



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

Docket No. 14-08-WA

S,

Waiver Proceeding

Respondent.

DECISION DISMISSING CASE

This matter comes before the Office of Hearings and Appeals (“OHA”) through the timely request of Respondent, an employee of the U.S. Department of Education (“Department” or “ED”). Respondent’s request arises under 5 U.S.C. § 5584 (“the Waiver Statute”) authorizing the waiver of claims of the United States against debtor due to erroneous payments made to a Federal employee.¹ The OHA maintains authority and jurisdiction² to waive³ claims of the United States against a former or current employee of the Department. The undersigned is the authorized Waiver Official⁴ who has been assigned this matter by OHA.

At issue in this case is whether an employee of the Department should be granted waiver⁵ of repayment of a debt arising from an error in her pay when she was incorrectly paid for the difference in pay between at GS-13, step 1 and a GS-13, step 2 for pay periods 24 and 25 in 2013.⁶ This overpayment appears to be the result of an erroneous personnel action implemented

¹ 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: <http://oha.ed.gov/overpayments/index.html>.

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, June 2005 (revised Dec. 2006)).

³ 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.

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

⁵ Respondent’s initial submission, received by the Office of Hearing and Appeals on February 28, 2014, was entitled “Request for Waiver of Partial Payment AND Petition to Request a Hearing”. In paragraph 3 of this submission, Respondent states, “I am requesting a waiver of \$60 and a hearing to discuss this matter.” For this reason, the matter was treated as a waiver request and assigned to a waiver official.

⁶ Respondent also received a salary overpayment in pay period 26 due to the same error. This resulted in a Bill for Collection (Debt ID Q0351390981) for \$92.46, which Respondent has paid.

when Respondent was promoted from a GS-12 to a GS-13. The personnel action was corrected in December, 2013, and her pay for the two pay periods in question was recalculated in January, 2014.⁷ The recalculation (characterized as a “time sheet correction”) generated the Bill for Collection.

Resolution of this case is based on the matters accepted into the record as argument, evidence, and/or documentation in this proceeding when considered as a whole, including Respondent’s initial waiver request, subsequent submissions and documents compiled by the Department’s Human Resources office. This decision constitutes a final agency decision.

Procedural History

Respondent was formally notified of the debt at issue through a Bill for Collection (“BfC”), dated February 18, 2014, which stated that Respondent had received a Federal Salary payment that was \$184.93 in excess of the amount to which she was entitled. Respondent’s request for a waiver was received by the Office of Hearings and Appeals on February 28, 2014. It was then assigned to this Waiver Official, who accepted Respondent’s request as timely and issued an Order Governing Proceedings (“OGP”) on March 5, 2014. The OGP outlined the process governing waiver proceedings and required Respondent to submit materials supporting her waiver request by March 26, 2014. Immediately thereafter, also on March 5, 2014, Respondent submitted a short, signed statement describing the circumstances surrounding the overpayment, a copy of the BfC for the debt and relevant supporting documentation. The Waiver Official requested additional information from Respondent, and Respondent submitted a revised statement in support of her waiver request on March 13, 2014. The record was subsequently closed on March 27th.

Discussion

The record in this case constitutes the documents that have been accepted as argument and evidence, as stated above: the initial waiver request and supporting documentation (dated February 24, 2014 and received by OHA on February 28, 2014); a signed, sworn, written statement by Respondent and supporting materials (submitted by email on March 5, 2014); a second (unsigned) written statement by Respondent (submitted by email on March 13, 2014), and other email correspondence between Respondent and the Waiver Official.

At the outset, there are two threshold procedural issues to be addressed in a waiver proceeding: timeliness and compliance. Under the Department’s waiver policy, a request for a waiver (or pre-offset hearing) must be made within 15 calendar days from the receipt of the initial notification letter.⁸ If a waiver request is filed in a timely manner, the next consideration is whether a respondent has complied with the requirements and procedures outlined in the Order

⁷ The Waiver Official notes that the Bill for Collection (Debt ID 40491390981) for the two pay periods in question totals \$184.93, which is approximately \$92.46 per week -- the same amount as the Bill for Collection (for pay period 26) that Respondent has already paid.

⁸ See, 34 C.F.R. § 32.6.

Governing Proceedings. If these two preliminary questions are satisfied, the tribunal then goes on to examine the merits of the waiver request.

In a waiver proceeding, waiver is available as an equitable remedy to a respondent who satisfies the relevant fault standard by demonstrating that his or her case does not involve fraud, misrepresentation, fault or lack of good faith on his or her part.⁹ Additionally, for a waiver to be granted, the debtor must demonstrate that the totality of the circumstances weighs against the collection of the debt because collection would not be equitable, in good conscience or in the best interests of the United States.¹⁰ Thus, it is incumbent upon the debtor to affirmatively satisfy both the fault standard and the equity prong with documentation in the record. Not factored into this consideration is the validity of the debt.¹¹ Indeed, for a debt to be considered for a full or partial waiver, the debtor first must acknowledge the validity of that debt. The fact that the Department erred by making the overpayment to an employee does not relieve that employee of liability for the debt¹² nor automatically provide grounds for a waiver.¹³

In the present case, the debt arose when Respondent was paid at a higher salary rate due to what appears to be an administrative error. The debt originated in pay periods 23 and 24 of 2013 when Respondent was promoted from a GS-12 to a GS-13. The record indicates that the personnel actions surrounding the promotion were improperly executed. The requested sequence of personnel actions appear to have been: first, a within grade increase from a GS-12, step 1 to a GS-12, step 2; and second, a promotion to a GS-13. Instead, Respondent was given the promotion first, followed by the within grade increase; thus, her grade (and pay level) went from a GS-12, step 1 to a GS-13, step 1 and then to a GS-13, step 2. In this manner, the overpayment debt is the result of what appears to be an administrative error that implemented an erroneous payment of salary.¹⁴

Respondent submitted her request for a waiver and responded to the Order Governing Proceedings in accordance with the established timeframes and deadlines. Respondent acknowledges the validity of the debt but disagrees as to the amount. In the initial submission, Respondent states, “I agree that I was overpaid; however, I disagree that I was overpaid \$184.93.” She explains that she received approximately \$125 in her paycheck as a result of the incorrect payment, after Federal, state and local taxes were deducted, but is now being asked to repay \$185. Respondent objects to this amount and does not believe she should be liable for repaying the taxes that were withheld from her paycheck. For this reason, Respondent requests that all taxes be included as “applicable recoverables”¹⁵, the debt amount be recalculated to exclude those taxes and she be granted “a waiver of \$60 and a hearing to discuss this matter.” Regarding the taxes, Respondent argues that she should not be required to repay funds that she did not receive and asserts, “The employer who overpaid me should do the work to collect those

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

¹⁰ See, *In re Arthur*, Dkt. No. 07-02-WA, U.S. Dep’t of Educ. (May 10, 2007).

¹¹ See, *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep’t of Educ. (June 14, 2005).

¹² *Id.* at n. 7.

¹³ *Id.* at 4.

¹⁴ Although Respondent does not specifically state this in her signed, written statement, it is clear from the supporting documentation that the overpayment was an administrative error beyond the control of Respondent.

¹⁵ Such that the taxes withheld would be recovered by the Department from the revenue collecting agencies to which they were paid (Federal, state, local), rather than from Respondent.

monies since it is the one who overpaid me.” Respondent further avers that she did not engage in any fraud, misrepresentation, fault or lack of good faith with respect to the debt and describes the actions she took to alert appropriate officials about the issue. Respondent states that she believes that the collection of this debt in its entirety would be against equity and good conscience and not in the best interests of the United States; however, Respondent does not proffer any arguments or submit any evidence in support of this statement.

Upon receipt of Respondent’s signed, written statement, this Waiver Official requested that Respondent provide an explanation as to how she determined that the overpayment was a net of \$125 such that she believed a waiver in the amount of \$60 was warranted. Respondent replied that she did not recall exactly how she determined the amount of the overpayment but provides several calculations, which are based on her analysis of tax withholdings in prior pay periods, as support of the approximately-\$60 figure. Further, Respondent states, “I realize that my calculation is not precise and there are other things which effect [*sic*] my net pay, such as TSP; hence, the use of the word ‘approximately’ numerous times in my statement. What I would really like is a recalculation of the debt as stated above.” Respondent clarifies that she is “not requesting a partial waiver in any particular amount” and agrees that she owes a debt.

Respondent’s case is unusual in that she acknowledges that the full amount of the overpayment was made in error but avers that the debt is incorrect because she is being asked to repay a portion that was not paid directly to her, but rather on her behalf to various tax revenue agencies. Thus, Respondent accepts the validity of the debt with one statement and subsequently rejects it. Respondent’s final posture in this matter seems to be a request for a partial waiver (in an unspecified amount) concurrent with a recalculation of the amount of the debt (by including all taxes withheld as “applicable recoverables”). In this manner, Respondent makes two requests: a partial waiver and a recalculation of the debt, removing all taxes previously withheld from Respondent’s repayment liability.

First, the tribunal notes that the remedies sought by Respondent are incompatible.¹⁶ For this reason, both cannot be granted. Given that Respondent does accept the validity of the debt, the tribunal gleans that, in essence, Respondent alternately seeks a waiver equal to the amount of the taxes paid on her behalf (Respondent’s request for a partial waiver) OR that the Department recover the taxes paid on her behalf, recalculate the debt, reduce her debt by the amount of the taxes and issue an amended BfC (Respondent’s request for a recalculation of the debt).¹⁷

¹⁶ Respondent states in her revised statement (emailed March 13, 2014) that she seeks both a partial waiver and a recalculation of the amount of the debt. However, these remedies, if both were granted, would provide double relief. In other words, if Respondent were to receive a partial waiver in the amount of the taxes withheld from her pay (X dollars), then she would be responsible for paying $\$185 - X$. If Respondent’s debt were also recalculated to include the taxes (X) as recoverables, then X would be removed from the debt resulting in her BfC being reduced by X ($\$185 - X$). Thus, if Respondent were granted both remedies she seeks – a partial waiver and a recalculation of the debt excluding the taxes withheld – then the amount of the taxes withheld (X) would be removed from her debt twice, resulting in double relief, an outcome which is both illogical and unsupported. For this reason, the tribunal interprets Respondent’s request as being for either a partial waiver in the amount of taxes withheld OR a recalculation of the debt (subtracting the amount of taxes withheld from the amount of the debt liability).

¹⁷ One could assert another interpretation of Respondent’s request for a recalculation of the debt: that the request is for the Department to calculate the amount of taxes withheld -- without seeking to recover that amount from the tax revenue agencies -- and to issue an amended BfC, removing the taxes from Respondent’s liability. However, if the Department recalculated Respondent’s debt but did not recover the funds from the tax revenue

Next, when considering Respondent's request for a waiver, the tribunal must assess the factors outlined above: the timeliness of the request, adherence to procedural requirements, the fault standard and equity concerns. This tribunal finds that Respondent's waiver request was filed in a timely manner and adequately explains the circumstances of the debt. Respondent has provided sufficient evidence to persuade this tribunal that Respondent is without fault in this matter; therefore, the fault standard is satisfied. However, lack of fault is only one consideration in a waiver proceeding. Inherent in any adjudication is the requirement that a respondent provide information sufficient for the hearing official to make factual determinations. Here, Respondent has failed to do so: she does not provide a specific figure in her claim for a partial waiver.¹⁸ Further, Respondent fails to articulate any equity arguments supporting a waiver of the debt; this is a fatal defect. Equity considerations are central to a waiver proceeding. Absent this information, the waiver request is deficient and cannot succeed.

Finally, to the extent that Respondent has requested the debt be recalculated, this tribunal determines that it does not have jurisdiction to adjudicate that remedy. As stated above, the tribunal interprets Respondent's recalculation request as tantamount to a request that the Department recover the taxes paid on her behalf, recalculate the debt and reduce her debt by the amount of the taxes.¹⁹ The record shows that Respondent received her overpayment in calendar year 2013, and the BfC was generated in calendar year 2014. In situations where the erroneous payment is made and repayment is sought in the same year, an employer may adjust a respondent's tax withholdings.²⁰ Unfortunately for Respondent, IRS rules and regulations prevent the Department from adjusting or recovering tax withholdings from a prior year.²¹ This tribunal has no authority to order that all taxes be recovered from the tax revenue agencies, included in "applicable recoverables" and removed from Respondent's debt liability. Thus, it is beyond this tribunal's jurisdiction to adjudicate Respondent's requested remedy.

Conclusion

Based on the findings of fact and conclusions of law contained herein, it is the determination of this tribunal that Respondent has not provided sufficient information or basis to obtain waiver of Respondent's debt and that it is beyond the jurisdiction conferred on this tribunal to order that all taxes be recovered from the tax revenue agencies, included in "applicable recoverables" and removed from Respondent's debt liability to recalculate Respondent's debt. Accordingly, this proceeding is dismissed.

agencies, the recalculation of the debt would be functionally equivalent to a waiver, which Respondent has already requested.

¹⁸ The tribunal recognizes that the circumstances prevent Respondent from articulating a specific amount; however, the tribunal cannot adjudicate a non-specific claim.

¹⁹ See, fn. 17.

²⁰ It is the understanding of this tribunal that had Respondent's overpayment and the generation of the BfC transpired in the same calendar year, then all taxes would have been included as "applicable recoverables" in the BfC.

²¹ See, *Publication 15 (2014), (Circular E), Employer's Tax Guide, available at* http://www.irs.gov/publications/p15/ar02.html#en_US_2014_publink1000202526 (retrieved on March 19, 2014).

Order

It is hereby ORDERED that the stay of the debt collection process is LIFTED, and this proceeding is DISMISSED. This decision operates as adjudication on the merits, and constitutes a final agency decision.²²



Kristine Minami
Waiver Official

Date: April 25, 2014

²² The import of this dismissal is that it is with prejudice and “operates as an adjudication upon the merits.” Respondent may not re-file a request for waiver on the same debt. *See, e.g., Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001) (expressing the view that under federal common law, a dismissal with prejudice directly relates to the dismissing tribunal).