



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of

J,

Respondent.

Docket No. 17-16-WA

Waiver Proceedings

DECISION GRANTING WAIVER REQUEST

The Office of Hearings and Appeals (OHA) received an April 3, 2017 request for a waiver of a debt from Respondent, a U.S. Department of Education (Department) employee, in the above-captioned proceedings. On April 10, 2017, the matter was assigned to me as waiver official. Respondent's waiver request comes in response to the receipt of a debt letter from the U.S. Department of the Interior (DOI) on April 1, 2017, which provided notice of a debt resulting from an overpayment of salary to Respondent in the total amount of **\$1,312.30**. This overpayment resulted from an error in the processing of Respondent's promotion from a GS-12 position to a GS-13 position, where he was placed into a higher step than was intended.

On April 10, 2017, an Order Governing Proceedings was issued requiring Respondent to file a complete waiver request on or before April 26, 2017. After Respondent failed to file a response, an Order to Show Cause was issued on May 1, 2017, ordering Respondent to file his documentation in support of his waiver request by May 22, 2017. On May 18, 2017, Respondent filed his 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.

Having reviewed the submitted information, I conclude that Respondent has met his burden of showing both that he is without "fault" for those overpayments at issue in this matter and that it is inequitable to require him 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

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

When Respondent was hired by the Department in 2010, he was hired as GS-9 level employee with a career ladder up to a GS-12 position. Over the next two years, he received his ladder promotions up to a GS-12 position and then in subsequent years received within-grade salary increases as he became eligible. In December 2016, Respondent was promoted into a new position at a GS-13 level. This was his first promotion at the Department outside of his career ladder promotions. On the SF-50 processing his promotion, it indicates that Respondent was

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.

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).

promoted from a GS-12, Step 5 to a GS-13, Step 4. Approximately four months later, on March 14, 2017, Respondent received an email from a representative from the Department's human resources department (OHR), indicating that his "current salary (GS-13 step 5)⁷ is incorrect and needs to be corrected. It was supposed to be a GS-13 step 2," and that he would receive a debt letter soon.

Respondent has indicated that because the promotion giving rise to the overpayment was his first promotion outside the career ladder, "[a]s a non-HR professional, [he] was not aware of what policies govern the movement between grades, especially when the grade salary spans overlap (i.e., the upper ends of each grade span are higher than the lower end of the grade above it)." Respondent further notes that the only documentation he received related to the promotion gave him no reason to suspect an error, and therefore, he was surprised by the March 14 email from OHR notifying him of the overpayment of salary. Finally, Respondent has, in great detail, explained the precarious status of his finances, only recently moving back onto "the path to financial stability." He, therefore, argues that requiring him to repay this debt would "throw everything back into disarray" and would, thus, be inequitable.

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.⁸

It is well established that "no employee has a right to pay that he or she obtains as a result of overpayments."⁹ 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).¹⁰ 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

⁷ Although this appears to be in conflict with Respondent's SF-50 indicating he was promoted to a step 4, not step 5, this conflict does not affect the outcome of this waiver proceeding.

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

⁹ *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.

¹⁰ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005).

that the employee knew or should have known the payment to be erroneous.”¹¹ 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.¹² As we have stated, when “assessing the reasonableness of a debtor’s failure to recognize an overpayment, the tribunal may consider the employee’s position and grade level, newness to federal employment, and whether an employee has records at his or her disposal, which, if reviewed, would indicate a salary overpayment.”¹³

In this matter, 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 Respondent received overpayments of salary, Respondent knew or should have known that the Department had committed an error by placing him at the wrong step when he was promoted to a GS-13 position. Respondent has indicated that he did not suspect an error, and was surprised by the March 14 email from OHR. Nothing in the record contradicts this sworn statement or indicates that at any time he had actual knowledge.

And, determining which step to place an employee into is not something the average employee would know. As indicated above, when determining which knowledge to charge an employee with, we consider the employee’s position. Respondent works in the Office of Innovation and Improvement on Parental Options and Improvement Programs. Nothing about his position would give him any particular insight into human resources matters. And, although Respondent has worked at the Department for approximately seven years, as he has indicated, this is his first experience with a promotion not on the career ladder. Finally, when I reached out to a representative from OHR to gain an understanding of how the proper step is determined, the OHR representative stated that she would not expect that someone who does not work in human resources would have knowledge of the subject. Because the proper step an employee is placed into is not a topic an employee in Respondent’s position would be expect to know about, he is not charged with constructive knowledge of the error, 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.¹⁴ In this matter, however, I have determined that requiring repayment would be inequitable. As Respondent noted, he has only recently gotten his finances under control and is on the road to financial stability. Requiring the return of over \$1,300 could derail these efforts, and, 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.

¹¹ See *In re Robert*, Dkt. No. 09-10-WA, U.S. Dep’t of Educ. (Nov. 19, 2009) at 3.

¹² *In re J.*, Dkt. No. 15-50-WA, U.S. Dep’t of Educ. (Nov. 9, 2015) at 6 n.14.

¹³ 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

¹⁴ See *In re A*, Dkt. 15-43-WA, U.S. Dep’t of Educ. (Sept. 4, 2015) at 5.

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 **\$1,312.30** is **HEREBY GRANTED**.

So ordered this 23rd day of June, 2017.

Daniel J. McGinn-Shapiro
Waiver Official