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In the Matter of
M,

16-30-WA

Respondent

Waiver Proceeding

DECISION GRANTING WAIVER

This proceeding comes before the Office of Hearings and Appeals (OHA) through the timely request of Respondent, an employee of the U.S. Department of Education (Department). Respondent's request arises under 5 U.S.C. § 5584 (Waiver Statute) authorizing the waiver of claims of the United States against debtor due to erroneous payments made to a Federal employee¹ and is based on notice of salary overpayment of \$15,000. The overpayment debt was set forth in a Bill of Collection (BoC).² The debt collection letter reflects salary overpayments related to a cancellation of a recruitment bonus and results from a correction to a personnel action processed by the employing agency. For the reasons that follow, I find that waiver of this debt is warranted. Accordingly, Respondent's request for waiver is granted.

The legal authorities pertinent to this waiver request are from the aforementioned statute, the Department's implementing regulations at 34 C.F.R. Part 32 (§ 32.1 et seq.), and the policy set forth in the Department of Education, Administrative Communications System, Handbook for processing Salary Overpayments (Handbook, ACS-OM-04) (revised January 2012). Taken together, these authorities prescribe procedures for processing debts, authorizing deductions from

¹ General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (5 U.S.C. §5584) (Waiver Statute). The law of debt collection is extensive. *See, e.g. In re Richard*, Dkt. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at footnote 1 (setting forth the statutory framework governing debt salary overpayment debt collection); *see also* 5 U.S.C. §5514 and 31 U.S.C. §3716 (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 procedure may be found on the Office of Hearings & Appeals website at <http://oha.ed.gov/overpayments/index.html>.

² The overpayment is identified as the Debt ID: M1613900001 specified by the Payroll Operations Division of the Department of Interior (DOI) dated May 18, 2016 which identified \$15,000 for Recruitment bonus paid in PP14 of 2011. This reflects back to Respondent's hire date of March 28, 2011.

wages to pay debts, and setting standards for waiving those debts when appropriate.³ The Handbook, ACS-OM-04, specifically delegates waiver authority involving all former and current employees of the Department to the Office of Hearings and Appeals (OHA), which, thereby, exercises waiver authority on behalf of the Secretary. The undersigned is the authorized waiver official who has been assigned this matter by OHA.⁴

For purposes of a waiver proceeding, the debtor is presumed to have acknowledged the validity of the debt. In this waiver proceeding, Respondent argues she should not be required to repay the debt on the basis of the circumstances of the debt and argues there is no indication of fraud, misrepresentation, fault, or lack of good faith by her or anyone else having an interest in obtain a waiver of the claim.⁵ In doing so, 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.

Resolution of this case is based on the matters accepted into the record as argument, evidence, and/or documentation when considered as a whole, including the Bill of Collection (Boc) sent by the Department's servicing agency the Department of Interior (DOI), Respondent's waiver request, and all subsequent submissions and documents she submitted under sworn testimony. For the reasons that follow, the tribunal concludes that waiver of the debt is warranted. This decision constitutes a final agency decision.

At issue in this case is whether the Department through its payroll servicer (DOI) is entitled to recover the salary overpayment for the \$15,000 recruitment bonus paid to a newly appointed employee under 5 U.S.C. § 5753. When Respondent was offered her position as a GS-301-12, Program Specialist, and the recruitment bonus by the hiring officials, she discussed the bonus, and asked what did she need to do and how would it be processed with the HR staff. The paperwork was supplied from the highest HR level of the Headquarters team⁶. Respondent signed the underlying Service Agreement to qualify for the recruitment bonus on March 25, 2011. That Agreement specified the amount here claimed as an overpayment and term of employment for 12 months which she was required to complete with the Department. Respondent's position, Organization and Duty station were similarly specified. A copy of the signed/dated Service Agreement is in this record.

³ In addition to regulations promulgated by the Department, standards prescribed by the Department of Justice and the Department of Treasury govern administrative debt collection efforts; those standards are widely known as the Federal Claims Collection Standards (FCCS). See 31 U.S.C. § 3711 (2000) and 31 C.F.R. ch. IX, Parts 900–904 (2000)

⁴ See, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

⁵ 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, U.S. Government Accountability Office, *Scope of Waiver Authority*, B-307681 (May 2, 2006).

⁶ Email dated March 25 2011, titled: Service Agreement, Blaylock to McNutt; 10:25 am.

DISCUSSION

Broadly stated, determining whether waiver is appropriate requires a consideration of two factors: namely, (1) whether there is no indication of fraud, misrepresentation, fault,⁷ or lack of good faith on Respondent's part, and (2) whether Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment.⁸ Respondent must satisfy both factors to obtain a waiver.

In waivers, the fault standard has specialized meaning and is examined in the context of an employee's duty to prevent or discover mistakes and errors in salary payments when doing so is feasible. Fault is examined in light of the following: (a) 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;⁹ (b) whether the erroneous payment resulted from the 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 (c) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.¹⁰

Respondent argues that the waiver of the entire debt is warranted because it was incurred through administrative error not caused by her. She further asserts that she thought the offer and acceptance of a Recruitment Bonus was an accepted practice as this was a first entry for her into federal service. She said she was aware of recruitment bonuses being offered in the private sector and thought this was a usual practice. Moreover, she made efforts to clarify the manner of accepting the recruitment bonus, contacting HR specialist Kim McNutt. McNutt sent her the initial hiring letter and referenced an email which forwarded the Service Agreement document from then-Supervisor of Human Capital & Client Services (HCCS) Headquarters team, Michael Blaylock. Respondent submits this email trail for showing approvals by the Department's hiring officials, one of which was an Assistant Secretary, and the top HR level official Blaylock. (See email exchange re: Service Agreement, March 25, 2011, MB to KM with copies to Respondent). Respondent supplied her SF-50 showing her initial appointment, with notation Appointment Affidavit executed 3/28/11 and one year probationary period beginning same date, and the signed Service Agreement form which she duly returned to the HR specialist. As a contractual matter, if she failed to fulfill the terms of the agreement period (12 months), repayment would need to be made as set forth at parts #2 and #3. Respondent began fulfilling the employment term when she reported for duty on March 28, 2011, and the 12 months carried forward to the end of March 2012. There is no dispute that Respondent met the terms of the employment period and she remains a Departmental employee through the present time.

⁷ In this respect, since fault can derive from an act or failure to act, fault does not require a deliberate intent to deceive.

⁸ See, *In re David*, Dkt. No.05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

⁹ For discussion of the scope of the Respondent's duty under the fault standard, see *In re William*, Dkt. 05-11-WA, U.S. Dep't of Educ. (Oct. 19, 2005).

¹⁰ See generally, *Guidelines for Determining Requests* U.S. Department of the Treasury Directive (2009), at <http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/td34-01.aspx>.

While we do not reach the validity of the debt question in a waiver proceeding, these particular facts establish Respondent's willingness to abide by and fulfill the Service Agreement terms which was the foundation for the recruitment bonus in the first place. Respondent also states that she was asked to meet in December 2012 with OSC (Office of Special Counsel) to review the hiring practices of her office for herself and another. She was later told while there may have been irregularities in the hiring, she was to retain her job, and no monetary findings resulted. Respondent supplied this information for the chronology of events and this meeting shows she acted to mitigate any problems. It is also important to review since all the original hiring officials Respondent dealt with and the original HR specialist and HCCS supervisor are no longer Department employees or available to submit any evidence or testimony in this case. Not surprisingly, the lengthy passage of time in this case resulted in employee retirements or separations of the acting officials.

Continuing with the chronology, Respondent says she was called by Human Resources to meet with them in March 2016, and at that time was told HR was cancelling the recruitment bonus. Respondent met with HR personnel, Ms. Johnson, who said the bonus was going to be cancelled, who apparently noted Respondent's case had fallen through the cracks, and advised her she could seek a waiver when she received a bill for the overpayment. Respondent recalls these were the representations made at the meeting and summarized them as such. Respondent has submitted into the record, the SF-50, Cancellation of recruitment bonus action, which was electronically signed and dated by Ms. Johnson on March 8, 2016. The SF-50 cancellation action for legal authority relies on 5 U.S.C. §302.¹¹

Moreover, it has been particularly hard for Respondent to locate documents to support her case given the lengthy time that has passed since March 2011. Respondent had to reconstruct what happened over 5 year ago, after digging through old emails, letters, and forms and including what she could find that had relevance. She also posits that she was not sure there was anything she could do to mitigate the matter any earlier as so much time passed and the only incident, the December 2012 OSC inquiry, had come and gone without further consequence, and she assumed there was nothing further she needed to do.

The first consideration in determining whether a waiver is appropriate in a salary overpayment case is whether the Respondent lacks fault. To assess fault, the tribunal takes into consideration all relevant evidence and information, and must evaluate the debtor's case against a "reasonable person" standard and decide whether the debtor knew, should have known, or should have suspected that she or he was receiving salary payments in excess of those authorized.¹² Criteria for this consideration include the employee's position, grade, longevity of Federal government service and whether the employee had access to records which, if reviewed,

¹¹ § 302 sets forth a Delegation of authority (for the Agency) and under subpart (b) (1) discusses delegation of authority by head of an agency to subordinates, (1) by law to take final action on matters pertaining to employment, direction, and general administration of personnel under his agency;. If the validity of the debt were under consideration, which it is not in this waiver matter, a question arises as to whether a pulling back (cancellation) of a recruitment bonus could rest on a general delegation like § 302 or would the Agency's reliance on specific authority be required for a cancellation.

¹² See, *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (Nov. 9, 2005).

would indicate a salary overpayment.¹³ Applying these criteria to Respondent, she was a new hire, this being her first federal service position, and unfamiliar with federal hiring practices but in exercising due diligence, she documents by emails that she asked for clarification about the recruitment bonus and what terms she had to fulfill for it. Given the approvals she believed she had from at least four persons in authority, she believed she qualified as long as she met the specified terms of the Service Agreement she signed and submitted. From this vantage point, there is no basis to conclude that Respondent knew or should have known she was receiving salary payments in excess of those authorized. In addition, she was not an employee in the human resources area, who we would expect to have specialized knowledge of hiring practices and could be held to a higher standard on this.¹⁴

In applying the fault standard to this case, the tribunal concludes the Respondent lacks fault. As an initial matter, the tribunal recognizes that this overpayment was the result of an administrative error that does not reflect any fraud, misrepresentation, or lack of good faith by Respondent. More importantly, this is not the type of case where an employee reasonably should know that an erroneous overpayment has occurred. She was a new hire to federal service and she was aware of the routine practice of recruitment bonuses offered in the private sector. Respondent reasonably relied on the knowledge and experience of the hiring officials, the HR specialist and the HR Supervisor, in properly handling her hire and onboarding process. As a new hire, she had no reason to doubt that the recruitment bonus was authorized, nor question that it had been properly reviewed and approved, nor suspect that any error occurred. In sum, she did not know, could not know, nor should have any reason to suspect the bonus as initially paid was in error. Therefore, this tribunal finds that Respondent satisfies the fault standard and is without fault regarding this debt. The present case is also related to the decision in *In re Francisco*, Dkt. No. 07-154-WA, U.S. Dep't of Educ. (Feb. 15, 2008). In keeping with *Francisco*, the fault standard is satisfied when the circumstances of the debt show the employee could not have known that he or she was erroneously compensated. From all indications, and particularly because Respondent was new to federal service, this is not a case where Respondent would have been able to discover the erroneous payment or otherwise know of the inaccuracy of her pay.¹⁵

Having found no fault or lack of good faith on Respondent's part, the remaining question is whether Respondent has demonstrated that it is against equity and good conscience for the Federal government to recover the debt in this case. To secure a favorable ruling on the equity standard, Respondent must show that she acted fairly, without fraud or deceit, and in good faith with regard to all matters concerning the overpayment. In addition, although there are no rigid rules governing the application of equity, the tribunal must balance equity and evaluate good conscience in light of the particular facts of this case.¹⁶ In doing so, I must balance the competing interests in the forgiveness of a debt owed to the United States against Respondent's asserted interests in the forgiveness of a debt owed to the United States. Factors weighed in this balancing of interests include the following: whether the debt is substantial; whether recovery of

¹³ See, *In re John*, Dkt. No. 07-03-WA, U.S. Dep't of Educ. (May 1, 2007)

¹⁴ See, *In re L*, Dkt. No.14-70-WA, U.S. Dep't of Educ. (February 9, 2015).

¹⁵ See, *In re Russell*, Dkt. No. 05-19-WA, U.S. Dep't of Educ. (June 23, 2005).

¹⁶ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Education. (December 14, 2005); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (September 14, 2005).

the claim would be unconscionable under the circumstances; whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment; and whether collection of the debt would impose an undue financial burden.

Here the debt is substantial, amounting to \$15,000. The Respondent detrimentally relied on receipt of her recruitment bonus when she decided to leave a lower cost of living area to make a cross country move to a higher cost of living area. Since no moving costs were provided, it is reasonable to expect her decision was influenced by the initial bonus. To now require her to pay it back would be unconscionable under the circumstances, especially since there is no dispute she fully satisfied the terms of the recruitment Service Agreement, after 12 months of continuous employment (April 2011-2012). Circumstances that have supported a claim of unconscionability are applicable to her case.¹⁷ Since Respondent was called to an OSC meeting in December 2012 about her office's hiring process including the bonus, as it involved her and others, her cooperation with any investigation was important. An email she submitted showed her acceptance of the meeting with an OSC staff member. By her representations, after appearing and meeting and receiving assurances that her job was secure, she thought she had closure when there were no penalties assessed or repayments demanded. This makes the later 2016 cancellation and collection action for the 2011 bonus unconscionable when she thought all was resolved and she had closure on the hiring matters four years earlier. Moreover, for Respondent to be told in 2016 that her case must have fallen through the cracks goes to a finding of agency negligence in handling an overpayment case. There is no supportable reason why the agency allowed four years to pass without follow up from official inquiry into her hiring process and acting on the bonus cancellation. Whether she relinquished a valuable right or changed position based on the overpayment, the point of cost of relocation has been made and discussed; and whether collection of the debt would impose an undue financial burden is the next point of review.

Respondent argues that it is against equity to collect the overpayments because the overpayments were caused by the Department's error and repayment will impose an undue financial burden. Respondent states she relied on representations that she could receive a recruitment bonus and moved across country from Texas with her young daughter to a higher cost of living area with high rentals and greater fixed monthly costs. She specifies rent, utilities, insurance, student loan repayments, all monthly costs she must meet for herself and her daughter and which are difficult to cover, with rent alone being half her monthly paycheck. She submitted her rental agreement as proof of the expense.¹⁸ She notes that the high rental cost she pays allows her to have an accessible commute to work while maintaining her daughter in the local school system she has known since the move here. She has been paying student loans since obtaining her business degree, a qualifying factor for her current position. She submits that as a single mother who does not receive regular child support, bearing all these expenses and increasing ones with a teenage daughter, that her disposable pay is minimal. It would impose a

¹⁷ Circumstances include: (1) an agency's failure to respond within a reasonable period of time to inquiries regarding an overpayment; (2) an agency's gross negligence in handling an overpayment case; and (3) the unreasonable terms of a one-sided agreement. See, *Aguon v. Office of Personnel Management*, 42 M.S.P.R. 540, 550 (1989); *Irvine v. Office of Personnel Management*, Docket No. SF-831M-97-0757-I-1 (Oct. 4, 1999).

¹⁸ Respondent submitted a signed and dated current rental agreement with her monthly rate. She has been at her current location since her move to the D.C. area 5 years ago.

serious burden to require her to repay such a large amount given her tight personal budget. In other cases, dicta has offered that when a debt (as here \$15,000) is a large one, accounting for a larger portion of an employee's income, it would be more likely for the tribunal to find that repayment would impose an undue burden.¹⁹ In this context of such a large debt, the tribunal concludes that Respondent's assertions establish the potential financial hardship repaying this debt would impose upon her. The financial burden is a significant factor supporting Respondent's position that repayment would be inequitable. In light of the aforementioned and on the basis of the entire record, I find that in the interests of the United States, waiver of this debt should be granted.

CONCLUSION

Because Respondent is without fault regarding her debt and because the circumstances of her case weigh in favor of equitable relief, this tribunal concludes that it would be against equity and good conscience to require Respondent to repay this debt. This decision constitutes a final agency decision.

ORDER

Pursuant to the authority of 5 U.S.C. § 5584, Respondent's request for waiver of the entire debt to the United States Department of Education in the amount of \$15,000 is **HEREBY GRANTED**.

So ordered this 14th day of October 2016.



Nancy S. Hurley
Nancy S. Hurley
Waiver Official

¹⁹ See, *In Matter of E*, Dkt. 15-07-WA, U.S. Dep't of Educ. (March 31, 2015).