



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS & APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202-4615

In the Matter of

Docket No. 14-59-WA

R,

Waiver Proceeding

Respondent

DECISION DENYING WAIVER

On November 18, 2014, Respondent, a current employee of the Department of Education (Department), requested a waiver of a \$94.55 debt arising from an overpayment. The overpayment accrued as a result of Respondent receiving overtime pay he was not entitled to after his status changing from “non-exempt” to “exempt.” For the reasons that follow, I find 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 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.¹ 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: a copy of a sworn written statement by Respondent, dated November 19, 2014, explaining the circumstances of the overpayment, and explaining why a waiver is appropriate; a November 10,

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 In re T*, Dkt. 13-40-WA (December 5, 2013) at 2 n.5.

2014 Bill For Collection issued by the Department of the Interior; the October 23, 2014 and November 1, 2014 notifications that documents had been added to Respondent's eOPF Folder; a payment Agreement Form; and four Notification of Personnel Action forms.

JURISDICTION

The waiver authority involving former and current employees of the Department was delegated to the Office of Hearings and Appeals (OHA),² which, thereby, exercises waiver authority and jurisdiction on behalf of the Secretary of Education to waive³ claims of the United States against a former or current employee of the Department.⁴ The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁵ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. § 5584.

PROCEDURAL HISTORY

In a Bill of Collection, dated November 10, 2014, the Payroll Operations Division of the Department of the Interior notified Respondent of an overpayment of \$94.55 as a result of overtime payments erroneously paid to Respondent.

On November 18, 2014, Respondent sent OHA a request for a waiver of this debt. I issued an order governing proceeding on November 19, 2014. The same day, on November 19, 2014, Respondent filed a sworn statement and supporting documents in support of his waiver request.

In support of his request for waiver, Respondent asserts the following facts. After Respondent was promoted to a GS-12 level, his status under the Wage and Fair Labor Standards Act should have been changed from non-exempt to exempt. This change was not completed in a timely manner, and as a result, Respondent was paid overtime payments he was not entitled to

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, revised January 2012).

³ *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).

⁴ *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>.

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

because of the change of his status. Respondent further asserts that after the mistake was realized, it was corrected retroactively, and the first indication he received that there were problems was when Respondent received an automated e-mail indicating that new documents had been added to his eOPF. Respondent contends that prior to receiving the November 19, 2014 Bill For Collection from the Department of the Interior, he was not emailed or called by any Department of Education or Interior official to explain the mistake or its consequences.

Respondent argues that because the erroneous overtime payments all occurred before he was notified that his status had not been changed to exempt, Respondent was unable to act earlier or to prevent the erroneous payments.

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.⁶

Under the Department's waiver policy, a request for a pre-offset hearing or waiver must be made within 15 calendar days from the receipt of the initial notification letter.⁷ The Bill For Collection is dated November 10, 2014, and so Respondent could not have received it earlier than that date. Therefore, Respondent's November 18, 2014 waiver request is timely and before this tribunal.

It is well established that "no employee has a right to pay that he or she obtains as a result of overpayments."⁸ 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).⁹ 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. At issue in this instant proceeding is whether Respondent's arguments and submissions support a request that an erroneous salary overpayment be waived.

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

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

⁷ See 34 C.F.R. § 32.6 (2014).

⁸ *In re Danae*, 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.

⁹ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

that the employee knew or should have known the payment to be erroneous.”¹⁰ Respondent asserts that because he was not notified of the erroneous payments until October 2014, he could not have acted earlier to prevent the erroneous overtime payments that occurred in April, July, and September 2014. Even assuming this is enough to meet the fault standard, however, Respondent has put forth no argument why requiring him to repay the debt owed is not in equity and good conscience, and not in the best interests of the United States.

When determining whether to grant a waiver, this tribunal “must balance the equities” by considering a number of factors, including: “(a) whether recovery of the claim would be unconscionable under the circumstances; (b) whether, because of the erroneous payment, the employee has relinquished a valuable right or changed positions for the worse, regardless of financial circumstances; (c) whether recovery of the claim would impose an undue financial burden upon the debtor under the circumstances, and (d) whether the time elapsed between the erroneous payment and discovery of the error and notification of the employee is excessive.”¹¹

Respondent has put forth no argument why equitable considerations weigh in favor of granting the waiver. Respondent asserts that the erroneous payments came as a result of the Department’s error. It is clear, however, that the fact that administrative error by the Department caused the overpayments does not entitle the employee to a waiver.¹² Respondent has made no showing that the repayment of the debt will cause an undue financial burden or require him to “lose medical care, housing, or other life sustaining needs.”¹³ Because Respondent has failed to meet his burden to show that it would be unconscionable or not in equity, I have no choice but to conclude that a waiver is not warranted.¹⁴ 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 **\$94.55** is **HEREBY DENIED**.

So ordered this 26th day of November 2014.

Daniel J. McGinn-Shapiro
Waiver Official

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

¹¹ *In re Donna*, Dkt. No. 12-56-WA, U.S. Dep’t of Educ. (November 8, 2012) at 5-6.

¹² *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.

¹³ *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.

¹⁴ *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.