



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of

Docket No. 15-40-WA

K,

Waiver Proceedings

Respondent.

DECISION GRANTING WAIVER

On June 26, 2015, the Office of Hearings and Appeals (OHA) received a waiver request,¹ dated June 25, 2015, from Respondent, a Department employee, in the above-captioned proceeding. Respondent's requests come in response to the receipt of a debt letter on June 13, 2015 from the Department of the Interior (DOI) providing notice of overpayments of salary to Respondent in the total amount of **\$1,089.42**. The overpayments accrued as a result of the Department incorrectly taking too small of a deduction from Respondent's salary for retirement for approximately one year.

On June 30, 2015, an Order Governing Proceedings was sent to Respondent directing Respondent to file a short sworn statement explaining why Respondent believed a waiver should be granted and to file necessary supporting documents. On July 20, 2015, Respondent filed a sworn statement and supporting documents setting forth his justification for a waiver of the \$1,089.42 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 June 25, 2015;
- (2) Respondent's sworn statement, dated July 20, 2015;
- (3) Respondent's Leave and Earnings Statement for pay period 15 of 2011;
- (4) Respondent's SF-50s from 2010, 2011, 2014, and 2015;
- (5) A letter, dated February 2, 2015, from Veronica Johnson of the Department's human resources department, notifying Respondent of the overpayment and informing him that he should expect a bill from DOI;

¹ Respondent also requested a hearing to challenge the validity of the debt. That proceeding, 15-39-OF, is currently stayed pending the outcome of this matter.

- (6) A chain of emails from April 7, 2015 through May 4, 2015 between Respondent and LaJuan Darby of the Department's human resources department arranging a meeting to discuss the overpayment;
- (7) A May 21, 2015 email from Ms. Darby informing Respondent that he should receive a debt letter in the mail the following week; and
- (8) The debt letter from DOI, dated June 5, 2015.

Reviewing these documents, this Tribunal concludes that Respondent's request for a waiver should be granted.

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.²

When requesting a waiver, Respondent is expected to: (1) explain the circumstances of the overpayment; (2) state why a waiver should be granted; (3) indicate what steps, if any, Respondent 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 Respondent's position that a waiver should be granted.

JURISDICTION

The waiver authority involving former and current employees of the Department was delegated to OHA,³ which, thereby, exercises authority and jurisdiction on behalf of the Secretary of Education to waive⁴ claims of the United States against a former or current employee of the Department.⁵ The undersigned is the authorized Waiver Official who has been

² 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.

³ 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).

⁴ *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).

⁵ *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

assigned this matter by OHA.⁶ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. § 5584.

PROCEDURAL HISTORY

In February 2015, Respondent received a letter from Veronica Johnson, the Director of Talent Recruitment and Hiring in the Department's human resources department. The letter informed Respondent that when he began employment with the Department in February 2014, he had been placed in the incorrect retirement classification. The letter indicated that as a result of this error, for approximately one year, too little money was taken from his salary for retirement. Respondent indicates that this was the first he learned of the overpayments, and the evidence submitted provides no indication that he had prior knowledge. Ms. Johnson's letter further informed Respondent that he would receive a bill for the overpayment amount from DOI within the next four to six weeks. When the bill did not come in a timely manner Respondent contacted the benefits specialist for the Department, and after a series of emails, and a meeting with her, Respondent received the bill from DOI. Specifically, in a letter dated June 5, 2015, DOI informed Respondent that he owed a debt of \$1,089.42. On June 26, 2015, OHA received a request for a waiver from Respondent. After an Order Governing Proceedings was issued, Respondent submitted a sworn statement and supporting documentation on July 20, 2015.

Respondent first argues that the overpayments at issue did not arise from any action or inaction on his part. Specifically, Respondent notes that he had previously served as a federal employee in 2010 and 2011, and at that time was eligible for an employee retirement contribution of only 0.8% of his salary. Respondent contends that he was not aware of the change in the laws that now required him to contribute a higher employee contribution of over 3%. Respondent asserts that, therefore, he did not know that too little deductions were taken.

Respondent next notes that once he was notified about the overpayment, he acted promptly to address the issue. Specifically, Respondent notes that when the bill from DOI did not arrive in the time period advised, Respondent persistently pursued the debt bill until it was issued by DOI.

Finally, Respondent notes that in addition to not being at fault for the overpayment, requiring repayment of the debt would be inequitable as it would place an undue financial burden on Respondent. Specifically, Respondent explains that his grandmother has recently suffered a series of serious health problems. As a result, Respondent has been required, and will continue to be required, to make numerous trips to Colorado to care for his grandmother and his parents. Respondent contends that the costs of traveling to care for his family will be hundreds of dollars for each trip.

overpayment procedures may be found on the OHA website at: <http://oha.ed.gov/overpayments.html>.

⁶ See 5 U.S.C. § 5584(b) (2012) (noting the authority held by the authorized official in waiver cases).

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.⁷

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 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.”¹⁰

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 he knew, or should have known, that he was not entitled to the additional pay.

This Tribunal has already concluded numerous times that proper retirement classification is not something the average employee, inexperienced in human resources issues, is charged with knowing. In *In re Joseph*, 08-06-WA, *In re T*, 13-40-WA, *In re E*, 15-07-WA, and, most recently, *In re R*, 15-17-WA, we have continually concluded 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.¹¹ In the present matter, Respondent

⁷ See, e.g., *In re David*, Dkt. No. 05-22-WA, U.S. Dep’t of Educ. (Dec. 14, 2005).

⁸ *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.

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

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

¹¹ Contrast *In re L*, 14-70-WA, where the employee was charged with such knowledge. In that case, however, the respondent was an employee in the Department’s human resources department, and because one of the pertinent factors used to determine whether an employee should have known of an overpayment is an employee’s position, there is a presumption that, as a human resources specialist, the respondent had more knowledge than the average employee about matters relating to the retirement classification of employees. Because nothing was

works as a liaison to the White House. Nothing about his position, training, or experience indicates that he would have any specialized knowledge of human resources matters like retirement classifications. Thus, an incorrect retirement classification would not be clear to him. Additionally, because when Respondent previously served as a federal employee 0.8% of his salary was taken for retirement, he would have no reason to expect that upon returning to federal employment over 3% of his salary should have been taken.

Finally, the evidence presented indicates that as soon as Respondent had actual knowledge of the overpayments he acted to address the issue. Respondent not only awaited the debt bill from DOI, when it failed to come in a timely manner, Respondent sent numerous emails to the Department's human resources office to obtain the bill. In short, once Respondent knew of the overpayment, he acted diligently in responding, and has made a showing that he has met the "fault standard."

When determining whether to grant a waiver, however, it is not enough to meet the fault standard. This Tribunal must also "balance the equities" by considering a number of factors, to determine whether repayment would be inequitable.¹² One established reason it may 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."¹³

As noted above, the rapid decline in the health of Respondent's grandmother requires significant expenses to be spent by Respondent. Although there are no rigid rules governing the equity standard,¹⁴ in the past we have noted that the financial obligations associated with caring for and supporting a family member or loved one can make repayment of a debt an undue, and inequitable, financial burden.¹⁵ Here, Respondent faces hundreds if not thousands of dollars in costs associated with traveling to care for his grandmother and parents. To require repayment of a debt of more than \$1,000 under these circumstances would, thus, impose an undue financial burden on Respondent.

In summary, Respondent has made a showing that: (1) he is not at "fault" for the overpayment; (2) he acted promptly once he knew of the overpayment to remedy the situation; and (3) repayment of the debt at this time would be inequitable. Therefore, Respondent's request for a waiver of the debt at issue in this matter is granted. This decision constituted a final agency decision.

presented to overcome that presumption, the respondent in that case failed to make an adequate showing to overcome the fault standard and his waiver request was denied.

¹² *In re R*, 15-17-WA, U.S. Dep't of Educ. (May 12, 2015) at 5.

¹³ *In re Donna*, Dkt. No. 12-56-WA, U.S. Dep't of Educ. (November 8, 2012) at 5-6.

¹⁴ *In re T.*, Dkt. 13-40-WA, U.S. Dep't of Educ. (December 5, 2013) at 3.

¹⁵ *See In re C*, 15-27-WA, U.S. Dep't of Educ. (June 3, 2015) at 5; *In re B*, 14-33-WA, U.S. Dep't of Educ. (Oct. 15, 2014) at 8; *In re Z*, 14-26-WA (July 24, 2014).

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 **\$1,089.42** is **HEREBY GRANTED**.

So ordered this 24th day of July 2015.

Daniel J. McGinn-Shapiro
Waiver Official