



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of
EDWARD,

**Docket Nos. 10-05-WA
11-15-WA**

Waiver Proceedings

Respondent

DECISION GRANTING WAIVER

At issue in this case is whether an employee of the Department of Education (Department) should be granted waiver of a debt arising from an overpayment of salary occurring as a result of the payment of an erroneous locality pay rate. The overpayments totaled **\$3,822.03**. For reasons that follow, I find that waiver of the debts at issue is warranted.¹ Accordingly, Respondent's request for waiver is granted.

The OFFICE OF HEARINGS & APPEALS (OHA)² maintains authority and jurisdiction to waive³ claims of the United States against a former or current employee of the Department.⁴

¹ Respondent requests waiver of two debts. While respondent's waiver request of a \$1,810.64 salary overpayment was pending, Respondent submitted a waiver request of a \$2,011.39 debt. These actions have been docketed as 10-05-WA and 11-15-WA, respectively and involve similar circumstances. For purposes of efficient adjudication, these cases have been combined, and all matters in each case are resolved by issuance of this decision.

² The Department'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 Dec. 2006)).

³ *Waiver* is defined as "the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee as [provided] by 5 U.S.C. 5584...or any other law." 5 C.F.R. § 550.1103.

⁴ *See also*, General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (codified at 5 U.S.C. 5584) (the Waiver Statute). The law of debt collection is extensive. *See, e.g., In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at 1 & n. 1 (setting forth, more fully, the statutory framework governing salary overpayment debt collection); *see also* 5 U.S.C. § 5514 and 31 U.S.C. § 3716 (these statutory sections constitute significant provisions of the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, April 26, 1996, 110 Stat. 1321). The Department's overpayment procedures may be found on the Office of Hearings & Appeals website at: www.ed-oha.org/overpayments/.

The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁵ In a waiver proceeding, the debtor acknowledges the validity of the debt, but argues that he or she should not be required to repay the debt on the basis of equitable circumstances connected to the debt as well as because there is no indication of fraud, misrepresentation, fault, or lack of good faith by Respondent or anyone else having an interest in obtaining a waiver of the claim.⁶ In the submission requesting waiver, the debtor is expected to: (1) explain the circumstances of the overpayment, (2) state why a waiver should be granted, (3) indicate what steps, if any, the debtor took to bring the matter to the attention of the appropriate official or supervisor and the agency's response, and (4) identify all the facts and documents that support the debtor's position that a waiver should be granted.

The record in this case comprises what I have accepted in evidence, including: a copies of written statements by Respondent, dated October 13, 2010, November 18, 2010, and February 28, 2011, and copies of Bills of Collection (BoC) issued on October 5, 2010 and January 10, 2011.

DISCUSSION

I.

After a review of the record, I find the following facts pertinent to this case. Respondent is a re-hired annuitant. When the position he currently occupies was announced the job announcement indicated that the Department would fill the position in either Region I (Boston) or Region III (Philadelphia). Respondent's predecessor worked in Boston. Respondent was hired to work in Philadelphia, which is the location of his official duty station. On September 9, 2010, Respondent contacted Nichelle Bowman, an official in the Department's Human Capital & Client Services office, by electronic mail and indicated that in response to a recent notice of a change made to his electronic Official Personnel Folder (eOPF), he reviewed the eOPF and discovered that the Department had erroneously recorded his official duty station as Boston.⁷ Due to error, Respondent was paid in accordance with pay rates set for Boston, instead of Philadelphia. Locality pay rates are set higher for Boston than Philadelphia.⁸

There is no dispute that Respondent owes the Department \$3,822.03, however, Respondent argues that collection of the overpayments would cause a financial hardship, and that the debts should be waived in the interests of fairness and equity. The Federal Employees Pay Comparability Act of 1990 (FEPCA) establishes a locality pay system for General Schedule (GS) employees. To make Federal pay more comparable to private sector pay, FEPCA provides for pay adjustments based on comparisons with non-Federal pay rates on a locality basis. Locality

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

⁶ Under waiver decisions issued by the Comptroller General interpreting 5 U.S.C. § 5584, "pay" has been held to include "nonpay" or nonsalary compensation, which covers recruitment bonuses, accrual of annual leave, health and life insurance premiums, retention allowances, and all forms of remuneration in addition to salary. See, U.S. Government Accountability Office, *Scope of Waiver Authority*, B-307681 (May 2, 2006).

⁷ The recent update to Respondent's eOPF included a Notice Personnel Action indicating that Respondent's Service Computation Date had been recomputed as a result of his re-employment; the notice also indicated that Respondent's duty station was Boston.

⁸ For example, in 2010, the locality pay rate for Boston resulted in an annual increase in pay of 2.7% while the locality pay rate for Philadelphia resulted in an annual increase in pay of 1.95%.

pay rates are set forth by regulation, and use of salary surveys conducted by the Department of Labor, Bureau of Labor Statistics (BLS). An employee's actual locality pay will depend on the geographic area of the employee's official duty station, which is usually where the employee primarily works, but need not be. To determine an employee's locality rate at the Department, human resource officials and the payroll office annually increase the employee's scheduled annual rate of pay by the locality pay percentage authorized by the President.

The standard for determining whether waiver of a debt is appropriate requires a consideration of two factors; namely, (1) whether there is no indication of fraud, misrepresentation, fault,⁹ 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.¹⁰ Respondent must satisfy both factors to obtain a waiver.

The resolution of this matter begins with an analysis of the fault standard. Although *fault* is often used in a conventional sense to refer to blunder, mistake or responsibility, *fault*, as the term is used in the Waiver Statute and in accordance with factor (1) above, has specialized and particular meaning. Rather than its conventional use, fault is examined in light of the following considerations: (a) whether there is an indication of fraud; (b) whether the erroneous payment resulted from an employee's incorrect, but, not fraudulent, statement that the employee under the circumstances should have known was incorrect;¹¹ (c) whether the erroneous payment resulted from an employee's failure to disclose to a supervisor or official material facts in the employee's possession that the employee should have known to be material; or (d) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.¹²

In support of his request for waiver, Respondent argues that he should be granted a waiver because the erroneous payments were the fault of the Department, not his. As such, in Respondent's view, requiring him to repay the debt is tantamount to penalizing him for the errors of the Department. Although the argument that Respondent is not the cause of the erroneous payments is acceptable in light of the facts, the argument has no bearing on the fault standard.

It is commonplace that salary overpayments often, if not usually, involve some type of administrative error by the agency; indeed, an error or mistake in payroll or in the application of a rule or regulation governing pay is the usual vehicle that drives creation of an overpayment. Indeed, the application of the fault standard operates to impose a statutory duty on the

⁹ In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

¹⁰ See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

¹¹ Under the fault standard, the scope of Respondent's duty extends to include the obligations to: (1) verify bank statements and/or electronic fund transfers of salary payments, (2) question discrepancies or unanticipated balances from salary payments, and (3) set funds aside for repayment when appropriately recognizing a salary overpayment. See, *In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (October 19, 2005). As such, in a waiver proceeding, the debtor must either acknowledge the validity of the debt or urge the absence of any reason to recognize the salary payment at issue as an overpayment. *Id.*

¹² See generally, *Guidelines for Determining Requests* U.S. Department of the Treasury Directive 34-01 (2000), available at <http://www.treasury.gov/regs/td34-01.htm>; Standards for Waiver, 4 C.F.R. § 91.5 (2000).

employee/debtor to seek correction of the erroneous payment regardless of the government's mistake. In this respect, our waiver cases have consistently recognized that despite the fact that an administrative error by the government may cause an employee to be paid at a rate that exceeds the employee's lawful rate of pay, the error cannot, itself, entitle an employee to waiver.¹³ This follows because no employee has an entitlement to pay that he or she obtains as a result of an overpayment.¹⁴

Despite the undeniably frustrating aspect of experiencing payroll errors, 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 unique ability to know of the antecedents that may give rise to changes in pay that could result in erroneous payments as well as the fact that the employee is often in the best position to recognize a mistake in his or her pay. Employees are not only often informed of a personnel action that affects pay before the pay change is implemented (e.g., promotions, pay increases, monetary awards or bonuses), but it is often the employee who initiates a change in status that results in a pay change (e.g., change in FEGLI coverage, health benefit coverage, or a change in a retirement benefit). As such, the employee is uniquely able to scrutinize the subsequent pay change for erroneous under *or* over payments, and alert the employer to potential errors in pay.

Notwithstanding Respondent's argument on the fault standard, it is clear from the facts of this case that the erroneous payments did not result from a failure on the part of the employee to disclose material facts in his possession pertinent to the erroneous payments. To the contrary, once Respondent recognized the overpayments, he contacted human resources in Washington, DC to inform the appropriate official of the errors.

On September 9, 2010, Respondent contacted Nichelle Bowman by electronic mail and indicated that in response to a notice to check his eOPF for review of a recent update, he reviewed the eOPF and discovered that the Department had erroneously recorded his official duty station as Boston. Respondent also requested that Ms. Bowman determine whether this error also resulted in an erroneous calculation of his locality pay. Ms. Bowman confirmed the errors and immediately ordered payroll to make the appropriate corrections. On the basis of these facts, I am convinced that Respondent did not accept erroneous locality payments that he knew or should have known to be erroneous. Instead, Respondent's conduct was clearly consistent with his duty to alert the Department to an erroneous salary payment as soon as he knows of the erroneous compensation.

II.

The remaining question is whether Respondent has demonstrated that it is against equity and good conscience for the Federal government to recover the debt in this case. To secure a favorable ruling on the equity standard, Respondent must show that he has acted fairly, without

¹³ *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 15, 2005).

¹⁴ *Id.*

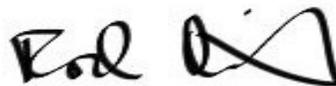
fraud or deceit, and in good faith with regard to all matters concerning the overpayment. In addition, although there are no rigid rules governing the application of equity, I must balance equity and appraise good conscience in light of the particular facts of this case; in doing so, I must balance the 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.

Respondent argues that it is against equity to collect the overpayments because the overpayments were caused by the Department's error and repayment will impose an undue financial burden. To underscore the significance of the financial burden that would be imposed, Respondent indicates that repayment of this debt would create a financial hardship "in light of the federal salary offset [he is] now incurring as a re-employed annuitant."¹⁵ I am convinced that there are significant factors supporting Respondent's request for waiver, including Respondent's asserted financial burden that would be concomitant to repayment of this debt, Respondent's effort in alerting the Department to the error in recording his official duty station, and Respondent's effort to inform the human resource official to the likely resulting error in locality pay. Moreover, I find no basis from the evidence in the record to conclude that Respondent was aware that he was overpaid prior to checking his eOPF or to conclude that Respondent did not act in good faith in pointing out the errors at the time he did so. Accordingly, I find that in the interests of the United States Respondent's request for waiver should be granted. This decision constitutes a final agency decision.

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 **\$3,822.03** is **HEREBY GRANTED.**¹⁶

So ordered this 17th day of March 2011.



Rod Dixon
Waiver Official

¹⁵ As a re-hired retiree, Respondent qualified to continue to receive an annuity while working, but, pursuant to rules established by the Office of Personnel Management, Respondent's pay is reduced by the amount of his annuity paid while reemployed by the Department.

¹⁶ This decision constitutes waiver of both debts: Debt ID 10111251387 in the amount of \$2,011.39 (docketed as case 11-15-WA) and Debt ID 02781251387 in the amount of \$1,810.64 (docketed as 10-05-WA).