



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of

Docket No. 20-50-WA

GH,

Salary Overpayment
Waiver Matter

Debt IDs: 02800042128 & Q2660042128

Respondent.

Decision Granting Waiver Request

The Office of Hearings and Appeals (OHA) received a request for a waiver of a debt from Respondent, a U.S. Department of Education (the Department) employee, in the above-captioned proceedings. Respondent's waiver request comes in response to the notice of a debt resulting from an overpayment of salary to Respondent. Respondent has indicated that this overpayment resulted from a conversion of paid leave status to unpaid leave status.

On January 6, 2021, the undersigned issued an Order Governing Proceedings 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 January 27, 2021. After Respondent did not file a response, an Order to Show Cause was issued on February 1, 2021 directing Respondent that if he did not respond by February 16, 2021 the record would be closed and the matter decided on what had been submitted. Once again, Respondent did not file a response. The file has now been closed. Based on the submitted information, Respondent has shown that he is without fault and repayment would be inequitable. Therefore, Respondent's waiver request is granted.

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.¹ 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)

¹ 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.

identify all the facts and documents that support the debtor’s position that a waiver should be granted.

JURISDICTION

The waiver authority involving former and current employees of ED was delegated to OHA,² which, thereby, exercises waiver authority and jurisdiction on behalf of the Secretary of Education to waive³ claims of the United States against a former or current employee of ED.⁴ The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁵ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. § 5584.

PROCEDURAL HISTORY

In late January 2020, the first reported case of the COVID-19 virus was reported in the United States.⁶ By March 4, 2020, the number of reported cases had reach 98 cases nationwide. On that day, the Office of the Deputy Secretary of Education (ODS) sent an email to all Department employees instructing Department employees to, among other actions, “test [an employee’s] ability to remotely connect to the network and to required applications.”⁷

One week later, on March 11, 2020, ODS sent out a further email that provided instructions to Department employees. Included among the instructions was that all employees should be telework ready because if the COVID-19 virus required the Department to employ its continuity of operations plan, “all employees in Telework eligible positions [would] be required to work.”⁸

Two days later, on March 13, 2020, ODS sent out a third email. That email indicated that, in accordance with guidance from the Office of Management and Budget, to protect “vulnerable adults” including “people with serious chronic underlying health conditions” and to “take additional precautions to protect themselves, including avoiding crowds as much as

² ED’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).

³ *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).

⁴ *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). ED’s overpayment procedures may be found on the Office of Hearings & Appeals website at: <http://oha.ed.gov/overpayments.html>.

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

⁶ *See* Press Release, Centers for Disease Control and Prevention, First Travel-related Case of 2019 Novel Coronavirus Detected in United States (Jan. 21, 2020)(available at <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>).

⁷ Email from Mitchell Zais to Department employees (March 4, 2020).

⁸ Email from Mitchell Zais to Department employees (March 11, 2020).

possible” from Monday, March 16, 2020 through Friday, April 10, 2020 vulnerable adults were “authorized to request unscheduled telework and unscheduled leave.”⁹ The email further instructed that for vulnerable adults who are ineligible to telework because they “have no portable work,” they “should coordinate with their supervisors and may request administrative leave based upon safety concerns and/or scheduled leave for any period during which they do not have sufficient portable work to perform.”¹⁰ The email, however, also instructed that, while supervisors were to “engage with remote employees throughout the day via email, chat, Skype, and phone . . . [e]mployees must remain engaged and connected to the in-person office environment.”¹¹

Respondent has indicated that he suffers from underlying health conditions that makes him especially vulnerable to serious illness or death from COVID-19. Specifically, Respondent has indicated that because of, among other challenges, serious cardiovascular and respiratory issues, Respondent could not come into the office or receive in-person assistance at home. He further contends that he was not telework eligible because he has significant vision impairments that requires in-person assistance in the office to complete his work.

Respondent has indicated that his team leader informed Respondent by phone on or around March 15, 2020 that Respondent had been placed on weather and safety leave. On March 16, 2020, the Department’s Office of Finance and Operations sent an update to all Department employees that instructed that for employees who are not telework eligible but who are at higher risk for serious complications from COVID-19, weather and safety leave could be granted.¹²

Respondent has indicated that he did not have internet or a computer at home and so he was not able to access work correspondence during this time period. Rather, he indicates that he regularly spoke with his supervisor by phone.

Respondent has further asserted that while the March 16, 2020 guidance indicated that widespread telework for Department employees would be in place until April 10, 2020, this timeline has been extended multiple times. Almost one year later, the Department remains in a status of widespread telework. Respondent asserts that while the COVID pandemic continued, he was never informed by anyone at the Department until August 2020 that he could not remain on weather and safety leave. Respondent notes that until August, his supervisor continued to approve weather and safety leave for Respondent and the WebTA system did not indicate any issues with that use of leave.

Respondent states that in August 2020, his supervisor contacted him and told him that the Department had changed its policy and wanted leave converted to a leave category more closely tied to the pandemic. Respondent was asked to provide information to support his eligibility for one of the COVID-19 related leave categories, which he provided. Based on the information provided, Respondent’s supervisor changed his leave from the period of March 31, 2020 through

⁹ Email from Mitchell Zais to Department employees (March 13, 2020).

¹⁰ Id.

¹¹ Id.

¹² Guidance, U.S. Dep’t of Educ., Office of Fin. and Operations, Updated Department-wide Guidance on Telework Flexibilities (March 16, 2020).

the middle of August 2020 to paid emergency leave for “reason 2,” that his doctor recommended that he stay in quarantine because of the high risk COVID-19 posed to his health.

Shortly after his leave was converted, Respondent was informed that his paid leave was capped at 80 hours, and so only covered pay period 17, from August 1 through 15, 2020. Respondent was told that the Department was going to retroactively change his leave from March 31, 2020 through July 31, 2020 to leave without pay with some advanced sick leave. Respondent has indicated that he later received notice of the overpayment resulting from this conversion and the debt of more than \$20,000 that resulted. Respondent has also indicated that since August 2020, his supervisor has come to his home, set up a mobile hotspot and a computer workstation and provided other assistance to allow Respondent to work. Respondent has indicated that although these measures, letting someone into his home, seriously threatened his health, he would have taken the measures earlier if he knew he would be in unpaid leave status for four months.

Respondent argues that there was no way for him to have recognized the overpayments while they were occurring. He further notes that having to pay back over \$20,000 in debts would not only cause an extreme hardship, but would be “fundamentally unfair.” Respondent asserts that this was caused by: (1) his supervisor telling him that he could take weather and safety leave; (2) the Department guidance being unclear on the matter; and (3) the WebTA system (which is used to input time and leave) never indicating an error for exceeding the cap on his use of the leave.

DISCUSSION

In general, a Department employee does not have the right to keep pay obtained as a result of overpayments of salary.¹³ An exception to that rule is that a waiver may be granted as an equitable remedy, but only where an employee can both meet the “fault standard”¹⁴ and the equity standard. First, the fault standard asks whether Respondent can prove that there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of Respondent.¹⁵ The equity standard asks whether it is against equity and good conscience for the Federal government to recover the overpayment, known as the “equity standard.”¹⁶

Part of examining whether the respondent acted in good faith is considering what the employee knew or should have known when the employee received the overpayments. This 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.”¹⁷ Essentially, a waiver cannot be granted when “under the particular circumstances involved, a reasonable person would have been aware

¹³ *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.

¹⁴ *See In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep’t of Educ. (Dec. 12, 2005).

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

¹⁶ *Id.*

¹⁷ *In re Spencer*, Dkt. No. 11-01-WA, U.S. Dep’t of Educ. (June 7, 2011) at 2.

that he or she was receiving more than entitled.”¹⁸ This duty aligns with “the employee’s particular capacity to know of the antecedents that may give rise to changes in pay.”¹⁹

Respondent points out that until his supervisor came to Respondent’s home to establish a hot spot and set up a computer workstation, he was not able to telework or access work related emails while at home. Additionally, Respondent was in contact regularly with his supervisor who told him that he had to convert his weather and safety leave to another paid leave category, but did not tell Respondent that he had exceeded the allotted use of that paid leave. Rather, Respondent’s supervisor continued to approve the use of weather and safety leave for multiple months throughout this time-period.

In past cases, we have noted that when determining whether an employee has met the fault standard, 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.”²⁰ As noted above, the Office of the Deputy Secretary sent out information about the Department’s response to the COVID-19 pandemic. And on April 30, the Chief Human Capital Officer sent out a message to all Department employees that indicated that there was an 80-hour cap on COVID-19 related leave. But it appears that, because of Respondent’s unique situation, he would not have had access to all of this information, especially the April 30 email that was sent while Respondent was: (1) at home; (2) on leave that was being documented through WebTA; (3) without access to Department emails.

Generally, it would likely not be reasonable for a Department employee to believe that the employee could be paid while not working for nearly six months. The COVID-19 pandemic, however, is unprecedented in the history of the Department. Under the circumstances, it was reasonable for Respondent to believe that his status had not changed when he regularly spoke with his supervisor who did not inform him of any changes in policy and continued to approve the use of the leave. And, once Respondent was informed in August that he could not use more than 80 hours of paid leave, he worked with his supervisor to remedy the situation.

Respondent noted that, because of his physical challenges, he had been receiving significant in person assistance before the pandemic. In other words, he was dependent on the Department to facilitate his ability to do his job. The Department knew, or should have known, that he remained on COVID-19 related leave well beyond the one pay period cap—the WebTA system allowed him to submit paid leave for multiple months. It is inequitable for Respondent to now be held accountable to return over \$20,000, and suffer the significant financial burden of repaying that large of a debt, because the Department failed to properly inform an employee of a change in policy, especially when the Department should have known that the employee necessarily relied upon assistance from the Department.

¹⁸ *Id.*

¹⁹ *In re Spencer*, Dkt. No. 11-01-WA, U.S. Dep’t of Educ. (June 7, 2011) at 2.

²⁰ *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.

Because Respondent has shown that he is without fault and because it would be inequitable under the circumstances to require repayment, Respondent's waiver request is granted. 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 debts 02800042128 & Q2660042128 to the United States Department of Education are **HEREBY GRANTED**.

So ordered this 22nd day of February 2021.

Daniel J. McGinn-Shapiro
Administrative Law Judge