence for 13 ½ hours during the 13th pay period of 2009 should have been recorded as LWOP as requested by Respondent. In light of this expectation, I am mindful that in this case, the LES was not easily accessible to Respondent due to his lack of capacity to complete routine activities. Therefore, Respondent was not in the best position to recognize a mistake in his pay; nor is it apparent how Respondent could have been more diligent at discovering the erroneous payment. The Department discovered the error and implemented a correction within two pay periods after the erroneous payment at which time Respondent was notified. As such, I am convinced that Respondent's conduct comports with the fault standard's requirement that an employee prevent or discover mistakes and errors in salary payments when doing so is feasible.

The aforementioned also serves to underscore why I am persuaded that the facts in this case balance equity in favor of Respondent. I find that Respondent acted fairly, without fraud or deceit, and in good faith with regard to all matters concerning his Time and Attendance and his Leave status during the pay period at issue. Guided by the evidence in this case, I conclude that Respondent has demonstrated that it is against equity and fairness for the Federal government to recover the debt in this case.⁷ Accordingly, Respondent's request for waiver is granted. This decision constitutes a final agency decision.

⁶ The net amount of the overpayment to Respondent is \$786.74.

⁷ There are no rigid rules governing the application of equity. I must balance equity and appraise good conscience in light of the particular facts of this case; in doing so, I must balance the competing interests in the recovery of all debts owed to the United States against Respondent's asserted interests in the forgiveness of a debt owed to the United States. Factors weighed in this balancing of interests include the following: whether the debt is substantial; whether recovery of the claim would be unconscionable under the circumstances; whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment; and whether collection of the debt would impose an undue financial burden.

ORDER

Pursuant to the authority of 5 U.S.C. § 5584, Respondent's request for waiver of the entire debt to the United States Department of Education in the amount of **\$786.74** is **HEREBY GRANTED**.

So ordered this 7th day of June 2011.

A handwritten signature in black ink, appearing to read "Rod Dixon", with a stylized flourish at the end.

Rod Dixon
Waiver Official