



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

VIRGIE,

Docket No. 11-45-WA
Waiver Proceeding

Respondent

DECISION DENYING WAIVER

On July 11, 2011, the tribunal received Respondent's request for waiver of a **\$2,976.50** debt. For the reasons that follow, the tribunal concludes that waiver of the debt is not warranted. Accordingly, Respondent's request for waiver is denied.

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.¹ 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, which includes: a copy of Respondent's Withdrawal Form for Transit Benefits and Parkings signed on July 6, 2007, a copy of Respondent's Employee Resignation form signed on July 6, 2007, a copy of Respondent's Notification of Personnel Action form indicating that effective July 7, 2007 Respondent transferred from the U.S. Department of Education to the U.S. Department of Health and Human Services, and a copy of a short statement, dated August 1, 2011, from Respondent indicating the: (1) circumstances of the overpayment and (2) the reasons why Respondent

¹ 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).

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 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

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

The basis of the debt in this case is the Department's determination that subsequent to Respondent's transfer of employment from the Department to a another Federal agency, Respondent continued to accept transit benefit payments from the Department over nearly a three-year period. As a result of a hearing on Respondent's debt, Administrative Law Judge Allan C. Lewis (ALJ) issued a decision finding that "Respondent knew or should have known that something was amiss regarding her transit benefits as early as three weeks into her position at HHS." The ALJ held that despite being on notice that she was not entitled to a portion of the transit funds she received, "she continued to download [excessive] funds to her SmarTrip card...every month between July 2007 and January 2010."⁶

Respondent argues that waiver is warranted because it was "her sincere belief" that she had properly withdrawn from the Department's transit benefit program. Respondent also asserts that collection of the debt should be waived because repayment would cause her undue financial hardship.⁷

As noted above, determining whether waiver is appropriate requires consideration of whether there is no indication of *fault* on the part of Respondent. 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 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

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)).

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).

⁶ See, *In re Virgie*, Dkt. No. 11-25-OF, U.S. Dep't of Educ. (July 1, 2011) (prior to this proceeding, Respondent elected to have a hearing on the debt).

⁷ Respondent presented no evidence supporting her claim that repayment would cause undue financial hardship.

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;⁸ (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.⁹ Given the aforementioned considerations, the application of the *fault* standard is critical to the ultimate determination of whether to grant or deny waiver. More precisely, waiver may be granted only if a debtor succeeds in showing that he or she can satisfy the *fault* standard.

Since fault 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, it is fundamental to the analysis of whether to grant a waiver request that the tribunal be persuaded that the employee did not shirk their duty and obligation to ensure the accuracy of their Federal salary and benefit payments and attempt to retain the benefits of a costly error.¹⁰ 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.

In the case at bar, the pertinent facts could hardly be clearer in showing that the employee did not inquire into the validity or accuracy of her transit benefit payments or attempt to bring the matter to the attention of an appropriate Federal official.¹¹ First, Respondent withdrew from the Department's transit benefits program and acknowledges that as a result of the withdrawal, she was not entitled to receive additional benefits from the Department.¹² In addition, the ALJ's finding in the debt hearing clearly established that Respondent knew she was receiving excessive transit benefit funds, and should have alerted the Department or her current employer that these payments exceeded her entitlement. These facts taken together establish that Respondent recognized that she accepted excessive transit benefits after her separation from the Department, and was in a position to alert the Department or, for that matter, the U.S. Department of Health and Human Services to the existence of the erroneous payments. Yet, Respondent chose to continue to accept the excessive transit payments for nearly three years.

⁸ 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.*

⁹ 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).

¹⁰ See, e.g., *In re Russell*, Dkt. No. 05-19-WA, U.S. Dep't of Educ. (June 23, 2005).

¹¹ See, e.g., *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

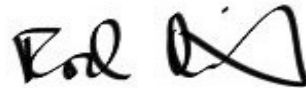
¹² In the ALJ's decision on Respondent's debt, the ALJ noted that even if Respondent was confused as to whether the excessive transit benefit payments came from the Department or her current employer, the U.S. Department of Health and Human Services, the source of the erroneous payments is impertinent to Respondent's awareness that she was receiving excessive payments. See, *In re Virgie*, *supra*. Moreover, Respondent failed to alert either agency of the existence of the excessive payments over the course of nearly three years.

In light of the aforementioned, the tribunal finds that Respondent's arguments and evidence fall short of establishing that she satisfied the requisites of the fault standard.¹³ Accordingly, in the interests of the United States, waiver should not 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 **\$2,976.50** is **HEREBY DENIED**.

So ordered this 1st day of December 2011.



Rod Dixon
Waiver Official

¹³ To the extent that Respondent raised arguments bearing on the equities of collecting the transit benefit overpayment in light of an undue financial burden of repaying the debt, those arguments are simply beside the point in this case because I have determined that Respondent knew or should have known that an overpayment existed. *See, e.g., In re Joanne*, Dkt. No. 06-22-WA, U.S. Dep't of Educ. (May 1, 2007).