



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF HEARINGS AND APPEALS

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In the Matter of

**J,**

Respondent.

**Docket No. 18-63-WA**

Waiver Proceedings

Debt ID: 82681605208

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**DECISION DENYING WAIVER REQUEST**

On November 14, 2018, the Office of Hearings and Appeals (OHA) received a request, dated November 12, 2018, for a waiver of a debt from Respondent, a U.S. Department of Education (Department) employee, in the above-captioned proceedings. Respondent's request comes in response to the notice of a debt resulting from an overpayment of salary to Respondent. OHA determined that there was a related pre-offset request related to this debt as well, matter 18-64-OF, and concluded that the pre-offset matter should be addressed first. On November 19, 2018, the salary overpayment waiver matter was assigned to me as hearing official. Also, on November 19, 2018, I issued an order staying collection of this debt until both proceedings were complete to allow for the orderly process of the two matters. On November 4, 2019, Administrative Law Judge Angela Miranda issued a decision concluding that the \$12,350.65 debt at issue is valid and providing Respondent with an opportunity to submit a voluntary repayment schedule.

On November 4, 2019, I issued an Order Governing Proceedings in the above-captioned matter. On December 4, 2019, Respondent submitted his statement with supporting documentation.<sup>1</sup> Having reviewed the submitted information, I conclude that Respondent failed to meet his burden of showing he is without "fault" as the term is used in these proceedings.

In a waiver proceeding, the debtor does not challenge<sup>2</sup> the validity of the debt, but rather 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

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<sup>1</sup> Included with his December 4, 2019 filing was a payment agreement form requesting a small payroll deduction in each pay period if the waiver was not granted. The form indicates that it should be returned to the Interior Business Center in Lakewood Colorado. Because I am not sure if the Interior Business Center has received a copy of the form, I am attaching a copy to this decision.

<sup>2</sup> As noted, Respondent has already challenged the debt in an offset hearing, 18-64-OF.

Respondent or anyone else having an interest in obtaining the waiver.<sup>3</sup> 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 OHA,<sup>4</sup> which, thereby, exercises waiver authority and jurisdiction on behalf of the Secretary of Education to waive<sup>5</sup> claims of the United States against a former or current employee of the Department.<sup>6</sup> The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.<sup>7</sup> Jurisdiction is proper under the Waiver Statute at 5 U.S.C. § 5584.

## PROCEDURAL HISTORY

Respondent is a contract specialist with the U.S. Department of Education, Federal Student Aid. Immediately before, and throughout the period of overpayment, Respondent was working as a full-time employee, paid on the General Schedule (GS), grade 14, step 10.

Respondent's mother faced significant health problems and Respondent requested permission to relocate to Georgia and telework from there so that he could care for her. On

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<sup>3</sup> 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. 13-40-WA (Dec. 5, 2013) at 2 n.5.

<sup>4</sup> 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).

<sup>5</sup> *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).

<sup>6</sup> *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). The Department's overpayment procedures may be found on the Office of Hearings & Appeals website at: <http://oha.ed.gov/overpayments.html>.

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

October 14, 2016, an SF-50 Personnel Action was approved stating that effective October 16, 2016, Respondent's duty station was changed from Washington DC to the Atlanta area.<sup>8</sup> The SF-50 also stated that Respondent's pay was changing from \$141,555 (the 2016 locality pay for Washington, DC) to \$135,656 (the 2016 locality pay for Atlanta, GA).<sup>9</sup> Then, approximately eight months later, in June 2017, Respondent entered into an agreement to remain in Georgia to care for his mother through January 15, 2018.<sup>10</sup> That agreement indicated that it was a "continual change in duty station to Atlanta, Georgia" and that Respondent understood that his pay would be "determined based on the locality pay for my new duty station."<sup>11</sup>

From pay period 23 in 2016 through pay period 6 in 2017 Respondent was correctly paid based upon the Atlanta locality pay rate.<sup>12</sup> In pay period 6, Respondent's net pay was \$3,432.12. In pay period 7 of 2017, however, Respondent's pay was change to the DC rate and his net pay changed to \$3,587.11. And then, during the next pay period, pay period 8 of 2017, Respondent improperly received a bulk payment to bring his pay up to the DC locality rate for pay periods 23 of 2016 through pay period 6 of 2017. As a result, Respondent's net pay for pay period 8 in 2017 was \$5,739.26. Moving forward, Respondent continued to be paid at the DC locality rate through pay period 19 in 2018. Effectively, Respondent received pay from pay period 23 in 2016 through pay 19 in 2018 at the DC locality rate when he should have been paid at the Atlanta locality rate. The difference between these locality rates gave rise to the debt at issue.

On September 10, 2018, the Department issued SF-50s making backdated corrections to Respondent's pay.<sup>13</sup> Then, in a letter dated September 24, 2018, the Agency's payroll agent, the United States Department of the Interior, Interior Business Center, informed Respondent that he owed a debt of \$12,350.65 as a result of the corrections to personnel actions.<sup>14</sup>

On November 14, 2018, Respondent sent a letter to OHA requesting a waiver of the debt. As noted above, a separate pre-offset matter was docketed, and this matter was stayed pending the outcome of that case. After a decision was issued in the pre-offset matter on November 4, 2019, I issued an order governing proceeding. On December 4, 2019, Respondent filed a response to the order governing proceedings with supporting documentation. In his initial request, Respondent argues that the overpayment was a result of an administrative error and that he had no reason to recognize the additional funds in his paycheck as an erroneous payment because his pay grade and step did not change. In his December 4, 2019 statement, Respondent asserts that the circumstances surrounding the debt show that there was no fraud, misrepresentation, fault, or lack of good faith and that he "simply did not know of an overpayment." Respondent finally notes that at the time of the transfer there had been several personnel changes, including a performance bonus.

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<sup>8</sup> Respondent's Attachment D to Request for a Waiver.

<sup>9</sup> Id.

<sup>10</sup> Respondent's Attachment B to Request for a Waiver.

<sup>11</sup> Id.

<sup>12</sup> See Leave and Earning Statements. Beginning in pay period 3 of 2017, Respondent's pay was increased to the 2017 rates.

<sup>13</sup> Respondent's Attachment C to Request for a Waiver.

<sup>14</sup> Respondent's Attachment A to Request for a Waiver.

In support of the contention that repayment would be inequitable, Respondent additionally asserts that repayment would impose a hardship on him and his family. Respondent notes that he incurred significant expenses as a result of the death of his mother and that he is currently paying a tax liability to the IRS.

## DISCUSSION

Determining whether waiver is appropriate requires consideration of two factors: (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.<sup>15</sup>

It is well established that “no employee has a right to pay that he or she obtains as a result of overpayments.”<sup>16</sup> 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).<sup>17</sup> As we have stated in the past, however, a “salary overpayments often, if not always, involve some type of error by the agency,” but “the administrative error by the government cannot, itself, entitle an employee to waiver.”<sup>18</sup> Rather, the fault standard imposes a duty on Department employees to seek correction of the erroneous payment regardless of the government’s mistake.<sup>19</sup> As part of this fault standard, a respondent must also show that he or she did not “accept[] the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.”<sup>20</sup> A waiver cannot be granted when, “under the particular circumstances involved, a reasonable person would have been aware that he or she was receiving more than entitled,” or, stated differently, when the respondent has “no reasonable expectation of payment in the amount received.”<sup>21</sup> In short, “where a reasonable person would have made inquiry about the accuracy of a salary payment, but the debtor did not, then the debtor is not free from fault.”<sup>22</sup> 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.<sup>23</sup>

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<sup>15</sup> See e.g., *In re David*, Dkt. No. 05-22-WA, U.S. Dep’t of Educ. (Dec. 14, 2005).

<sup>16</sup> *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.

<sup>17</sup> See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep’t of Educ. (Dec. 12, 2005).

<sup>18</sup> *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.

<sup>19</sup> *In re Faith*, Dkt. No. 10-04-WA, U.S. Dep’t of Educ. (Nov. 19, 2010) at 3.

<sup>20</sup> See *In re Robert*, Dkt. No. 09-10-WA, U.S. Dep’t of Educ. (Nov. 19, 2009) at 3; see also *In re Cruz*, Dkt. No. 08-12-WA, U.S. Dep’t of Educ. (Aug. 5, 2009) at 2; *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep’t of Educ. (June 14, 2005) at 4-5.

<sup>21</sup> *In re Spencer*, Dkt. No. 11-01-WA, U.S. Dep’t of Educ. (June 7, 2011) at 2.

<sup>22</sup> *In re Spencer*, Dkt. No. 11-01-WA, U.S. Dep’t of Educ. (June 7, 2011) at 2.

<sup>23</sup> *In re J.*, Dkt. No. 15-50-WA, U.S. Dep’t of Educ. (Nov. 9, 2015) at 6 n.14; *In re Cruz*, Dkt. No. 08-12-WA, U.S. Dep’t of Educ. (Aug. 5, 2009) at 3; *In re Sean*, Dkt. No. 08-01-WA, U.S. Dep’t of Educ. (July 31, 2009), at 3.

In making this determination, we consider the employee's job position, grade level, education and training, newness to Federal government, and "whether an employee has records at his or her disposal, which, if reviewed, would indicate a salary overpayment."<sup>24</sup> Specifically, employees have a duty to review and react to errors that are clear on the face of a leave and earnings statement.<sup>25</sup>

As Respondent notes, there is no indication that the overpayment resulted from any fraudulent actions on his part. Rather, the salary overpayment appears to have been caused by an administrative error. Respondent, however, should have recognized the overpayment when he received additional pay. This is especially true when he erroneously received a lump sum of back pay in pay period 8 of 2017 and his net pay was more than \$2,100 more than it had been in the prior pay period, pay period 7, and almost \$2,300 more than it had been in pay period previous to that, pay period 6. Respondent could not reasonably fail to notice or believe that he was entitled to a sudden increase in salary of over \$2,000. Therefore, he cannot show that he was not at fault for failing to identify the overpayment and seek to have it remedied and the waiver request must be denied. Because a waiver cannot be granted without meeting the fault standard it is not necessary to address whether Respondent's financial hardships would justify granting a waiver if Respondent had met the fault standard. This decision constitutes a final agency decision.

#### ORDER

Pursuant to the authority of 5 U.S.C. § 5584 (2012), Respondent's request for waiver of the entirety of debt 82681605208 to the United States Department of Education is **HEREBY DENIED**.

So ordered this 24th day of January 2020.

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Daniel J. McGinn-Shapiro  
Waiver Official

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<sup>24</sup> 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; *In re Spencer*, Dkt. No. 11-01-WA, U.S. Dep't of Educ. (June 7, 2011) at 2.

<sup>25</sup> See *In re M*, Dkt. No. 17-26-WA, U.S. Dep't of Educ. (July 6, 2017) at 5; *In re E*, Dkt. No. 15-61-WA, U.S. Dep't of Educ. (Feb. 5, 2016) at 5; *In re J*, Dkt. No. 15-50-WA, U.S. Dep't of Educ. (Nov. 9, 2015) at 5-6 n.14; *In re S*, Dkt. No. 13-59-WA, U.S. Dep't of Educ. (Nov. 25, 2013) at 5; *In re B*, Dkt. No. 12-62-WA, U.S. Dep't of Educ. (Dec. 28, 2012) at 4; *In re Spencer*, Dkt. No. 11-01-WA, U.S. Dep't of Educ. (June 7, 2011) at 2.