



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of

Docket No. 17-33-WA

J,

Waiver Proceedings

Respondent.

DECISION GRANTING WAIVER REQUEST

The Office of Hearings and Appeals (OHA) received a request for a waiver of a debt from Respondent, a former U.S. Department of Education (Department) employee, in the above-captioned proceedings. Respondent's waiver request comes in response to the receipt of a debt letter from the U.S. Department of the Interior (DOI), which provided notice of a debt resulting from an overpayment of salary to Respondent in the total amount of **\$12,343.27**. This overpayment resulted from the Department retroactively changing Respondent's work schedule from full time to intermittent, making her ineligible for the leave and holiday pay earned during her one year fellowship with the Department.

On June 20, 2017, an Order Governing Proceedings was sent via electronic mail in response to Respondent's waiver request. The Order Governing Proceedings required Respondent to file a complete waiver request on or before July 13, 2017. On June 20, 2017, Respondent filed her sworn statement with supporting documentation. On June 27, 2017, I issued an order providing Respondent with the opportunity to supplement the file. My order indicated that if Respondent wished to submit any further information, she should do so by July 18, 2017, and that at that point, I would close the file. On June 27, 2017, Respondent submitted additional information, but has not submitted any further filings or indicated that she needs additional time. Therefore, because July 18, 2017 has passed, the file is closed and Respondent's request is ready for consideration.

Having reviewed the submitted information, I conclude that Respondent has met 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

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.

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 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

Between 2015 and 2016, Respondent worked at the Department through an Intergovernmental Personnel Agreement (IPA) as a Teaching Ambassador Fellow. The program

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.

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).

allowed teachers to work for one year at the Department as a fellow before returning to their classrooms as a teacher. On July 15, 2015, a couple months before Respondent began her tenure at the Department, she signed an “Assignment Agreement” under the Intergovernmental Personnel Act of 1970, or an IPA agreement. The IPA Agreement indicated that Respondent “will receive an excepted service appointment as a GS-13 with [a] full-time work schedule.” Additionally, the IPA agreement indicated that “[s]ick and annual leave will be accrued in accordance with Department policies.” Soon after completing her time at the Department, in September 2016, Respondent received a debt letter from the Department of the Interior (DOI), which indicated that she had been overpaid salary and owed a debt of \$12,343.27. Within days of receiving the letter, Respondent contacted her former supervisor and a representative from the Department’s General Counsel’s office who had worked with the IPA agreement and Respondent then contacted a representative from DOI to ask about the debt. On September 27, 2016, the DOI representative told Respondent that “payroll” had researched the debt and discovered that “[t]he Dept. of Education change [Respondent’s] work schedule to intermittent (as corrections to personnel actions), retroactively, after timesheets had already [been] paid based on leave and holiday coded. Because intermittent employees may not be paid for leave or holidays, significant debt was recorded.” After a delay caused by a misunderstanding related to a separate debt, Respondent filed a request for a waiver of the debt at issue in this matter.⁷

Respondent has indicated that she does not believe she should be held at fault for the overpayments. She has argued that she operated in good faith and seemingly indicates that she relied upon the IPA agreement. Additionally, she has asserted that the repayment of a debt of over \$12,300 would impose substantial undue financial burden, especially because it accounts for over a quarter of her annual salary earned in her full time career as a public school teacher in Texas.

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.

⁷ In April 2017, \$3,242.90 was withheld from Respondent’s pay seemingly in collection of the debt at issue in this matter. Because the debt is being waived, if that money was collected to satisfy Debt 62571128533, it should be returned to Respondent. 5 USC § 5584 (c).

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).

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.”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

As Respondent asserts, 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 she should be treated as an intermittent employee and not paid for leave or holidays. As indicated above, before beginning her fellowship, Respondent signed an IPA Agreement that stated that she was to be appointed to serve in a position with a “full-time work schedule” where “[s]ick and annual leave will be accrued in accordance with Department policies.” Nothing in the Agreement states that she would work as an intermittent employee. And, Respondent has indicated it was only when she received the debt letter after leaving the Department, inquired about the debt, and was told by the DOI representative that Respondent’s schedule was changed to intermittent “retroactively,” that she learned she should not have been eligible for pay for holidays and leave. It was reasonable for Respondent to rely on the IPA Agreement, and there does not appear to be any reason she would know, or should have known, that her work schedule would be retroactively changed. In short, the circumstances indicate that Respondent both did not know and should not have known about the salary overpayments while receiving them; Respondent has met 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.¹⁴ In this matter, however, I have determined that requiring repayment would be inequitable. As Respondent noted, the debt at issue accounts for a quarter of her annual salary. Imposing the undue financial burden on Respondent of requiring

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.

repayment of that amount of money, when Respondent is not at fault for overpayment is 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 **\$12,343.27** is **HEREBY GRANTED**.

So ordered this 27th day of July, 2017.

Daniel J. McGinn-Shapiro
Waiver Official