



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

C,

Respondent.

Waiver Proceedings

Docket No. 15-27-WA

DECISION GRANTING WAIVER

On April 29, 2015, the Office of Hearings and Appeals (OHA) received a letter, dated April 15, 2015, from Respondent, a Department employee, requesting a waiver of debts arising from salary overpayments made to her. Respondent's waiver request comes in response to the receipt of two debt letters from the Department of the Interior (DOI) providing notice of overpayments of salary to Respondent in the total amount of **\$6,588.33**. The emails Respondent has submitted indicate that these overpayments arose because, when Respondent was promoted or given pay raises multiple times between November 2012 and November 2014, the Department erroneously failed to remove a "special pay determination" that had been granted when Respondent was in another position, resulting in years of overpayments of salary.

On April 30, 2015, an Order Governing Proceedings was issued directing Respondent to file a short sworn statement explaining, among other things, why Respondent believed a waiver should be granted and to file necessary supporting documents. On May 29, 2015, Respondent filed a sworn statement and supporting documents setting forth her justification for a waiver of the \$6,588.33 in debt.

Before this Tribunal, therefore, are the following documents filed either with the initial request for a waiver or with the sworn statement:

- (1) Respondent's request for a waiver, dated April 15, 2015;
- (2) Respondent's sworn statement, dated May 29, 2015;
- (3) A series of emails dated November 18, 2014 addressing a change in Respondent's pay;
- (4) A January 29, 2015 email from the Department's human resources office (HCCS) notifying Respondent of salary overpayments as a result of pay coding errors;
- (5) SF-50 Notifications of Personnel Action;
- (6) A bill for collection from DOI for a debt of \$2,712.99, dated February 17, 2015; and

(7) A bill for collection from DOI for a debt of \$3,875.34, dated April 9, 2015.

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.

JURISDICTION

The waiver authority involving former and current employees of the Department was delegated to OHA,² which, thereby, exercises 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.

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. No. 13-40-WA (Dec. 5, 2013) at 2 n.5.

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 Jan. 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 OHA 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).

PROCEDURAL HISTORY

In November 2014, Respondent noticed that, when she was promoted to a GS-9 level position from a GS-7 level position, the locality adjustment for her salary decreased, and so she immediately contacted her supervisor. After a series of communications, in January 2015, Respondent received an email from HCCS thanking Respondent from bringing the issue of pay discrepancy to their attention. The letter, however, also notified Respondent that, upon further review, HCCS discovered years of past overpayments. Specifically, the email outlined the following course of events:

- (1) On January 29, 2012, Respondent was converted from a Management & Program Analyst to an IT Specialist, and this new position came with a “special rate of pay” that was higher than the general GS-5, Step 1 rate;
- (2) On November 18, 2012, Respondent was converted back to a Management & Program Analyst at a GS-7, Step 1 with the “special rate” of \$45,872 per year. This was in error, however, as there is no special rate for the Management & Program Analyst series of positions, and Respondent’s salary should have been \$42,209;
- (3) On November 17, 2013, Respondent received a within-grade increase with the special rate code still in effect, increasing Respondents pay to \$47,401. Keeping the special rate code in effect was in error, however, and Respondent’s salary should have been \$43,616 instead;
- (4) On November 16, 2014, Respondent again received a within grade step increase, and again HCCS erroneously kept the special rate code in effect. Therefore, while Respondent’s salary should have been \$45,473, it was instead set at \$49,419; and
- (5) The same day, on November 16, 2014, Respondent was promoted to a GS-9 level, and her salary was properly calculated without the special pay code erroneously applied.

Finally, the HCCS letter informed Respondent that she would receive a letter of indebtedness from DOI, and that she would have the opportunity to request that the debt be forgiven by this Tribunal at that time. On February 17 and April 9, 2015, Respondent received the bills of collection from DOI for a total debt of \$6,588.33. On April 15, 2015, Respondent sent OHA a request for a waiver. After an Order Governing Proceedings was issued, Respondent submitted a sworn statement and supporting documentation on May 29, 2015.

Respondent argues that (1) she notified her supervisor as soon as she noticed a discrepancy in her pay; (2) she had no reason to recognize the overpayment prior to seeing the salary discrepancy in November 2014; and (3) that requiring repayment would be against equity because it would cause significant financial hardship for Respondent and her son.

DISCUSSION

Determining whether waiver is appropriate requires consideration of two factors: (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

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 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 or not in the best interests of the United States.

In waiver cases, the fault standard has specialized and particular meaning. “[F]ault 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

As a starting point, there is no indication that the overpayments at issue in this matter resulted from Respondent’s fraud, actions, statements, or failures to disclose information. So the only issue before this Tribunal is whether Respondent accepted the overpayments when she knew, or should have known, that she was not entitled to the additional pay. The circumstances surrounding the overpayments, however, indicate that Respondent did not know, and should not reasonably have known, that she was being paid in excess of the salary owed to her. Therefore, Respondent is not at “fault” for the overpayments at issue.

In *In re T*, 13-40-WA, this Tribunal established that “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,” and 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.”¹⁰ In the present matter, the overpayment resulted from the Department’s failure to remove a salary rate code when Respondent became a Management & Program Analyst, a position not eligible for the salary rate code. Whether or not a position is eligible for a salary rate code, however, is not knowledge that an employee who is not experienced in human resources and pay grade matters would reasonably be charged with knowing. It would not be clear to most employees from the face of their leave

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

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 T*, Dkt. No. 13-40-WA, U.S. Dep’t of Educ. (Dec. 5, 2013) at 3.

and earnings statements or other documents employees are charged with reading. Once Respondent noticed an issue with her salary, she contacted her supervisor. Therefore, based on the circumstances surrounding the overpayment in this matter, I am convinced that Respondent did not know, and should not reasonably have known, of the overpayments prior to acting to address the issue.

When determining whether to grant a waiver, however, this Tribunal must be convinced that it would be either inequitable or not in the Government's interest to require repayment. One established reason it would be inequitable to require repayment of a debt would be if "recovery of the claim would impose an undue financial burden upon the debtor under the circumstances."¹¹

Respondent argues that "requiring a repayment would cause significant hardship on [her] son and [Respondent]." She further contends that if she is required to repay the debt, her son and her "will lose our fragile stability."

Respondent asserts that she is currently raising her six year old son alone and has been since his father left when the child was a few weeks old. One consideration we take into account when determining if repayment will constitute an undue financial burden is the costs associated with caring for a dependent.¹² Respondent is doing so without assistance from her son's father. In addition, we have in the past considered the size of the debt. Respondent's current salary is \$54,423. A debt of \$6,588.33 amounts to over 12% of Respondent's gross annual salary, which is a substantial percentage of her income.¹³ In short, requiring Respondent to repay this debt would impose an inequitable undue financial burden on her and her family.

Because Respondent is not at fault for the overpayment, and requiring repayment would be inequitable, I conclude that a complete waiver of the debt at issue is warranted. Therefore, Respondent's request for a waiver is granted. This decision constitutes a final agency decision.

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

¹² *See In re Zohaib*, Dkt. No. 14-26-WA, U.S. Dep't of Educ. (July 24, 2014) at 7.

¹³ *Contrast In re E*, Dkt. No. 15-07-WA, U.S. Dep't of Educ. (March 31, 2015) at 6, where this Tribunal determined that a debt of less than one half a percentage of the respondent's annual income was less likely to impose an undue financial burden.

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 **\$6,588.33** is **HEREBY GRANTED**.

So ordered this 3rd day of June, 2015.

Daniel J. McGinn-Shapiro
Waiver Official