



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS

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In the Matter of

R,

Respondent.

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**Docket No. 14-54-WA**  
Waiver Proceedings

**ORDER DENYING WAIVER**

On November 6, 2014, Respondent, a Department employee, requested a waiver of a debt in the above-captioned proceedings in response to receipt of a debt letter providing notice that the Payroll Operations Division of the Department of the Interior identified overpayment of salary to Respondent in the amounts of **\$1,762.60**. The overpayment accrued as a result of the Department incorrectly taking a retirement deduction of 0.8% rather than 1.3% from Respondent's pay between 2010 and 2014. An Order Governing Proceedings was issued requiring Respondent to file a complete waiver request. Respondent responded initially on December 15, 2014 and then supplemented that filing on December 29, 2014. After a review of Respondent's filings, I find that Respondent has failed to show that collecting the assessed debt is inequitable or against the Department's interest. 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 because of equitable considerations 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 the waiver.<sup>1</sup> When requesting a 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. This decision constitutes a final agency decision.

The record in this case comprises what I have accepted in evidence, including: statements dated November 6, 2014, December 15, 2014, and December 29, 2014; a copy of the notice from

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<sup>1</sup> 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 *In re T*, Dkt. 13-40-WA (December 5, 2013) at 2 n.5.

the Department of the Interior, dated October 30, 2014, notifying Respondent of his debt; and an August 15, 2014 email from the Department with an attached letter explaining the grounds for the debt. Based on my review of these documents, and all others submitted, I find a waiver is not warranted.

## JURISDICTION

The waiver authority involving former and current employees of the Department was delegated to the Office of Hearings and Appeals (OHA),<sup>2</sup> which, thereby, exercises waiver authority and jurisdiction on behalf of the Secretary of Education to waive<sup>3</sup> claims of the United States against a former or current employee of the Department.<sup>4</sup> The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.<sup>5</sup> Jurisdiction is proper under the Waiver Statute at 5 U.S.C. § 5584.

## PROCEDURAL HISTORY

In a Bill of Collection, dated October 30, 2014, the Payroll Operations Division of the Department of the Interior notified Respondent of an overpayment of \$1,762.60 erroneously paid to Respondent. In a letter, attached to an August 15, 2014 email, Respondent had been notified of the overpayment. The letter indicated that after Respondent's June 2010 promotion, his retirement code should have been designated as M—FERS and FICA Special, requiring a contribution of 1.3%, but it was erroneously coded as K—FERS and FICA and only 0.8% was taken. As a result, over a four year period, the debt was incurred.

On November 6, 2014, Respondent sent OHA a request for a waiver of this debt. After an Order Governing Proceedings and a Rule to Show Cause Order were issued, Respondent filed support for his waiver request on December 15, 2014, and then, after a request for an extension was granted, filed supplementary information, including a sworn statement, on December 29, 2014.

In support of his request for waiver, Respondent asserts that he was recently married in July 2014 and that he is expecting his first child in May 2015. He argues that it is "against equity to collect the overpayment because the overpayments were caused by the Department's

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<sup>2</sup> 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).

<sup>3</sup> Waiver is defined as "the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee to an agency as [provided] by 5 U.S.C. 5584 . . . or any other law." 5 C.F.R. § 550.1103 (2014).

<sup>4</sup> See General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 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 (2012) and 31 U.S.C. § 3716 (2012) (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: <http://oha.ed.gov/overpayments.html>.

<sup>5</sup> See 5 U.S.C. § 5584(b) (2012) (noting the authority held by the authorized official in waiver cases).

error and repayment will impose a financial burden on my household.” Respondent further contends that he was unaware of the mistake and had no control over the Department’s actions.

## DISCUSSION

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.<sup>6</sup>

It is well established that “no employee has a right to pay that he or she obtains as a result of overpayments.”<sup>7</sup> Waiver of an erroneous salary payment is an equitable remedy available only when there is no indication of fraud, misrepresentation, fault, or lack of good faith by the debtor (fault standard).<sup>8</sup> It is not enough, however, for the debtor to meet the fault standard. The debtor must also demonstrate that collection of the debt would be against equity and good conscience, and not in the best interests of the United States.

In waiver cases, the fault standard has specialized and particular meaning. “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; (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.”<sup>9</sup>

This tribunal has already spoken on this exact matter. In both *In re Joseph*, 08-06-WA, and *In re T*, 13-40-WA, we determined that retirement classifications are not readily clear to the average employee, and most employees are not charged with knowing whether the Department has accurately classified them. Therefore, the fault standard is met in this matter.

When determining whether to grant a waiver, however, this tribunal must also “balance the equities” by considering a number of factors, including: “whether recovery of the claim would impose an undue financial burden upon the debtor under the circumstances.”<sup>10</sup>

Respondent asserts that “[i]t is against equity to collect the overpayment because the overpayments were caused by the Department’s error and repayment will impose a financial burden on my household.” Respondent further asserts that he was recently married and is expecting his first child in the coming months. As to Respondent’s assertion that it is against equity because the overpayments were caused by the Department’s error, it is clear that the fact

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<sup>6</sup> See e.g., *In. re David*, Dkt. No. 05-22-WA, U.S. Dep’t of Educ. (Dec. 14, 2005).

<sup>7</sup> *In re Danea*, Dkt. No. 13-28-WA, U.S. Dep’t of Educ. (October 24, 2013) at 4; *In re Carolyn*, Dkt. No. 11-02-WA, U.S. Dep’t of Educ. (August 11, 2011) at 4.

<sup>8</sup> See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep’t of Educ. (December 12, 2005).

<sup>9</sup> See *In re Robert*, Dkt. No. 09-10-WA, U.S. Dep’t of Educ. (November 19, 2009) at 3.

<sup>10</sup> *In re Donna*, Dkt. No. 12-56-WA, U.S. Dep’t of Educ. (November 8, 2012) at 5-6.

that administrative error by the Department caused the overpayments does not entitle the employee to a waiver.<sup>11</sup> An overpayment will nearly always be a result of the Department's administrative error, yet a waiver is an exception to the rule that an employee must return money erroneously paid to him or her.

As to the allegation of financial burden, Respondent has failed to make an adequate showing that the repayment of the debt will cause an undue financial burden. As this tribunal has stated in the past, “[t]here is no doubt that repayment of any sum may be inconvenient and unplanned in terms of any household budget, but that is not tantamount to showing a financial burden such that the equities call for waiver.”<sup>12</sup> In the Order Governing Proceedings, Respondent was counseled that if raising “a financial hardship claim [Respondent] should demonstrate it with specifics, with supporting information about why this is the case and why he or she asserts ability to repay the debt is a hardship.” After initially submitting a response on December 15, 2014, Respondent was provided an opportunity to supplement the record. In neither of his filings, however, has Respondent made an adequate showing to warrant a waiver. Although there are no rigid rules governing the equity standard,<sup>13</sup> in the past we have looked to whether requiring repayment would result in a loss of “medical care, housing, or other life sustaining needs.”<sup>14</sup> A statement that Respondent’s family is expanding without any specific evidence of special hardship does not warrant a waiver.

Because Respondent has failed to meet his burden to show that it would be unconscionable or not in equity to require repayment, I have no choice but to conclude that a waiver is not warranted.<sup>15</sup> Therefore, Respondent’s request for a waiver is denied. This decision constituted a final agency decision.

## ORDER

Pursuant to the authority of 5 U.S.C. § 5584 (2012), Respondent’s request for waiver of the entire debt to the United States Department of Education in the amount of **\$1,762.60** is **HEREBY DENIED**.

So ordered this 12th day of January 2015.

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Daniel J. McGinn-Shapiro  
Waiver Official

<sup>11</sup> *In re Danae*, Dkt. No. 13-28-WA, U.S. Dep’t of Educ. (October 24, 2013) at 6; *In re Sarah*, 11-07-WA, Dkt. No. 11-07-WA, U.S. Dep’t of Educ. (May 5, 2011) at 2-3.

<sup>12</sup> *In re April*, Dkt. No. 12-23-WA, U.S. Dep’t of Educ. (July 11, 2012) at 9.

<sup>13</sup> *In re T.*, Dkt. 13-40-WA, U.S. Dep’t of Educ. (December 5, 2013) at 3.

<sup>14</sup> *In re Lester*, Dkt. No. 11-47-WA, U.S. dep’t of Educ. (December 27, 2012) at 6; *In re Sarah*, 11-07-WA, Dkt. No. 11-07-WA, U.S. Dep’t of Educ. (May 5, 2011) at 3.

<sup>15</sup> *In re April*, Dkt. No. 12-23-WA, U.S. Dep’t of Educ. (July 11, 2012) at 10; *In re Sarah*, 11-07-WA, Dkt. No. 11-07-WA, U.S. Dep’t of Educ. (May 5, 2011) at 3.