



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

L,

Respondent.

Docket No. 14-70-WA

Waiver Proceedings

DECISION DENYING WAIVER

On December 17, 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 amount of **\$191.16**. Respondent asserts that the overpayment arose from him being initially processed under the wrong retirement plan. An Order Governing Proceedings was issued requiring Respondent to file a complete waiver request, and, on January 5, 2015, Respondent filed a sworn statement with supporting documents. After a review of Respondent's filings, I find that Respondent has failed to show that he is without fault for the overpayments in this matter. 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 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: both Respondent's initial December 17, 2014 request for a waiver and Respondent's January 5, 2015 sworn statement; Respondent's original and corrected SF-50s; the documents sent to Respondent notifying him of the debt; and the decisions referenced in Respondent's statement.

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.

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

On December 9, 2014, the Payroll Operations Division of the Department of the Interior notified Respondent of an overpayment of \$191.16 erroneously paid to Respondent. Specifically, Respondent was informed that between pay periods 16 and 24 of 2014, Respondent's retirement code was incorrectly being classified as KR rather than KF, as it should have been. As a result, less money was incorrectly withheld from Respondent's paychecks during that period and the debt was incurred.

On December 17, 2014, Respondent sent this tribunal a request for a waiver of the debt. After an Order Governing Proceedings was issued, Respondent sent a sworn statement with supporting documentation on January 5, 2015.

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

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).

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

It is well established that “no employee has a right to pay that he or she obtains as a result of overpayments.”⁷ 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).⁸ In the present matter, Respondent fails to show that he is without “fault” as the term is narrowly used in this context.

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.”⁹

Respondent argues that a waiver should be granted for three reasons. First, Respondent argues that because this involves an incorrect waiver classification, it is akin to the situation in *In re Joseph*, 08-06-WA, where this tribunal granted a waiver request. Second, Respondent asserts that “there is no reasonable expectation that [he] should have recognized this overpayment as an erroneous payment” citing *In re Francisco*, 07-154-WA as precedent. And finally, Respondent asserts that because it took 62 days from the time the Department discovered its error to take corrective action, the Department “did not demonstrate due diligence by processing the action in a timely manner.”

It is well established that “[a]n employee who knows or *who should know* that he or she is receiving erroneous overpayments cannot acquire title to the erroneous amounts under any condition.”¹⁰ When determining whether an employee is charged with the knowledge that his or her payment was erroneous, this tribunal examines “pertinent factors such as an employee’s position, grade level, education, and training.”¹¹

As noted above, Respondent has cited *In re Francisco* to assert that he has satisfied the fault standard. Central to the determination that the fault standard was met in that case, however, was that error giving rise to the overpayment was “far too obscure for an employee, *not an expert in personnel or pay rules*, to detect or be alerted of the possible error.”¹² In this matter, however, Respondent is a human resource specialist in Human Capital and Client Services (HCCS), the Department’s human resources department. An employee who works in human resources is charged with more knowledge about proper retirement classifications, as it is HCCS who

⁷ *In re Danea*, Dkt. No. 13-28-WA, U.S. Dep’t of Educ. (Oct. 24, 2013) at 4; *In re Carolyn*, Dkt. No. 11-02-WA, U.S. Dep’t of Educ. (Aug. 11, 2011) at 4.

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

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

¹⁰ *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep’t of Educ. (June 14, 2005) at 5 (emphasis added).

¹¹ *Id.*

¹² *In re Francisco*, Dkt. No. 07-154-WA, U.S. Dep’t of Educ. (Feb. 15, 2008) at 4 (emphasis added).

oversees the proper retirement classification of employees. Although Respondent is correct that in *In re Joseph*, this tribunal determined that the respondent should not have reasonably known that he was being overpaid as a result of an improper retirement classification, there is no indication in that decision that the respondent worked in human resources.

Although Respondent has raised arguments that it would be inequitable to require repayment, because Respondent has not shown we do not reach the equitable question. Because Respondent has failed to meet his burden under the fault standard, 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 **\$191.16** is **HEREBY DENIED**.

So ordered this 9th day of February 2015.

Daniel J. McGinn-Shapiro
Waiver Official