



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of

M,

Respondent.

Docket No. 17-26-WA

Waiver Proceeding

DECISION DENYING WAIVER REQUEST

The Office of Hearings and Appeals (OHA) received a May 8, 2017 waiver request from Respondent, a former U.S. Department of Education (Department) employee, in the above-captioned proceedings. On May 17, 2017, the matter was reassigned to me as waiver official. Respondent's waiver request comes in response to her receipt of a notice from the U.S. Department of the Interior indicating that she owed a debt resulting from an overpayment of salary to Respondent in the total amount of **\$1,754.19**.

An Order Governing Proceedings was issued in this matter, and on June 21, 2017, Respondent filed her sworn statement with supporting documentation. The file is closed in now closed and the matter is ready for decision. Having reviewed the submitted information, I conclude that Respondent has failed to meet her burden of showing both that she is without "fault" for these overpayments. Accordingly, Respondent's request for waiver is denied.

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 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

¹ Assuming the validity of the debt for the purposes of the waiver proceedings 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.

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

Respondent was an employee at the Department for over five and a half years, working during the relevant time in the Office of State Support (OSS) in the Department's Office of Elementary and Secondary Education. In September 2016, while Respondent was being paid at a GS-13 level, and the Acting Director of OSS asked Respondent to serve as the Acting Group Leader of a group in OSS, a position paid at the GS-14 level, for a 120-day detail. At the time the detail was offered and Respondent accepted the detail, Respondent was not given many details about the position. In a SF-50 identified as a "[Change] in Tenure Group" and approved of on September 22, 2016, Respondent was informed that, although she would be acting in a role generally filled by an employee at a GS-14 or GS-15 pay grade, at that time she would remain at GS-13 pay level. However, in a second SF-50, approved of one week later on September 29, Respondent was informed she was being promoted to a GS-14 level. This SF-50, however,

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).

indicated that the “\nature of the action was a promotion not to exceed January 18, 2017.”⁷ Respondent indicates that she received both of these SF-50s multiple weeks after she began working in the position, possibly as late as October 2016.

On January 6, 2017, the Acting Director of OSS notified Respondent that her role as Acting Group Leader would end on January 9, 2017. Respondent also received an SF-50 with both an approval and effective date of January 8, 2017, which indicated that Respondent was receiving the general cost of living salary increase ordered by the President. Respondent asserts that her layman’s reading of the regulations associated with the cost of living increase led her to believe that “the agency would process the pay action in conjunction with any other necessary pay actions, for example, a pay action to reduce my salary back to a GS-13 level.” Respondent further alleges that her layman’s reading of regulations governing her placement into the 120 detail and governing discretionary personnel actions indicated that “the agency may have had the authority to promote me.” She further argues that the SF-50 giving her the cost of living increase indicated that it was “permanent” and she remained listed in WEBTA, the Department’s time and attendance system, as a GS-14 level employee. Respondent alleges that because of this and because no one in OSS or OESE leadership or from the Department’s human resources office said anything to the contrary, she believed that it was reasonable for her to remain at a GS-14 level. Finally, in an SF-50 with the approval date of April 6, 2017, but with the effective date of January 19, 2017, Respondent’s pay was changed from a GS-14 step 1 to a GS-13 step 3.

In a letter, dated April 24, 2017, the United States Department of the Interior, which handles salary payment matters for the Department of Education, informed Respondent that she had been overpaid a total of \$1,754.19 as a result of the Department paying excessive salary between pay periods 3 and 8 in 2017. In a May 8, 2017 waiver request Respondent requested a waiver of this debt.

Respondent has argued that she does not believe she owes this debt because she is not trained in human resources, does not have a special knowledge of personnel matters, and has not been provided training on the matters at issue in this case. Rather, she “operated with the understanding” that she could rely on those in human resources, payroll, and management roles to perform their responsibilities in this area. Respondent asserts that she had “no reason” to recognize the overpayments “because the SF-50 forms and lack of communication from individuals in management roles and human resources resulted in mixed signals and expectations,” and she is “not familiar with personnel actions and was not able to question or remedy the multiple errors made throughout my temporary assignment.” Respondent further asserts that she did not learn of the overpayment of salary until she received the debt letter from DOI. In summary, Respondent argues that she had no reason to recognize that there was any issue to bring to her supervisor or appropriate official.⁸

⁷ Respondent indicates that the OESE front office, informed Respondent that she would be receiving back-pay for performing these duties to a time even before the detail began. At issue in this matter, however is not when the increased pay began, but rather when Respondent knew or should have known that the increased pay was intended to end.

⁸ Respondent does not appear to assert why repayment would be inequitable, other than asserting that the overpayment resulted from other Department employees’ errors. As we have noted, a

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 a starting point, 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 her salary should have been returned to a GS-13 level and was not between pay periods 3 and 8 in 2017. Respondent has indicated that she did not know of the overpayments. There is, however, evidence that indicates that Respondent should have known of the error, and should have notified the appropriate personnel to remedy that error.

waiver cannot be granted unless there is a showing that the employee is not only free from fault, as it is defined in waiver matters, but also that the “balance the equities” would make repayment inequitable. See *In re L*, Dkt. No. 16-40-WA, U.S. Dep’t of Educ. (Aug. 13, 2016) at 5. In this matter, however, Respondent does not pass the “fault” standard and so it is immaterial whether she makes any showing that repayment is inequitable. See *In re M*, Dkt. No. 16-12-WA, U.S. Dep’t of Educ. (May 11, 2016) at 4 n.12.

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.

As Respondent has noted, when the Acting Director of OSS asked Respondent to serve as the Acting Group Leader of a group in OSS, it was for a “120 day detail.” And, the SF-50, approved of on September 29, promoting Respondent into the temporary position, states that the “Nature of the Action” is a “Promotion NTE [Not to Exceed] 01-18-17.”¹⁴ So, when, on January 6, 2017, the Acting Director of OSS notified Respondent that her role as Acting Group Leader would end on January 9, 2017, Respondent was on notice that her position, and the pay increase that accompanied it, would be ending soon.

Respondent argues that her “layman’s reading” of the regulations associated with the cost of living increase led her to believe that when she received an SF-50, both approved and effective on January 8, implementing the cost of living increase, she believed that “the agency would process the pay action in conjunction with any other necessary pay actions, for example, a pay action to reduce my salary back to a GS-13 level.” This is not a reasonable conclusion. Respondent was told the detail would end on January 9, so it is not reasonable to believe that if they were going to move her back into a GS-13 position they would execute that move on January 8.

Respondent further alleges that her layman’s reading of regulations governing her placement into the 120 detail and governing discretionary personnel actions indicated that “the agency may have had the authority to promote me.” Whether the agency had the authority to promote Respondent permanently, however, she had no reason to believe she was permanently promoted to the GS-14 level, especially when she was told by the Acting Director of OSS that her tenure as the acting team lead was ending on January 9, 2017.

She further argues that the SF-50 giving her the cost of living increase indicated that it was “permanent” and she remained listed in WEBTA, the Department’s time and attendance system, as a GS-14 level employee. First, the only indication on the SF-50 that anything is permanent is that Respondent’s tenure is checked off as “Permanent.” Whether Respondent is a permanent employee is not at issue, just the salary grade at which she is paid. And, that WEBTA was indicating that she was paid at a GS-14 level after the end of her time as Acting Team Lead acts as evidence that she had more reason to be aware that she was being paid at a GS-14, when the circumstances indicated that once her detail as lead was over, she should have been returned to a GS-13 level. Respondent asserts that because no one in OSS or OESE leadership or from the Department’s human resources office said anything to the contrary, she believed that it was reasonable for her to remain at a GS-14 level. The Acting OSS Director, however, told Respondent that her detail as Acting Team Lead was ending, and it is not reasonable for an employee to believe that their pay for a position they had previously held at a GS-13 level had been promoted to a GS-14 pay simply because he or she is not notified that this did not happen.

As this tribunal has stated, Department employees have an obligation to check their leave and earning statements and discover clearly indicated mistakes on them.”¹⁵ Here, Respondent should have seen on her leave and earning statements that she was being paid at a GS-14 level

¹⁴ Although Respondent has stated that she did not receive this SF-50 when she began the detail, she did receive it by October 2016, long before the overpayments began the following January.

¹⁵ *In re E.*, Dkt. No. 16-13-WA, U.S. Dep’t of Educ. (May 10, 2016) at 2.

when she had no reason to believe that this was correct. Yet, she did take action to address this overpayment while receiving it. Therefore, Respondent has failed to satisfy the “fault” standard and her request to waive her debt must be denied.¹⁶ 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 **\$1,754.19** is **HEREBY DENIED**.

So ordered this 6th day of July, 2017.

Daniel J. McGinn-Shapiro
Waiver Official

¹⁶ Because Respondent has failed to demonstrate that she is without “fault,” and her request must be denied, it is not necessary to address whether repayment would be inequitable if she had not been at “fault” for the salary overpayments. *See In re Jacqueline*, at 6-7.