



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202-4616

TELEPHONE (202) 619-9700

FACSIMILE (202) 619-9726

In the Matter of

RICHARD,

Respondent

Docket No. 12-19-WA¹
Waiver Proceeding

REVISED DECISION GRANTING WAIVER²

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 an erroneous calculation of compensation for a Federal employee called to military service in 2009. The debt total covers two distinct, but interrelated bills of collection (BoC).³ For reasons that follow, I find that waiver of the debt at issue is warranted. Accordingly, Respondent's request for waiver is granted.

The OFFICE OF HEARINGS & APPEALS (OHA)⁴ maintains authority and jurisdiction to waive⁵ claims of the United States against a former or current employee of the Department.⁶

¹ The docket clerk has changed the docket number for this case from 12-03-WA to 12-18-WA, and finally set the docket number at 12-19-WA. Some of the documents in the case will reflect these docket numbers.

² This revised decision contains corrections to the amount of the debt involved in the two Bills of Collection as well as the amount of refund owed, which the Department's payroll services provider shall calculate. The decision issued on March 29, 2012 is withdrawn.

³ Respondent received bill of collection M113400003 for \$3,835.66 and bill of collection M1129400002 for \$3,326.50. This decision governs each.

⁴ 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, revised January 2012).

⁵ *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.

The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁷ 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.⁸ 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: copies of written statements by Respondent, dated January 4, 2011, February 3, 2012, and March 27, 2012, and copies of email messages from Respondent sent to human resource officials in the office of Federal Student Aid and the payroll service provider of the Department during the months of October and November 2011.

DISCUSSION

I.

Pursuant to 5 U.S.C. § 6323, a Federal employee who performs full-time military service, as the facts of this case show Respondent has done, "is entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise is entitled, [but] ... [l]eave granted by this subsection shall not exceed 22 workdays in a calendar year." In light of this statutory entitlement, Respondent was granted paid leave in pay periods 0901, 0902, 0903, and 0904.⁹ Subsequently, the Department's payroll office was informed that during Respondent's 22 days of paid leave from the Department, he also received military pay, which resulted in Respondent being overpaid. Consequently, Respondent was required to repay the Federal government the lesser of his military pay or his civilian pay covering the 22 days.¹⁰

Broadly stated, determining whether waiver is appropriate requires consideration of two factors; namely, (1) whether there is no indication of fraud, misrepresentation, *fault*, or lack of

⁶ 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/.

⁷ See, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

⁸ 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).

⁹ During this time period, Respondent served in Iraq.

¹⁰ Although the Department has collected \$2,000 of his debt, Respondent seeks a refund, if the debt is waived.

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.¹¹

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 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;¹² (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.¹³ 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 cannot be granted if a debtor fails in showing that he or she can satisfy the fault standard.

Despite the undeniably frustrating aspect of experiencing payroll errors, 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 common vehicle that drives creation of an overpayment. The application of the fault standard, therefore, operates to impose a statutory duty on the employee/debtor to seek correction of the erroneous salary payment regardless of the government's initial mistake. Consequently, notwithstanding 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 government's error cannot, itself, entitle an employee to waiver.¹⁴ This follows because no employee has an entitlement to pay that he or she obtains as a result of an overpayment.¹⁵

More directly, 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. 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

¹¹ See, *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

¹² 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.*

¹³ 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).

¹⁴ *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 15, 2005).

¹⁵ *Id.*

increases, monetary awards or bonuses), but the employee is often the individual 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.

Applying this standard to the facts in this case, Respondent argues that waiver of the entire debt is warranted because he could not have alerted the Department to the payroll error while he was in Iraq. According to Respondent, his supervisors in Washington, DC processed his Time & Attendance forms while he was in Iraq, and, apparently, incorrectly coded his pay resulting in the double payment.

Respondent also argues that repayment of the debt would result in financial hardship because he used the pay to cover the costs of a down payment on a house. In addition according to Respondent, the Department already has collected \$2,000 through deductions from his pay, which has hindered his ability to cover his mortgage payments on his new home. Respondent further indicates that even a deduction of 15% from his pay each pay period to repay the remaining debt would create a “severe financial hardship” because the deductions “jeopardize[] [his] full and timely payments on [his] mortgage. Finally, Respondent argues that the intent of the law, pursuant to 5 U.S.C. § 6323, providing Federal employees compensation while performing military service is negated by the collection of this debt. In Respondent’s view, the “law was put into effect to benefit war veterans, not to put them in a position of financial hardship.”

After a careful review of the record in this case, I am convinced by Respondent’s argument that he was unable discover or seek correction of the payroll coding error while he was on tour of duty in Iraq. Moreover, I am convinced that the errors in Respondent’s pay during his tour of duty were so complex that it was well beyond the type of error that an employee is expected to understand without training in human resources or expertise in employee compensation.¹⁶ On this basis, I am persuaded that Respondent did not accept compensation that he knew or should have known to be erroneous. Therefore, I find that Respondent demonstrated that his circumstances satisfy the *fault* standard.

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

¹⁶ *In re Richard*, Dkt. No. 10-02-WA, U.S. Dep’t of Educ. (June 16, 2011) (in a waiver case involving the same employee, the same time period, but a different error, the hearing official recognized that a new law had been recently enacted governing the pay of Federal employees serving in the military, and that the Department’s payroll office had difficulty computing pay in accord with the law’s requirements); *see also In re Francisco*, Dkt. No. 07-154-WA, U.S. Dep’t of Educ. (February 15, 2008) (some compensation errors are “far too obscure for any employee, not expert in personnel or pay rules, to detect or be alerted to the possible error.”).

favorable ruling on the equity standard, Respondent must show that he has acted fairly, without fraud or deceit, and in good faith with regard to all matters concerning the overpayment. In addition, 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 the 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 weighing in this balancing of interests include the following: whether the debt is substantial - - in this case, it is; whether recovery of the claim would be unconscionable under the circumstances - - in this case, it is; whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment - - in this case, he did not; and whether collection of the debt would impose a financial hardship - - in this case, it does.

Respondent argues that repayment of the debt would result in an undue financial hardship because as a result of recently purchasing a home, repayment of this debt - - even on the basis of an installment plan deducting only 15% from his pay each pay period - - would create a "severe financial hardship" in light of Respondent's mortgage payment.

As noted in footnote 13, *supra*, Respondent has been overpaid on two occasions during his 2009 military service in Iraq. Although the multiple errors in salary payments provide Respondent with more than a modest cause to be watchful for errors in his compensation, doing so while mobilized for military service during war is clearly burdensome. As this tribunal has noted in *In re Francisco*, when deployed for military service during war, access to personnel records, bank statements, and computer systems traditionally used by civilian employees to check the accuracy of salary payments may become burdensome or entirely unavailable to those deployed in combat.¹⁷

I am also mindful that although Respondent filed a timely request for waiver of this debt - - which usually results in a stay of collection by payroll, the Department collected a portion of the debt, which resulted in a financial hardship that Respondent is already experiencing. Indeed, deducting "a portion of the debt from Respondent's pay prior to complying with the [Debt Collection Act] requirements" to provide the debtor with due process before debt collection "constitutes an equitable factor" that could, itself, "favor waiver of a debt."¹⁸ This serves to underscore why the tribunal is persuaded that the facts in this case balance equity in favor of Respondent. Moreover, I find no basis from the evidence in the record to conclude that Respondent did not act fairly, without fraud or deceit, and in good faith with regard to all matters concerning this debt. Therefore, I find that Respondent has demonstrated that it is against equity and fairness for the Federal government to recover the debt in this case. Accordingly, Respondent's request for waiver is granted. This decision constitutes a final agency decision.

¹⁷ Dkt. No. 07-154-WA, U.S. Dep't of Educ. (February 15, 2008).

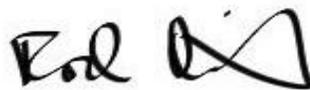
¹⁸ *In re Elizabeth*, Dkt. No. 06-46-WA, U.S. Dep't of Educ. (November 7, 2006)

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 \$3,835.66 for BoC M113400003 and in the amount of \$3,326.50 for BoC M1129400002 is **HEREBY GRANTED**.

Pursuant to the authority of 5 U.S.C. § 5584(c) and upon timely request of Respondent, the United States Department of Education shall REFUND the repaid debt in the total amount of repayment as calculated by the National Business Center, U.S. Department of Interior.

So ordered this 4th day of April 2012.

A handwritten signature in black ink, appearing to read "Rod Dixon", written over a horizontal line.

Rod Dixon
Waiver Official