



UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of

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Docket No. 19-06-WA

Salary Overpayment Waiver Proceeding

Debt ID 82541129178

Respondent.

DECISION GRANTING WAIVER

The Office of Hearings and Appeals (OHA) received a request, dated January 7, 2019, for a waiver from Respondent, a U.S. Department of Education (Department) employee, in the above-captioned proceeding. On January 10, 2019, the matter was assigned to me as waiver official. Respondent's waiver request comes in response to a Bill of Collection, dated December 19, 2018, which identified a salary overpayment debt incurred from pay period 26 in 2015 and pay periods 19 of 2016 through 18 of 2018,¹ in the total amount of **\$29,827.08**. This overpayment debt appears to have resulted from Respondent receiving salary calculated using the incorrect locality pay.²

Based on the submitted information, Respondent has proven that he is without "fault" as the term is used in waiver proceedings and that it is against equity and good conscience for the federal government to recover the overpayments. Therefore, all debt that accrued between the

¹ Although the debt notice only lists salary overpayments from pay period 26 in 2016 and pay periods 19 in 2016 through 18 in 2018, the total amount of overpayment appears to be inclusive of all pay periods from pay period 19 in 2015 through 18 in 2018. The debt incurred in pay periods 19 through 25 in 2015 appears to be included in the overpayment amount for pay period 26 in 2015. Similarly, the debt incurred in pay periods 1 through 18 in 2016 appears to be included in the overpayment amount for pay period 26 of 2016. Whether the calculations are correct, this decision waives all debts that arose out of Respondent being paid based upon the incorrect duty station between the time of Respondent's promotion in 2015 and the correction to his duty station in 2018.

² As noted below, in a waiver matter, the validity of the debt is not addressed. Respondent, simultaneous, however, with his request for this waiver also requested a separate pre-offset hearing, docketed as 19-05-OF.

time of his promotion in 2015 and the correction of his duty station in 2018 is waived.

In a waiver proceeding, the debtor does not challenge the validity of the debt, but rather argues that he 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 the reason 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 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 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

In 2015, Respondent applied for and was selected for a promotion within the Department of Education's Office of Communications and Outreach (OCO). Specifically, he was promoted from a GS-13 level position to a GS-14 level position, effective September 20, 2015. Before and after his promotion, Respondent lived in the state of Kansas and worked either from the Department's office in Kansas City, Missouri or from his home. However, after the promotion,

³ Under waiver decisions issued by the Comptroller General interpreting 5 U.S.C. § 5584, "pay" has been held to include all forms of remuneration in addition to salary. *See In re T*, Dkt. No. 13-40-WA, U.S. Dep't of Educ. (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), Oct. 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, Apr. 26, 1996, 110 Stat. 1321).

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

Respondent's duty station was changed from "Rest of United States"⁸ to Washington, D.C. When the GS-14 level position was posted, the listing indicated that the position would be in Washington, D.C. Respondent, however, had documented approval that he would be permitted to continue to work from the Kansas City metropolitan area after the promotion. Respondent erroneously received the locality pay rate associated with Washington, D.C. during pay periods 19 in 2015 through 18 in 2018. Throughout this time period, however, Respondent continued to pay income tax to Kansas and Missouri.

On September 4, 2018, the Department issued a signed SF-50 with effective date September 20, 2015 to correct the duty station code associated with Washington, D.C. to the duty station code associated with the Kansas City metropolitan area. A Bill of Collection, dated December 19, 2018 was issued to Respondent to recover the debt that accrued during the time period that Respondent erroneously received the Washington, D.C. locality pay rate.

Respondent asserts that he was never aware nor should have been aware that his duty station had erroneously been changed after his promotion. Although the position location listed Washington, D.C., he had received approval from his supervisor and the leadership within OCO to continue to work from the Kansas City metropolitan area. Because Respondent and his supervisors did not expect him to relocate to Washington, D.C., Respondent did not expect a change in his duty station. And, although the erroneous change in duty station resulted in a large salary increase, Respondent believed that his increase in pay corresponded with the promotion he had just received. Finally, Respondent asserted that he was especially unlikely to catch the erroneous change to his locality pay because at the time of that change, he was dealing with several unexpected crises including his wife's cancer diagnosis, his father's unexpected passing, and his own medical issues. These occurrences proved to be disruptive in his day-to-day life.

Respondent further asserts that repaying the debt would place his family in an extreme financial hardship. His disposable income, calculated after deductions, can be less than his family's fixed expenses in any given month. Respondent's wife's income is based in part on commissions and varies significantly. Respondent, a disabled Marine veteran, relies on his monthly disability pay and his spouse's variable monthly earnings to help pay additional expenses. Finally, Respondent has already been forced to take a loan on his Thrift Savings Plan. With a family of five, a child starting college, and his wife's potential reduction in commission rate, Respondent fears that he will have to sell his house to pay off the debt.

DISCUSSION

Determining whether waiver is appropriate in this matter requires consideration of two factors: (1) whether Respondent can prove that there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of Respondent, known as the "fault standard;" and (2) whether Respondent can show that it is against equity and good conscience for the federal government to recover the overpayment, known as the "equity standard."⁹

⁸ "Rest of United States" locality included the Kansas City metropolitan area until a specific locality was introduced in 2016.

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

A Department employee generally does not have the right to keep pay obtained as a result of salary overpayments.¹⁰ An exception to this rule is that a waiver may be granted as an equitable remedy, but only when an employee can meet the “fault standard.”¹¹ This standard is not satisfied merely because salary overpayments resulted from an administrative error by the agency. Salary overpayments “often, if not always, involve some type of error by the agency.”¹² Rather, the fault standard is “examined in the context of an employee’s duty to prevent or discover mistakes and errors in salary payments when doing so is feasible.”¹³ This duty comports with “the employee’s particular capacity to know of the antecedents that may give rise to changes in pay,” especially because the employee “often initiates [the] change in status that results in a pay change”¹⁴ Essentially, a waiver cannot be granted when “a reasonable person should have known or suspected that he or she was receiving more than his or her entitled compensation.”¹⁵ Every waiver case must be examined in light of its particular facts and circumstances.¹⁶

*In re K*¹⁷ is illustrative of the fault standard not being satisfied in a waiver case involving erroneous locality pay. In that case, the Respondent had worked for the Department as a human resources specialist for more than 13 years. She had signed a Flexiplace Work Agreement that established her official worksite in the Washington, D.C. locality and two alternative worksites, one in the Washington, D.C. locality and the other in the State of Washington. The Department determined that Respondent did not qualify for Washington, D.C. locality pay during the pay periods in question because Respondent did not report to her regular worksite at least twice each biweekly pay period nor perform work at her alternative worksite in the Washington, D.C. locality in accordance with 5 C.F.R. § 531.605(d)(1). Instead she teleworked exclusively from her residence in the State of Washington, thus establishing her locality as the State of Washington in accordance with 5 C.F.R. § 531.605(d)(3). Respondent, in that matter, should have known that she was not entitled to Washington, D.C. locality pay because she affirmatively changed where she was physically working, and as a human resources specialist, she should have known that regulations did not entitle her to continue to receive Washington, D.C. locality pay when she failed to sufficiently report to the Washington, D.C. office.

*In re D*¹⁸ is another example of the fault standard not being met in an erroneous locality pay waiver case. In that case, Respondent was transferred from New York to Florida. She repeatedly notified the Department’s Office of Human Resources about her transfer but was still paid the higher New York locality rate. Respondent was not granted a waiver because she knew

¹⁰ *In re D*, 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 *In re Faith*, Dkt. No. 10-04-WA, U.S. Dep’t of Educ. (Nov. 19, 2010) at 3; see also *In re Richard*, Dkt. No. 12-19-WA, U.S. Dep’t of Educ. (Apr. 4, 2012) at 3; *In re Paul*, Dkt. No. 11-90-WA, U.S. Dep’t of Educ. (Mar. 8, 2012) at 2; *In re Jason*, Dkt. No. 10-01-WA, U.S. Dep’t of Educ. (Aug. 24, 2010) at 4.

¹³ *In re Spencer*, Dkt. No. 11-01-WA, U.S. Dep’t of Educ. (June 7, 2011) at 2.

¹⁴ *Id.*

¹⁵ *In re K*, Dkt. No. 15-20-WA, U.S. Dep’t of Educ. (May 4, 2016) at 3.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Dkt. No. 18-40-WA, U.S. Dep’t of Educ. (Aug. 29, 2018).

that her higher salary was a result of a Department error and that error was immediately apparent to her.

The present matter is unlike the aforementioned erroneous locality pay cases in which the fault standard had not been met. In those cases, respondents had the “particular capacity” to know that their initiated changes should have resulted in a change in duty station and locality pay. Respondent D repeatedly notified the Department’s Office of Human Resources about her upcoming transfer because she *knew* that Florida’s locality pay was less than New York’s. And as a human resources specialist, Respondent K *should have known* that under the regulations pertaining to locality pay for telework employees her decision to work exclusively from Washington state would affect her duty station.¹⁹

In contrast, Respondent in this matter did not fail to notice a change that he should have expected, but rather failed to anticipate a change he had no reason to expect. Respondent expected to receive an increase in pay as a result of his promotion from a GS-13 level position to a GS-14 level position. It is not obvious that he should have recognized that the increase in his gross pay was a result of his promotion *and* a change in locality. He had previously earned “Rest of United States” locality pay in his GS-13 level position. Respondent believed that everything would remain the status quo after his supervisors approved him to continue to work in the Kansas City metropolitan area and he continued to pay income taxes to Kansas and Missouri during the time period in question. Essentially, it is reasonable that Respondent did not know that his locality would be changed erroneously because he did nothing to initiate the change. Consequently, there is a distinct difference between noting a failure to make a change that one expects, as in the cases of Respondent K and Respondent D, and noticing a change, like in this present matter, that one is unlikely to expect.

Department employees’ leave and earning statements (LES) contain language that an “employee is responsible for verification of pay, deductions, and leave.” It, however, can be reasonable for Respondent to fail to identify a change that he has no reason to expect. Because every waiver case must be evaluated in light of its particular facts and circumstances, special consideration must be given to Respondent’s family crises at the time of his promotion. Respondent’s spouse was diagnosed with cancer in August 2015, one month before his promotion. Respondent was reasonably distracted and less likely to discover the erroneous and unexpected change in his locality on his LES. Respondent’s father’s unexpected death in November 2015 and Respondent’s diagnosis of medical issues in February 2016 compounded his distractions. All these crises made it reasonable for Respondent to fail to check his LESs after his promotion for a potential mistake resulting from a change that he did not initiate. Accordingly, Respondent satisfies the fault standard.

To be granted a waiver, it is not enough to meet the fault standard. This tribunal must also “balance the equities by assessing the competing interests in the recovery of debts owed to the United States against Respondent’s asserted interests in the forgiveness of debt owed to the United

¹⁹ See *In re C*, Dkt. No. 15-27-WA, U.S. Dep’t of Educ. (June 3, 2015) at 4 (noting that employees with human resources experience are reasonably charged with knowing pay related matters that may be obscure to employees with no human resources experience).

States and consider good conscience in light of the particular facts of Respondent's case."²⁰ One settled reason repayment of debt may be inequitable is if "recovery of the claim would impose undue financial burden upon the debtor under the circumstances."²¹

Respondent and his spouse have both provided sworn affidavits attesting to monthly expenses and supported those statements with detailed evidence, including copies of monthly bills. These documents show that the collection of this debt would place their family in significant financial hardship.²² These documents show Respondent's fixed monthly expenses often total more than Respondent's disposable income after taxes and deductions. Respondent is reliant on his disability pay and his spouse's income to help pay for additional expenses for his family of five. Respondent has indicated that the burden of repaying the debt would be exacerbated because his wife's monthly income is highly variable due to the nature of her work. The documentation provided demonstrates a family of five that lives within its means but does not have much financial flexibility. Collecting this debt is "beyond the bounds of what is customary or reasonable"²³ and would go against equity and good conscience.

ORDER

Pursuant to the authority of 5 U.S.C. § 5584 (2012), Respondent's request for a waiver of the entirety of debt 82541129178 in the amount of **\$29,827.08** to the United States Department of Education is **HEREBY GRANTED**.

So ordered this 25th day of July 2019.

Daniel J. McGinn-Shapiro
Waiver Official

²⁰ *In re Donna*, Dkt. No. 12-56-WA, U.S. Dep't of Educ. (Nov. 8, 2012) at 5.

²¹ *Id.* at 5-6.

²² The Department defines "financial hardship" as "the inability to meet the basic living expenses for goods and services necessary for the survival of the debtor, his/her spouse and any dependents," HANDBOOK FOR PROCESSING SALARY OVERPAYMENTS (ACS-OM-04, revised Jan. 2012).

²³ *In re Donna*, Dkt. No. 12-56-WA, at 6 (citing *Aguon v. Office of Personnel Management*, 42 M.S.P.R. 540, 549-50 (1989)).