



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

Docket No. 13-40-WA

T,

Waiver Proceeding

Respondent

DECISION GRANTING WAIVER

On November 7, 2013, the tribunal received Respondent's complete submissions regarding his request for waiver of a **\$215.97** debt owed to the U.S. Department of Education. For the reasons that follow, the tribunal concludes that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

The waiver authority involving all former and current employees of the agency was delegated to the OFFICE OF HEARINGS & APPEALS (OHA),¹ which, thereby, exercises waiver² authority on behalf of the Secretary of Education.³ The undersigned is the authorized Administrative Law Judge who has been assigned this matter by OHA.⁴ 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

¹ 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, Jan. 2012).

² *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.

³ *See* General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 119 Stat. 3828 (codified at 5 U.S.C. 5584) (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, Stat. 1321). The Department's overpayment procedures may be found on the Office of Hearings & Appeals website at: <http://oha.ed.gov/overpayments.html>.

⁴ *See*, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

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.⁵ In the submission requesting waiver, the debtor is expected to: (1) explain the circumstances of the overpayment, (2) state the reasons 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.

In adjudicating this case, the tribunal's findings and conclusions are based on matters accepted as argument and evidence, including: copies of written statements by Respondent, dated July 19, 2013 and November 7, 2013, copies of email messages Respondent sent to human resource officials regarding the nature of the debt, and a copy of the Notice of Debt Letter issued by the Department's payroll contractor, the U.S. Department of the Interior, on June 22, 2013.

DISCUSSION

Broadly stated, determining whether waiver is appropriate requires a consideration of two factors; namely, (1) whether there is no indication of fraud, misrepresentation, fault⁶, or lack of good faith on the part of the Respondent, and (2) whether Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment.⁷ Respondent must satisfy both factors to obtain a waiver.

Fault, as the term is used in the waiver statute, and in factor (1) above, 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. Fault is examined in light of the following considerations: (a) 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 (b) 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 (c) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.⁹

Respondent argues that the waiver of the entire debt is warranted because the overpayment is the result of an administrative calculation error that was not caused by him.

⁵ 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).

⁶ In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

⁷ See, e.g., *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

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 transfer 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, e.g., *In re William*, Dkt. No. 05-11-WA, U.S. Department of Educ. (Oct. 19, 2005).

⁹ See generally, *Guidelines for Determining Requests* U.S. Department of the Treasury Directive 34-01 (2009), available at <http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/td34-01.aspx>; Standards for Waiver, 4 C.F.R. § 91.5 (2000).

Respondent claims that because the overpayment was to a Federal Employees Retirement System account and not reflected in his pay, he was unaware of it until he was contacted by the Department of the Interior. Respondent states that as soon as the overpayment was brought to his attention, he contacted the appropriate people at the Department of Education. Finally, Respondent asserts that there is no indication of negligence, misrepresentation, fault, or lack of good faith by him.

In applying the fault standard to this case, the tribunal concludes the Respondent lacks fault. As an initial matter, the tribunal recognizes that this overpayment was the result of an administrative error that does not reflect any fraud, misrepresentation, or lack of good faith by Respondent. More importantly, this is not the type of case where an employee reasonably should know that an erroneous overpayment has occurred. The change in Respondent's retirement rate did not result in any significant change to his pay.

In view of the aforementioned facts, this case comes within the ruling of *In re Joseph*, Dkt. No. 08-06-WA, U.S. Dep't of Educ. (Aug. 4, 2009), which held that an employee was not liable for an overpayment of salary resulting from an erroneous retirement classification. Similarly in the instant case, the employee in *Joseph* was overpaid because of a change in his retirement classification. This case is also related to the decision in *In re Francisco*, Dkt. No. 07-154-WA, U.S. Dep't of Educ. (Feb. 15, 2008). In *Francisco*, the tribunal held that notwithstanding the default rule that an employee is responsible for recognizing that he or she received an erroneous salary payment, a waiver official may find that there are sufficient factors in the case that satisfy the fault standard. Drawing on *Francisco*, the fault standard is satisfied when the circumstances of the debt show that the employee could have not known that he or she was erroneously compensated. Furthermore, the tribunal recognized in *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005), that an employee, untrained or inexperienced in labor relations, should not be at fault when the rule underlying the existence of a debt is obscure. These cases are illustrative of the circumstances found in this case, and I find that the same analysis from these cases applies here. By all indications, this is not a case where Respondent would have been able to discover the erroneous payment or otherwise knew of the inaccuracy of his pay.¹⁰

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, an individual must show that he has acted fairly, without fraud or deceit, and in good faith with regard to all matters concerning the overpayment.¹¹ 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 the case and against the competing interests in the recovery of debts owed to the United States.¹² Factors weighed in this balancing of interests include an assessment of: whether the debt is substantial; whether recovery of the claim would be unconscionable under the circumstances; whether the debtor has

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

¹¹ 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).

¹² 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. (Sept. 14, 2005).

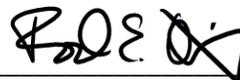
relinquished a valuable right or changed his or her position based on the overpayment; and whether collection of the debt would impose an undue financial burden.¹³

Respondent argues that repayment of this debt would impose a financial burden. Respondent states that his current position pays less than his former position with the Department and other family expenses have resulted in an extremely tight personal budget. In this light, the tribunal concludes that Respondent's assertions highlight the potential financial hardship that the repayment of this debt may impose. The financial burden is a significant factor supporting Respondent's position that repayment would be inequitable. In light of the aforementioned and on the basis of the entire record, I find that in the interests of the United States waiver of this debt 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 **\$215.97** is **HEREBY GRANTED**.

So ordered this 5th day of December 2013.



Rod Dixon
Administrative Law Judge

¹³ See *In re Shelley*, Dkt. No. 06-25-WA, U.S. Dep't of Educ. (Nov. 28, 2006).