



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of

Docket No. 15-43-WA

A,

Waiver Proceedings

Respondent.

DECISION GRANTING WAIVER

On July 13, 2015, the Office of Hearings and Appeals (OHA) received a letter, dated June 25, 2015, from Respondent, a Department employee, in the above-captioned proceedings. The letter was in reference to debt arising out of an overpayment of salary in the amount of **\$994.04**. Respondent asserts that the overpayment arises from him being initially processed under the wrong retirement plan. After Respondent provided clarification, it is clear that Respondent is not challenging the validity of the debt, but rather requests a waiver of the debt on equitable grounds.

On July 14, 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 August 5, 2015, Respondent sent this Tribunal an email indicating he was “sure that [he] submitted all that was required in [his] initial submission and that the documents state that these items do not need to be resubmitted.” As Respondent had failed to file a sworn statement, an Order Extending Opportunity to Supplement File was issued, and, on August 31, 2015, Respondent filed a sworn statement.

Before this Tribunal, therefore, are the following documents:

- (1) Respondent’s request for a waiver, dated June 25, 2015;
- (2) Respondent’s sworn statement, submitted August 31, 2015;
- (3) Respondent’s emails with the waiver official indicating that Respondent is seeking a waiver but is not challenging the validity of the debt;
- (4) Respondent’s emails with LaJuan Darby of the Department’s HR Department dated February 5, 2015;
- (5) Five (5) SF-50 Notification of Personnel Action forms approved on 10/16/14, 1/11/15, 2/2/15, 2/2/15, and 2/11/15;
- (6) A July 17, 2015 email from Respondent to Deana Patterson of the Department of the Interior; and

- (7) Two emails between Respondent and Cassandra Cuffee-Graves, the Department's HR Director, dated April 17, 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.¹

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,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

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>.

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

PROCEDURAL HISTORY

In February 2015, Respondent received a letter informing Respondent that when he began employment with the Department, he had been placed in the incorrect retirement classification resulting in a salary overpayment. Respondent indicates that this was the first he learned of the overpayment, and the evidence submitted provides no indication that he had prior knowledge. The day after receiving the letter, Respondent emailed LaJaun Darby, Branch Chief for Benefits in the Department's Human Resources Office, who was listed as the point of contact. Respondent indicated to Ms. Darby that he disagreed that his retirement coding was incorrect because he had prior federal service, but he was awaiting his documents showing federal employment. Once Respondent's documents were received, it was determined that Respondent had, in fact, been placed in the wrong retirement classification and had been overpaid. On July 13, 2015, OHA received Respondent's request for a waiver with supporting documentation. And, after an Order Governing Proceedings and an Order Extending Opportunity to Supplement File were issued, OHA received Respondent's sworn statement on August 31, 2015

Respondent first argues that he is not at fault for the overpayment. Specifically, Respondent notes that when he began employment with the Department, he indicated no prior federal service. Respondent contends that using this form, his retirement was improperly classified by the Department's Human Resources Office. Because Respondent indicated no prior federal service on his form when he began working for the Department after January 1, 2014, his retirement should have been properly coded as FERS-FREA & FICA. Instead he was incorrectly classified as FERS & FICA.⁶

Respondent also asserts that requiring overpayment would be inequitable as it would result in an undue financial hardship. Specifically, Respondent has provided evidence that as a result of having to care for a family member; Respondent has incurred a substantial and unexpected real estate related liability. Because of this liability, Respondent cannot afford to repay the overpayment debt.

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

⁶ Respondent further notes that later, on an unrelated issue, Respondent was informed that his prior service with the Postal Service and with the Army Air Force Exchange Service might affect his service computation date, which is the reason he first questioned the existence of the overpayment. Respondent indicates, however, that it was later determined that he did not have a sufficient amount of prior service to change that his original placement in the FERS retirement plan was incorrect.

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. The evidence presented indicates that as soon as Respondent had actual knowledge of the overpayments he acted to address the issue. As soon as Respondent learned about the error in his retirement coding, he sent an email to LaJaun Darby, the Branch Chief for Benefits in the Department. And, in a situation like Respondent’s, where the overpayment arose because of an error in his retirement classification, this Tribunal has already concluded that the average employee generally should not have reasonably known about the overpayment. In *In re Joseph*, 08-06-WA, *In re T*, 13-40-WA, *In re E*, 15-07-WA, *In re R*, 15-17-WA, and *In re K*, 15-40-WA, this Tribunal has repeatedly held that proper retirement classification is not something the average employee, inexperienced in human resources issues, is charged with knowing.¹¹ In the present matter, Respondent is an Education Program Specialist in the Office of Special Education and

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 a human resources specialist was presumed to have more knowledge than the average employee about matters relating the processing of retirement classification by the Department’s human resources office.

Rehabilitative Services. 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 and Respondent 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

Respondent has provided evidence that he is currently dealing with extensive financial obligations arising from unexpected real estate costs that were incurred so that he could care for a family member. 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 To require repayment of a debt of almost \$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.

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 **\$994.04** is **HEREBY GRANTED**.

So ordered this 4th day of September 2015.

Daniel J. McGinn-Shapiro
Waiver Official

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).