



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202-4616

TELEPHONE (202) 245-8300

FACSIMILE (202) 245-6931

In the Matter of

Docket No. 18-68-WA

T J,

Waiver Proceeding

Respondent.

DECISION DENYING WAIVER

At issue in this case is whether an employee of the U.S. Department of Education (Department) should be granted a waiver of \$501.67 (Debt ID Q2960864020) for a salary overpayment. This overpayment occurred because the Department failed to timely process a personnel action to end the employee's temporary promotion. For the reasons that follow, this tribunal concludes that waiver of the debt does not meet the waiver standards. Accordingly, Respondent's request for waiver is DENIED.

Jurisdiction

Under 5 U.S.C. § 5584 (the Waiver Statute), the Department has the authority to waive claims of the United States against debtors as a result of an erroneous payment to a federal employee.¹ The Department promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 *seq.*) and its *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (January 2012),² which specifically delegates the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).

The undersigned is the authorized waiver official who has been assigned this matter by OHA. Resolution of this case is based on the matters accepted as argument, evidence, and/or documentation in this proceeding, when considered as a whole, including the Respondent's request for waiver. This tribunal has reviewed all the submissions that are in the record. This decision constitutes a **FINAL** agency decision.

¹ 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) (setting forth more fully the statutory framework governing salary overpayment debt collection); see also 5 U.S.C. § 5514 and 31 U.S.C. § 3716 (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>.

² The *Handbook*, ACS-OM-04, was revised and reissued by the Department on Jan. 19, 2012.

Discussion

On November 21, 2018, OHA received a waiver request from the Respondent for an overpayment identified as Debt ID Q2960864020. The waiver proceedings were stayed on November 29, 2018. Upon initial review of the employee's waiver request, this tribunal determined that clarification of the employee's waiver request was needed. Correspondence was sent to the Respondent on April 17, 2019, which requested clarification of the Respondent's initial request. No clarification was received from the Respondent. On June 28, 2019, an Order Governing Proceedings (OGP) was issued reinstating the waiver proceedings. The OGP directed the Respondent to submit a sworn declaration³ regarding the waiver request. The Respondent did not file a sworn declaration. The OGP provided the Respondent an additional opportunity to supplement the record with materials that would support the Respondent's waiver request. Despite ample time to do so, the Respondent did not file any additional material.

This tribunal has reviewed the submitted evidence and has determined that the record contains sufficient evidence to determine whether to grant Respondent's waiver request. The record is now closed, and the matter is ready for decision.

Currently before this tribunal in this matter are the following documents:

- (1) Respondent's correspondence requesting a waiver, dated November 16, 2018.
- (2) SF-50 Notification of Personnel Action with EFFECTIVE DATE of September 10, 2018, and an APPROVAL DATE of October 5, 2018, and the NATURE OF ACTION identified as CHG TO LOWER GRADE, LEVEL OR BAN.
- (3) An email dated October 11, 2018 to the Respondent from eopf-noreply@opm.gov with a subject heading of *eOPF Notification: New Documents Have Been Added to Your Folder*.

Fault Standard

In a waiver proceeding, the validity of the debt is not within the determination of the Waiver Official. The waiver of a salary overpayment is an equitable remedy, in which the debtor argues that he or she should not have to repay the debt. The standard for determining whether a 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,⁴ and (2) whether Respondent can demonstrate that collection of the debt would be against equity and not in the best interests of the United States.

To determine whether these requirements are met, the debtor, upon requesting a waiver hearing, is required 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

³ 28 U.S.C. § 1746

⁴ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005).

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.

At issue in this proceeding is whether Respondent's arguments and submissions support a request that the entire overpayment be waived in accordance with standards prescribed by statute and consistent with the case law and regulations promulgated by the Department. Therefore, the Respondent's waiver can only be granted if there is a lack of fault by the Respondent and it would be against equity to collect the debt.

Fault in a waiver case is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. Fault in a waiver case is determined by assessing whether a reasonable person should have known or suspected that he or she was receiving more than his or her entitled compensation.⁵ In 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.⁶ Thus, every waiver case must be examined in light of its particular facts and circumstances.⁷ A waiver cannot be granted if a debtor is unable to satisfy the fault standard.

When a personnel action is authorized for an employee, the employee is issued a form entitled SF-50 Notification of Personnel Action. This form provides notice to the employee of the authorized personnel action. The employee has a duty to review any SF-50 issued for clearly identifiable errors.⁸ An employee has a duty to review their leave and earnings statements for errors, in particular when the employee is anticipating a payroll change.⁹ An employee's applicable pay rate for that pay period is conspicuous on the leave and earnings statement.

The SF-50 submitted by the Respondent indicates in Box No. 45 that a prior SF-50, with an effective date of May 13, 2018, temporarily promoted the Respondent to a GS-15 Step 3 until September 9, 2018. In the Respondent's November 16, 2018, correspondence, the sole argument to support a waiver is "Due to the debt being a result of an administrative error that I had no cause to realize was an error, and that repayment of the debt would be a hardship, I respectfully request a waiver of repayment for the complete debt." Despite having an opportunity to do so, the Respondent did not submit any additional material that supports the Respondent's argument. There is nothing in the record that indicates the Respondent could not have known or should not have known their promotion was temporary until September 9, 2018. After September 9, 2018, any pay received above the GS-14 Step 6 pay rate was an overpayment to the Respondent. The Respondent had an obligation to review their leave and earnings statement. Had the Respondent reviewed their leave and earnings statement, they would have been alerted to the erroneous higher pay rate. There are also no mitigating factors present in the record which would have prevented the Respondent from reviewing their leave and earnings statement for the pay period beginning September 10, 2018.

⁵ See *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (Nov. 9, 2005).

⁶ See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

⁷ *Id.* at 5.

⁸ See *In re Robert*, Dkt. No. 06-77-WA, U.S. Dep't of Educ. (Nov. 7, 2006).

⁹ See *In re EC*, Dkt. No. 15-61-WA, U.S. Dep't of Educ. (Feb. 5, 2016).

Despite Respondent's submissions, the record does not support a finding that the Respondent has satisfied the waiver fault standard. Therefore, this tribunal concludes that the Respondent's waiver request cannot be granted.

Equity and Good Conscience

To secure a waiver based upon equity and good conscience, an individual must have acted fairly, without fault, fraud or deceit, and in good faith.¹⁰ Although the Respondent has raised an argument that it would be inequitable and against good conscience to require repayment, this tribunal does not reach the equity and good conscience question because the Respondent has failed to meet its burden under the fault standard.

ORDER

Pursuant to the authority of 5 U.S.C. § 5584, Respondent's request for waiver of the entire debt to the United States Department of Education in the amount of \$501.67 is **HEREBY DENIED**. This decision constitutes a **FINAL AGENCY** decision.

So ordered this 18th day of March 2020.

George H. Abbott, III
Waiver Official

¹⁰ See 5 U.S.C. § 5584 and *In re Anh-Chau*, Dkt. No. 05-01-WA, U.S. Dep't of Educ. (June 17, 2005) and 5 U.S.C. § 5584.