



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of

D,

Respondent

Docket No. 17-09-WA

Waiver Proceedings

DECISION GRANTING WAIVER REQUEST

The Office of Hearings and Appeals (OHA) received a February 23, 2017 request for a waiver of a debt from Respondent, a 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. Respondent's waiver request comes in response to the receipt of a notice of a debt resulting from an overpayment of salary to Respondent in the total amount of **\$1,859.94**. This overpayment is related a cash performance award received late in 2016.

On May 1, 2017, an Order Governing Proceedings was issued requiring Respondent to file a complete waiver request on or before May 22, 2017. After Respondent requested an extension, she was given until June 22, 2017 to respond. On June 21, 2017, Respondent filed her 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.

After reviewing 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 assumes¹ 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.² When requesting a waiver, the debtor is

¹ 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.

² 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.

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),³ which, thereby, exercises waiver authority and jurisdiction on behalf of the Secretary of Education to waive⁴ claims of the United States against a former or current employee of the Department.⁵ The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁶ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. § 5584.

PROCEDURAL HISTORY

As with most Department employees, at the end of fiscal year 2016, Respondent met with her supervisor for a performance review. Although she received what her supervisor calls "a perfectly acceptable" rating, Respondent was unhappy with her rating. Respondent's rating, although close, was not a high enough average score to warrant a cash performance award. A few days after meeting with her supervisor about her performance review, Respondent asked her supervisor to re-evaluate her performance with an eye towards possibly increasing her score. Respondent's supervisor informed her that he would re-evaluate her performance in specific areas with the possibility of increasing her score in those areas. On November 24, 2016, Respondent received an SF-50 informing her that she had received a performance award and

³ 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).

⁴ *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).

⁵ *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>.

⁶ *See* 5 U.S.C. § 5584(b) (2012) (noting the authority held by the authorized official in waiver cases).

when Respondent received her pay check for pay period 25 of 2016, it included additional money. Although Respondent's supervisor eventually determined that her score should not be increased and she should not receive a cash award, Respondent's supervisor did not communicate this to Respondent before she received her overpayment. Over two months after receiving the cash award, on February 3, 2017, Respondent's supervisor called Respondent and informed her that the Department's human resources office (OHR) had found an error during an audit and discovered that she had received a performance award erroneously. Respondent's supervisor informed her that she would receive a notice of the overpayment and suggested that she request a waiver of the debt. Respondent checked her online file and noticed that a SF-50 had been uploaded the prior day stating that the award was in error. On February 16, 2017, Respondent received a Bill for Collection from the United States Department of the Interior, which handles payroll matters for the Department of Education, informing Respondent of the debt arising from the erroneously awarded cash performance award. On February 23, 2017, Respondent timely filed a request for a waiver of that debt with this Tribunal.

Respondent has indicated that due to her conversation with her supervisor, wherein he considered raising her performance rating to a level that would warrant a cash award, and the receipt of an SF-50 soon after, which indicated that Respondent would be receiving a performance award, there was no reason for her to recognize the overpayment in her paycheck. Additionally, Respondent asserts that she has already spent the additional money paying down student debt and that she currently has significant financial obligations with two children attending college out-of-state. She, therefore, contends that she should have her waiver request granted.

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).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, 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,

⁷ See *e.g.*, *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

⁸ *In re Danae*, 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).

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 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.¹¹

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, when Respondent received her paycheck with the overpayments of salary, Respondent knew or should have known that she should not have received a performance-based cash award. Respondent's supervisor stated that he did not inform Respondent that her ratings would not be improved and that she would not be getting a cash award before Respondent was paid the extra money. And, Respondent indicates that she learned that she was not supposed to receive the award when she received a telephone call from her supervisor on February 3, 2017, over two months after she received the overpayment, which moved her into discovering an SF-50 issued the day before, that indicated that the award was in error. In short, there is nothing in the record to indicate that Respondent had actual knowledge that she was not receiving a cash award when, in November 2016, she received an SF-50 indicating that she was to receive an award and she received pay that included it. Thus, the only remaining issue is whether Respondent should have known that she was not intended to receive a cash award.

As we have stated, "[e]very waiver case must be examined in light of its particular facts and circumstances."¹² The particular circumstances of this case indicate that Respondent was reasonable in believing that she had properly received a cash performance award and that the additional salary in her November 24, 2016 paycheck was correct. Specifically, as Respondent indicates, two days before receiving her paycheck, Respondent received an SF-50 indicating that she was to receive an award. And, although she did not initially earn a performance rating that would warrant a performance cash award, she had been told by her supervisor that her ratings were being re-evaluated and, when she received the overpayment, Respondent was not informed that her supervisor decided not to increase her scores. In short, an employee in Respondent's position would reasonably assume the increased salary was proper and not an overpayment and the "fault" standard is met in this case.

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.¹³ In this matter, however, I have determined that requiring repayment would be inequitable. As Respondent noted, she does not have the money anymore, having used it to pay down student debt, and she is currently experiencing additional

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

¹¹ *In re J.*, Dkt. No. 15-50-WA, U.S. Dep't of Educ. (Nov. 9, 2015) at 6 n.14.

¹² *In re Jay*, Dkt. No. 06-01-WA, U.S. Dep't of Educ. (June 23, 2006) at 3.

¹³ See *In re A*, Dkt. 15-43-WA, U.S. Dep't of Educ. (Sept. 4, 2015) at 5.

financial constraints resulting from the costs associated with two children attending college out-of-state. As we have stated “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.”¹⁴ The costs associated with providing for her children’s expenses make requiring repayment in this case 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 **\$1,859.94** is **HEREBY GRANTED**.

So ordered this 13th day of July, 2017.

Daniel J. McGinn-Shapiro
Waiver Official

¹⁴ *In re J.*, Dkt. No. 14-12-WA, U.S. Dep’t of Educ. (Sep. 21, 2015) at 4.