



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of

J,

Respondent.

Docket No. 16-57-WA

Waiver Proceedings

DECISION GRANTING WAIVER REQUEST

The Office of Hearings and Appeals (OHA) received a November 27, 2016 request for a waiver of a debt from Respondent, a former U.S. Department of Education (Department) employee, in the above-captioned proceedings. On May 1, 2017, the matter was reassigned to me as waiver official.¹ Respondent's waiver request comes in response to notice of a debt resulting from an overpayment of salary to Respondent in the total amount of **\$7,294.93**. Respondent has indicated that she believes that this overpayment arose from the Department's failure to collect social security taxes while she was working as a fellow through the Teaching Ambassador Fellowship Program.

On May 1, 2017, an Order Governing Proceedings was issued. The following day, on May 2, 2017, I received Respondent's sworn statement with supporting documentation. Having received sufficient evidence to determine whether to grant Respondent's waiver request, the file is closed and the matter is ready for decision.

Currently before me in this matter are the following documents:

- (1) Respondent's request for a waiver;
- (2) Respondent's sworn statement;
- (3) The Debt Letter from the Department of the Interior (DOI) dated November 21, 2016;
- (4) A series of emails with the subject line "Social Security Tax question," which are dated from May 16, 2016 to August 12, 2016 and sent among Respondent and representatives from the Department's human resources office;
- (5) A series of emails with the subject line "Overpayment notice," which are dated between September 15, 2016 and September 26, 2016 and sent among Respondent and representatives from the Department's human resources office; and

¹ Respondent has indicated that she would like to challenge the validity of a debt allegedly arising from overpayments of salary (the "offset proceeding") and separately that if the debt is valid, she requests that the debt be waived for equitable reasons (the "waiver proceeding"). Because Respondent's request for a waiver is granted, the offset proceeding, docket number 17-21-OF, will be dismissed.

- (6) A series of emails with the subject line “Overpayment notice,” which are dated between September 27, 2016 and October 25, 2016 and sent among Respondent and representatives from the Department’s human resources office and DOI.

Having reviewed the submitted information, I conclude that Respondent has meet her burden of showing both that she is without “fault” for those overpayments at issue in this matter and that it is inequitable to require her to pay the alleged debt. Accordingly, Respondent’s request for waiver is granted.

In a waiver proceeding, the debtor assumes² the validity of the debt, but argues that 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 Respondent or anyone else having an interest in obtaining the waiver.³ 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),⁴ which, thereby, exercises waiver authority and jurisdiction on behalf of the Secretary of Education to waive⁵ claims of the United States against a former or current employee of the Department.⁶ The undersigned is the

² Assuming the validity of the debt for the purposes of a waiver proceeding does not preclude Respondent from challenging the validity of the debt in a separate pre-offset hearing.

³ 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 (Dec. 5, 2013) at 2 n.5.

⁴ 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).

⁵ *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).

⁶ *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

authorized Waiver Official who has been assigned this matter by OHA.⁷ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. § 5584.

PROCEDURAL HISTORY

Between 2015 and 2016, Respondent worked temporarily at the Department through an Intergovernmental Personnel Agreement (IPA) as a Teaching Ambassador Fellow. The program allowed teachers to work for one year at the Department as a fellow before returning to their classrooms as a teacher. In May 2016, one of Respondent's fellow Teaching Ambassador Fellows indicated to Respondent that she noticed that social security taxes had not been taken from her pay, which she thought were supposed to be taken under the IPA. However, in her role as a teacher in Texas, Respondent had never paid social security taxes, and Respondent's supervisor told her that under an IPA agreement, she would not be eligible to pay into social security. When Respondent checked her leave and earnings statement, she noticed that like her colleague, social security taxes were not taken from her pay. In response, Respondent contacted numerous representatives from the Department's human resources office (OHR). Although Respondent's question was forwarded to other employees in OHR between May 2016, when she initially asked the question, and August 2016, when Respondent left the Department, Respondent never got an answer whether she owed social security taxes. Rather, she left the Department in August believing that she did not owe social security taxes and it was proper that the deductions were never taken from her pay. One month later, in September 2016, the Department of the Interior (DOI) sent Respondent a bill for over \$12,000. When Respondent inquired about the bill, she was told by a DOI representative that Respondent's work schedule had been changed retroactively to intermittent. Once the Department of Education changed her schedule back to full time, Respondent received a new debt letter from DOI which she challenges in this matter.⁸

Respondent has indicated that she did not believe she was eligible to pay into social security. As noted above, she had not paid social security taxes in her career as a fourth grade teacher in Texas and she had been told by her supervisor that she was not eligible to pay into social security. Respondent also asserts that there is no indication in the record of fraud or misrepresentations or that she failed to act in good faith. Finally, Respondent noted that the debt at issue would be more than two month's salary for her and amount to approximately 17% of her yearly income. Therefore, Respondent asserts that she is requesting that the debt be waived because she believes that collection "would be against equity and good conscience."

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>.

⁷ See 5 U.S.C. § 5584(b) (2012) (noting the authority held by the authorized official in waiver cases).

⁸ In April 2017, during the pendency of this waiver proceeding, but before I was reassigned to this matter, \$3,242.90 was withheld from Respondent's pay in collection of the debt at issue in this matter. Because the debt is being waived, that money should be returned to Respondent. 5 USC § 5584 (c).

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.⁹

It is well established that “no employee has a right to pay that he or she obtains as a result of overpayments.”¹⁰ 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).¹¹ 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.”¹² Once an employee knows or should know of a salary overpayment, the employee is required to set aside money to repay the overpayment of salary.¹³

As Respondent noted, there is no indication that the overpayments at issue in this matter resulted from Respondent’s fraud, actions, statements, or failures to disclose information. Therefore, the only matter left to be considered in the “fault” analysis is whether, during the time she was receiving overpayments of salary, Respondent knew or should have known that the Department had committed an error by failing to take deductions from her pay for social security taxes. Respondent has indicated that she did not know that she was supposed to pay into social security. And nothing in the record indicates that at any time she had actual knowledge. In fact, when she was told she might have to pay social security taxes, she inquired of OHR and was not given an answer, but rather left three months later believing she did not owe a debt. Although her colleague raised the issue in May 2016 of the possibility that Respondent should be paying social security taxes, Respondent received contrary information from her supervisor and although she inquired about the issue with OHR, for the remaining three months of her tenure at

⁹ See e.g., *In re David*, Dkt. No. 05-22-WA, U.S. Dep’t of Educ. (Dec. 14, 2005).

¹⁰ *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.

¹¹ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep’t of Educ. (Dec. 12, 2005).

¹² See *In re Robert*, Dkt. No. 09-10-WA, U.S. Dep’t of Educ. (Nov. 19, 2009) at 3.

¹³ *In re J.*, Dkt. No. 15-50-WA, U.S. Dep’t of Educ. (Nov. 9, 2015) at 6 n.14.

the Department, Respondent was not told definitively that she should be paying social security taxes.

Additionally, while the average employee might have reason to suspect they should be paying social security taxes, under Respondent's unique circumstances, she is not charged with that knowledge. When determining whether an employee is charged with the knowledge of an error resulting in an overpayment, pertinent factors include employee's newness to the federal government.¹⁴ Respondent was on a temporary assignment to the Department, and had spent over two decades working outside the federal government, as a teacher in Texas, where she did not pay social security taxes. Additionally, she was told by her supervisor that she should not be paying into social security. Additionally, social security, unlike health insurance, for example, is not a benefit that Respondent would be utilizing while working at the Department, as opposed to health insurance for example, and she would have less reason to be aware that she should be paying into the system.¹⁵ In this case, where Respondent is new to the federal government, has been working without paying social security taxes for over two decades, and was informed by a supervisor that she would not be paying into social security in her temporary position, it is reasonable for Respondent not to know of the overpayment during her tenure at the Department. Therefore, Respondent satisfies the "fault" standard.

For a waiver to be granted, it is not enough to meet the fault standard. In addition, this Tribunal must also "balance the equities" by considering a number of factors, to determine whether repayment would be inequitable.¹⁶ In this matter, however, I have determined that requiring repayment would be inequitable. As Respondent noted, the amount at issue, 7,294.93 is more than two month's take home salary and 17% of Respondent's annual pay. Requiring the return of that substantial of a portion of Respondent's pay in this circumstance would be inequitable.

Because Respondent is both without "fault" for the overpayment and requiring repayment of the debt would be inequitable, Respondent's request for a waiver 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 **\$7,294.93** is **HEREBY GRANTED**. Additionally, any moneys already collected to satisfy this debt shall be returned.¹⁷

¹⁴ See *In re Jeanette*, Dkt. Nos. 06-11-WA, 06-12-WA, & 06-13-WA, U.S. Dep't of Educ. (Sept. 20, 2006) at 2.

¹⁵ Contrast *In re M*, Dkt. No. 16-52-WA, U.S. Dep't of Educ. (Feb. 15, 2017) (employee did not pay health insurance premiums although she had a health insurance card indicating that she was receiving coverage for her and her children).

¹⁶ See *In re A*, Dkt. 15-43-WA, U.S. Dep't of Educ. (Sept. 4, 2015) at 5.

¹⁷ 5 USC § 5584 (c).

So ordered this 18th day of May, 2017.

Daniel J. McGinn-Shapiro
Waiver Official