UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS

In the Matter of

J,

Respondent.

Docket No. 15-50-WA

Waiver Proceedings

DECISION DENYING WAIVER

On August 26, 2015, the Office of Hearings and Appeals (OHA) received a request for a waiver of a debt, dated August 14, 2015, from Respondent, a Department of Education (Department) employee, in the above-captioned proceedings. Respondent's waiver request comes in response to the receipt of an email from the Department's human resources department providing notice of an overpayment of salary to Respondent. Additionally, Respondent received a debt letter from the Department of the Interior (DOI) indicating that the overpayments resulted in a debt of **$1,642.52**. After a telephone conversation with Respondent, two Department human resources (HR) employees, and a representative from DOI, the parties agree that the alleged overpayments arose from an error in processing Respondent's promotion that resulted in a within-grade salary increase approximately seven months earlier than Respondent was eligible for the raise.

On September 2, 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. Additionally, the Order informed Respondent that "[t]o aid Respondent in presenting the clearest, appropriate, and most persuasive reasons why waiver should be granted, Respondent is encouraged to review waiver decisions issued and posted [on the OHA website]." After a series of extensions, requested because the Department was unresponsive to Respondent's requests for information, on October 24, 2015, Respondent filed a sworn statement with supporting documentation.

Currently 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, received August 26, 2015;
(2) Email from Ike Gilbert to Respondent, dated July 14, 2015, notifying Respondent of his overpayment;
(3) Debt Letter from DOI, dated August 3, 2015;
(4) A series of emails, dated between July 1 and July 15, 2015, between three Department employees directing that the improper within-grade increase be corrected;

(5) A series of emails, on July 21, 2015, between Respondent and an HR employee addressing a change in Respondent's pay and explaining the personnel actions taken to correct prior errors;
(6) Respondent's sworn statement, received October 26, 2015;
(7) Respondent's summary of monthly expenses with attached mortgage statement;
(8) Respondent's 2015, pay period 22, Leave and Earnings Statement;
(9) Respondent's health insurance Explanation of Benefits for an April 2015 dental visit; and
(10) Two bills for car repairs completed in March 2014 and August 2014.

In a waiver proceeding, the validity of the debt is assumed, but the respondent 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 the respondent or anyone else having an interest in obtaining the waiver.[1] When requesting a waiver, the 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, the 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 the respondent's position that a waiver should be granted. This decision constitutes a final agency decision.

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 authority and jurisdiction on behalf of the Secretary of Education to waive[3] 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.

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[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.

[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).

PROCEDURAL HISTORY

On July 14, 2015, Respondent was notified, by an email from an HR specialist, that Respondent had erroneously received a within-grade salary increase on June 29, 2014 when the increase should not have been processed until February 22, 2015, leading to an overpayment.

A week later, on July 21, 2015, Respondent contacted the HR specialist when he noticed that his salary had decreased and after checking in Employee Express, Respondent discovered his salary had been erroneously changed from a GS-13, Step 2 salary into a GS-13, Step 1 salary. After a series of emails, the HR specialist corrected the error, changing Respondent's salary to a GS-13, Step 2 salary effective February 22, 2015, and notified Respondent that he would receive any back-pay owed to Respondent for pay periods after February 22, 2015 where he was paid at a GS-13, Step 1 rate.

On August 3, 2015, DOI sent Respondent a Bill of Collection showing that between pay period 16 in 2014 and pay period 5 in 2015, Respondent received overpayments in salary, totaling a net overpayment of $1,642.52. On August 26, 2015, OHA received Respondent's request for a waiver, dated August 14, 2015. After Respondent sent the Bill of Collection to OHA on September 1, 2015, an Order Governing Proceedings was issued on September 2, 2015. On September 15, 2015, Respondent contacted the Tribunal to notify it that the human resources specialist designated to facilitate providing documents to respondents in overpayment matters was out of the office for an extended period of time preventing Respondent from obtaining information and documents. That same day, I issued an order granting Respondent an extension of time to collect information and submit a sworn statement with supporting documentation. On September 28, 2015, Respondent filed with this Tribunal a motion to have the waiver request granted based upon the Department's failure to respond to Respondent's requests for documentation. On September 29, 2015, I sent notice to Respondent and representatives from DOI and the Department's HR office indicating that: (1) Respondent had indicated to me that the Department had failed to respond to his requests for information related to his waiver request; (2) that the Department has an obligation to provide certain information to Respondent; (3) that I had received a motion from Respondent requesting that the waiver be granted based upon the Department's failure to respond to Respondent's requests; (4) that I was withholding judgement on the motion until I had an opportunity to speak with the parties; and (5) that the parties were, therefore, directed to respond to me to indicate times when they were available for a call. On October 1, 2015, the Department sent Respondent a set of email chains related to the Department's efforts to address his overpayment. On October 5, 2015, I spoke with Respondent, two members of the Department's HR office, and a representative from DOI. At the conclusion of the call, Respondent stated that he had all of the documents he required to move forward with the waiver proceeding,[6] and I issued an order requiring Respondent to file his sworn statement with supporting documentation by October 26, 2015. On October 26, 2015, this Tribunal received Respondent's sworn statement and supporting documentation.

[6] Respondent indicated, however, that he was reserving the right to request more information if he was denied his waiver request and then sought to challenge the validity or amount of the debt through a salary pre-offset hearing. (See 34 C.F.R. § 32.6(b)).

Respondent argues he has "acted in complete good faith in this matter." Specifically, Respondent asserts that he "was totally unaware of the erroneous payment" until he received the July 14, 2015 email from HR, wherein Respondent was informed that HR would correct the error. Respondent further asserts that he did not have "any reason to suspect his payment amount was incorrect" when he was receiving the overpayments. In support of this statement, Respondent notes that later, on July 21, 2015, he was informed that another error had been made, moving him form a GS-13, Step 2 to a GS-13 Step 1, which would be rectified and Respondent would receive back-pay to correct this error. Finally, Respondent cites to a prior decision from this Tribunal, *In re Nicole*, to support his argument that "waiver [d]ecisions have routinely found that non-human resources employees are not expected to know the rules regarding determination for time in grade increases."

Respondent additionally contends requiring repayment would "cause Respondent a financial hardship." Specifically, Respondent asserts that because of the purchase of his home, the furnishing of that home, and recent dental and auto repair bills, he is unable to repay the debt and still have sufficient amount money for "likely expenses, such as repairs associated with home ownership."

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.[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), and it would be inequitable to require repayment.[9]

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."[10]

Under the circumstances of this matter, I have determined that at the time he accepted the overpayments, Respondent should have known that he was not entitled to the additional pay.

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[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.

During the October 5 call, the representatives from HR and from DOI and Respondent agreed that the basis for the overpayment was that Respondent received an increase in his grade to a GS-13, Step 1 at the end of February 2014 and then received a within-grade increase to a GS-13, Step 2 just over four months later on June 29, 2014. The regulation governing within-grade increases clearly indicates that an employee is not eligible for a within-grade increase from a Step 1 to a Step 2 for at least 52 weeks.[11] Our Tribunal has consistently held that "an employee generally should be aware of the waiting periods between step increases and should make an inquiry about any increase not in accord with those waiting periods."[12] And, although there can be mitigating circumstances that can indicate that an employee would be reasonable in no knowing that the early grade increase was erroneous, the facts of this case indicate that the Respondent is at fault.

When Respondent received the step increase at the end of June 2014, he had been a federal employee for almost 10 years. As we have indicated in the past, the "newness of an employee's federal service has been used as the primary consideration in mitigating the general rule" that employees should be aware of the waiting periods between step increases. After a decade of federal service, Respondent should have known he could not receive a within-grade step increase less than five months after receiving a grade increase. And none of the facts or arguments presented by Respondent indicate that he should not have had this knowledge.

Respondent cites to *In re Nicole* to support the reasonableness of his accepting the early within-grade step increase. In that case, however, the within-grade salary increase happened at nearly the same time as the grade increase, and it was reasonable for the respondent to believe that all of the changes to her pay were made together to correctly establish what her new salary after her promotion would be.[13] Here, there was no reason for Respondent to believe that his within-grade step increase at the end of June 2014 was part of correctly establishing his new salary after his grade promotion over four months earlier.

Respondent further cites to the emails exchanged with the HR specialist on July 21, 2015 after he noticed a change in his pay. Nothing about those emails, or the information contained within the emails, however, affects whether Respondent should have known between June 2014 and February 2015 that he was not entitled to the early within-grade step increase. First, the emails cited came long after the overpayment period, and even after Respondent was notified of the overpayments. Second, at issue in those emails is correcting Respondent's pay in July 2015 from a Step 1 to a Step 2 because Respondent was past the February 22, 2015 date when his within-grade step increase should have been processed. That Respondent is entitled to a GS 13, Step 2 pay after February 22, 2015 does not make it reasonable to believe he was entitled to that pay before that date.

Respondent has failed to show that he, an experienced federal employee, should not have known that he was not entitled to the within-grade step increase in June 2014, failing to satisfy

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[11] See 5 C.F.R. § 531.405

[12] *In re Nicole*, Dkt. No. 09-07-WA, U.S. Dep't of Educ. (July 30, 2009) at 3 (*quoting In re Pedro*, Dkt. No. 06-78-WA, U.S. Dep't of Educ. (April 13, 2007) at 4); *see also In re Jeanette*, Dkt. No. 06-11-WA, U.S. Dep't of Educ. (Sept. 20, 2006) at 3.

[13] *In re Nicole*, Dkt. No. 09-07-WA, U.S. Dep't of Educ. (July 30, 2009) at 3.

the "fault standard."[14] Because, passing the fault standard is required for a waiver to be granted, I do not need to examine whether Respondent has shown that repayment would be inequitable to conclude that 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 **$1,642.52** is **HEREBY DENIED**.

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Daniel J. McGinn-Shapiro
Waiver Official

Dated: November 9, 2015

[14] It has long been the standard in this Tribunal that employees are expected to: (1) check bank statements, Leave and Earnings Statements (LES), and other indications of salary; (2) question irregularities and discrepancies in salary payments; and (3) "set funds aside for repayment when appropriately recognizing a salary overpayment." When Respondent received his erroneous within-grade increase in June 2014, he should have noticed it on his LES or bank statement, questioned the increase, and set aside money for repayment of any erroneous overpayments of salary.