



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

E,

Respondent.

Docket No. 15-07-WA

Waiver Proceedings

DECISION DENYING WAIVER

On February 2, 2015, Respondent, a Department employee, requested a waiver of a debt in the above-captioned proceedings in response to receipt of a debt letter providing notice that the Payroll Operations Division of the Department of the Interior (DOI) identified an overpayment of salary to Respondent in the amount of **\$351.54**. The overpayment accrued as a result of the Department incorrectly taking a retirement deduction of 3.1% rather than 4.4% from Respondent's pay prior to pay period 26 in 2014.

On February 9, 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]." Additionally, the Order Governing Proceedings noted that "[i]n seeking a waiver proceeding, if Respondent raises a financial hardship claim, he or she should demonstrate it with specifics, with supporting information about why this is the case and why he or she asserts ability to repay the debt is a hardship." On February 17, 2015, Respondent filed a sworn statement and supporting documentation.

On February 26, 2015, I issued an Order Extending an Opportunity to Supplement the File. The Order outlined the documents that were currently before me and instructed Respondent that if she wished to submit any further documentation in support of her waiver request, she was to do so by March 13, 2015, because "[a]t that point, I will close the file and consider it complete." Additionally, the Order once again encouraged Respondent to review the waiver decisions on the OHA website. Further, the Order notified Respondent that she may wish to review the Handbook on overpayments available on the OHA website, specifically noting that the Handbook defines "Financial Hardship" as "[a]n inability to meet the basic living expenses for goods and services necessary for the survival of the debtor, his/her spouse and any

dependents.” Finally, because a financial hardship claim requires a respondent to both demonstrate with specifics that the repayment will constitute an undue financial hardship, and provide supporting documentation, the Order noted that guidance on what documentation could show an undue financial hardship can be found in 34 C.F.R. §§ 31.5(b)(3) and 31.8(b).

To date, Respondent has filed no additional information or supporting documents in response to the Order Extending an Opportunity to Supplement the File. 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 February 2, 2015 request for a waiver;
- (2) Respondent’s February 17, 2015 sworn statement;
- (3) Two SF-50 “Notification of Personnel Action” forms from August 1, 2014 and December 8, 2014;
- (4) A January 28, 2015 letter from the Director of Talent Recruitment and Hiring within the Department’s human resources office notifying Respondent of the error in her retirement coding;
- (5) A copy of Respondent’s February 2015 Monthly Long Island Railroad (LIRR) pass;
- (6) A July 18, 2014 pay stub from Respondent’s former job;
- (7) Respondent’s Leave and Earnings Statement (LES statements) for pay periods 25 and 26 in 2014 and pay period 4 of this year;
- (8) A December 23, 2014 email from Respondent to Naomi Sanchez in human resources discussing the overpayment; and
- (9) A January 21, 2015 notice from the U.S. Department of Interior notifying Respondent of the overpayment.

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. 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

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).

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.

PROCEDURAL HISTORY

In late December 2014, Respondent contacted the Department's payroll department after she noticed that the amount of pay in her paycheck for pay period 26 was approximately \$40 less than in her previous paychecks. Respondent was notified that because she was hired in 2014, her mandatory retirement contribution should have been 4.4% rather than the 3.1% that had been taken from her past paychecks. Additionally, Respondent was told that she should receive notice of the change to 4.4% and an explanation of the change. After not receiving the notice, Respondent emailed an HR specialist in the Department's Payroll Department on December 23, 2014 to obtain the formal notice, to inquire about the change, and to receive information about the consequences of the underpayment, but did not receive a response from the HR specialist. On January 29, 2015, however, Respondent received a letter from DOI notifying Respondent that she owed \$351.54 in overpayments. Then, on February 2, 2015, Respondent received a letter from the Department explaining the cause of the overpayment.

Respondent argues that as an employee, she "had no responsibility or authority to process my [entrance-on-duty] action or place myself in a particular retirement system," but rather it is her "understanding that this responsibility rested with the Department's Human Resources Department." Respondent further asserts that she received no notice of the requirement that she contribute 4.4% or that, effective pay period 26, she would be subjected to the mandatory increased contribution. Finally, Respondent argues that she did not elect to contribute 3.1% rather than 4.4% and had no reason to know that she should have been contributing the higher amount.

Respondent additionally contends that "collection would be unfair and result in an undue financial burden." Specifically, Respondent argues that her out-of-pocket transportation costs coupled with her higher student loan payments have "essentially resulted in [Respondent] living check-to-check" and "[a]s a result, repayment will cause an undue financial burden."

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).

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.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, and not in the best interests of the United States.

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.”⁹

As to the fault standard, this Tribunal has already spoken as to this situation. In both *In re Joseph*, 08-06-WA, and *In re T*, 13-40-WA, it was determined 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. In *In re L*, 14-70-WA, on the other hand, we charged the employee 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,”¹⁰ 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 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. In the present matter, Respondent is an attorney with the Office for Civil Rights, and nothing about her position, training, or experience indicates that she would have any specialized knowledge of human resources matters like retirement classifications. Therefore, because Respondent in this matter is like the respondents in *in re Joseph* and *In re T*, and an incorrect retirement classification would not be clear to her, there is no showing she knew or should have known of the overpayments. Moreover, once

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

⁷ *In re Danae*, Dkt. No. 13-28-WA, U.S. Dep’t of Educ. (October 24, 2013) at 4; *In re Carolyn*, Dkt. No. 11-02-WA, U.S. Dep’t of Educ. (August 11, 2011) at 4.

⁸ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep’t of Educ. (December 12, 2005).

⁹ See *In re Robert*, Dkt. No. 09-10-WA, U.S. Dep’t of Educ. (November 19, 2009) at 3.

¹⁰ *Id.*

Respondent became aware of the overpayment, she promptly contacted the Department's human resources department. In this case, the fault standard is met.

When determining whether to grant a waiver, however, this Tribunal must also "balance the equities" by considering a number of factors. 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 advances two arguments why it would be inequitable to require repayment. First, Respondent contends that she was not responsible for placing herself into the incorrect retirement system and she did not incorrectly elect to withdraw 3.1% rather than 4.4% from her paycheck. And second, Respondent asserts that it would impose an undue financial burden to require repayment.

As to Respondent's assertion that it is against equity because the overpayments were caused by the Department's error, not her own, it is clear that the fact that administrative error by the Department caused the overpayments does not entitle the employee to a waiver.¹² An overpayment will often be a result of the Department's administrative error, yet a waiver is an exception to the rule that an employee must return money erroneously paid to him or her.

In support of her undue financial burden contention, Respondent asserts that after she accepted her position with the Department, she learned that her transportation subsidiary would cover only \$125 per month, rather than between \$200 and \$250 like she was led to believe. As a result, Respondent is now paying approximately \$217 per month out-of-pocket in transportation expenses for the Long Island Railroad (LIRR) and New York City Subway. Therefore, Respondent asserts that she is now paying \$256 a month in work related expenses, \$217 for transportation and \$39 in additional retirement contributions moving from 3.1% to 4.4%. Respondent argues that although her base salary has increased \$123.82, she is, in fact, making less if you subtract \$256 from her current salary.¹³ Added to this, because the amount of student loan repayment is triggered by her base salary, Respondent is paying more in student loan repayments per month. Respondent asserts that the decrease in her take-home income coupled with the higher student loan payments has "essentially resulted in [Respondent] living check-to-check" and "[a]s a result, repayment will cause an undue financial burden." In support of her claim, Respondent has included a copy of Respondent's February 2015 Monthly LIRR pass showing her transportation costs; a July 18, 2014 pay stub from Respondent's former job showing her previous salary; and Respondent's LES statements for pay periods 25 and 26 in 2014 and pay period 4 of this year showing her current salary before and after the adjustment to her retirement contributions.

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

¹² *In re Danae*, Dkt. No. 13-28-WA, U.S. Dep't of Educ. (October 24, 2013) at 6; *In re Sarah*, 11-07-WA, Dkt. No. 11-07-WA, U.S. Dep't of Educ. (May 5, 2011) at 2-3.

¹³ Respondent's comparison appears inconsistent. She compares her old salary without subtracting transportation expenses to her new salary with transportation expenses subtracted. Unless Respondent paid no transportation expenses in her previous position, she cannot make this comparison.

Despite multiple opportunities to do so, Respondent has failed to make an adequate showing that repayment would cause an undue financial burden. As this Tribunal has stated in the past, “[t]here is no doubt that repayment of any sum may be inconvenient and unplanned in terms of any household budget, but that is not tantamount to showing a financial burden such that the equities call for waiver.”¹⁴ In the Order Governing Proceedings, Respondent was counseled that if raising “a financial hardship claim [Respondent] should demonstrate it with specifics, with supporting information about why this is the case and why he or she asserts ability to repay the debt is a hardship.” After initially submitting a response on February 2, 2015, Respondent was provided an opportunity to supplement the record. In neither of her filings, however, has Respondent made an adequate showing to warrant a waiver.

Although there are no rigid rules governing the equity standard,¹⁵ in the past we have looked to whether requiring repayment would result in a loss of “medical care, housing, or other life sustaining needs.”¹⁶ As noted in the Order Extending an Opportunity to Supplement the File, the Department’s Handbook on Overpayments Handbook defines “Financial Hardship” as “[a]n inability to meet the basic living expenses for goods and services necessary for the survival of the debtor, his/her spouse and any dependents.”¹⁷ Respondent has asserted that she is living “check-to-check” but the only support she has provided for this statement is that she is paying more for out-of-pocket travel expenses and student loan repayments and these increased costs are not covered by the increase in salary she received when she joined the Department. Despite being provided an additional opportunity to do so, Respondent has provided no support to show that because of these costs, requiring repayment would rendered her unable to meet her basic living expense or those of a family member or dependent. If this had been a larger debt, accounting for a larger portion of her income, it would be more likely that repayment would impose an undue burden. But here, where her debt amounts to less than half a percentage of her annual income, Respondent has failed to prove that the repayment of \$351.54 will impose an undue financial burden.

Although there are numerous ways to prove an undue financial burden, one possible way to put forth such a claim would be to look to the method proscribed for a person demonstrating an extreme financial hardship in the context of requesting a hearing to challenge a salary offset to repay a debt under 34 C.F.R. §§ 31.5(b)(3) and 31.8(b). Specifically, these regulations require that when asserting an extreme financial hardship claim, a respondent must submit a written explanation of the claim and documents supporting the claim, including evidence of: (1) income from all sources; (2) assets; (3) liabilities; (4) number of dependents; (5) expenses for food housing, clothing, and transportation; (6) medical expenses; and (7) any exceptional expenses.¹⁸

Because Respondent has failed to meet her burden to show that it would be unconscionable or not in equity to require repayment, I have no choice but to conclude that a

¹⁴ *In re April*, Dkt. No. 12-23-WA, U.S. Dep’t of Educ. (July 11, 2012) at 9.

¹⁵ *In re T.*, Dkt. 13-40-WA, U.S. Dep’t of Educ. (December 5, 2013) at 3.

¹⁶ *In re Lester*, Dkt. No. 11-47-WA, U.S. Dep’t of Educ. (December 27, 2012) at 6; *In re Sarah*, 11-07-WA, Dkt. No. 11-07-WA, U.S. Dep’t of Educ. (May 5, 2011) at 3.

¹⁷ HANDBOOK FOR PROCESSING SALARY OVERPAYMENTS (ACS-OM-04, revised January 2012) at 6.

¹⁸ 34 C.F.R. § 31.5(b)(3)

waiver is not warranted.¹⁹ Therefore, 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 **\$351.54** is **HEREBY DENIED**.

So ordered this 31st day of March 2015.

Daniel J. McGinn-Shapiro
Waiver Official

¹⁹ *In re April*, Dkt. No. 12-23-WA, U.S. Dep't of Educ. (July 11, 2012) at 10; *In re Sarah*, 11-07-WA, Dkt. No. 11-07-WA, U.S. Dep't of Educ. (May 5, 2011) at 3.