



## UNITED STATES DEPARTMENT OF EDUCATION

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In the Matter of  
**DAVID,**

**Docket No. 05-22-WA**  
Waiver Proceeding

Respondent

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### DECISION GRANTING WAIVER

At issue in this case is whether a Federal employee may obtain waiver of a debt arising from a salary overpayment caused by an agency's failure to deduct Social Security taxes from an employee's pay. For the reasons that follow, I find that Respondent's arguments and evidence persuade me that granting waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

#### PROCEDURAL HISTORY

This case emerges out of a request for waiver of a salary overpayment. The pertinent statutory authority for waiver of salary overpayments is set forth under the General Accounting Office Act of 1996 (the Waiver Statute), which authorizes the waiver of claims of the United States against debtors as a result of an erroneous payment of pay to a Federal employee.<sup>1</sup> In addition to the Waiver Statute, the United States Department of Education (Department) promulgated regulations at 34 C.F.R. Part 32, and established general policy guidance set forth in the Department of Education, Administrative Communications System (ACS), *Handbook for Processing Salary Overpayments* (Salary Overpayment Handbook, ACS-OM-04) (June 2005) that prescribe procedures for processing debts, authorize deductions from salary and wages to

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<sup>1</sup> General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (the Waiver Statute); *see also 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 all salary overpayment debt collection) and 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).

pay debts, and set standards for waiving debts.<sup>2</sup> The Salary Overpayment Handbook, ACS-OM-04, specifically delegates waiver authority involving all former and current employees of the Department to the Office of Hearings and Appeals (OHA), which, thereby, exercises waiver authority on behalf of the Secretary. The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.<sup>3</sup>

The resolution of this case is based on the matters accepted as argument and evidence in this proceeding, including a sworn written statement by Respondent (and the documents attached therein), Respondent's submission of the statement of his former Executive Officer, Respondent's Leave and Earning Statements (LES) covering the pay periods at issue in 2005, the Department's Bill of Collection (BoC) and Notice of Salary Overpayment (Notice), and printed copies of electronic communications between Respondent and the Waiver Official.

In the case at bar, on September 16, 2005, the Department's Human Resources System Team (Human Resources) authorized issuance of a BoC identifying that Respondent owed a debt to the Department in the amount of \$4,098.08.<sup>4</sup> The issuance of the BoC and Notice authorized the Department to initiate an administrative offset of pay from the salary of Respondent as a result of an erroneous health benefit and retirement classification of Respondent upon the commencement of his tour of duty. Respondent was a temporary employee who was classified as ineligible for any retirement benefit. This classification resulted in the failure to deduct FICA taxes from Respondent's pay during the employee's entire tour of duty. In response to the BoC, on September 6, 2005 and September 17, 2005, Respondent timely requested waiver of the overpayment.

## DISCUSSION

### I.

Respondent was hired to begin a temporary appointment in May 2003 with the Department's Office of Special Education and Rehabilitative Services (OSERS). As established by the Department, although Respondent's temporary appointment excluded him from eligibility for certain retirement benefits, it was erroneous to exclude Respondent from the benefits authorized under the Federal Insurance Contributions Act (also known as FICA).<sup>5</sup> FICA is a Federal law that requires, among other things, that FICA taxes be withheld from employee

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<sup>2</sup> See also government-wide regulations issued by the Office of Personnel Management (OPM) (5 C.F.R. Part 550, Subpart K) and *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at 1 & n. 2 (when the Department issues a notice proposing a salary offset to satisfy an overpayment, the employee/debtor has the opportunity to: request a hearing concerning the existence and the correctness of the amount of the overpayment, request a proceeding concerning the waiver of the debt in whole or in part, or request an opportunity to pursue both a waiver proceeding and a hearing). These standards, along with those cited in note 1, *supra*, establish the due process rights afforded a debtor when an agency seeks to collect a debt by administrative offset.

<sup>3</sup> See, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

<sup>4</sup> On July 27, 2005, a BoC was issued for \$79.22; this BoC was canceled on September 15, 2005, and the \$79.22 amount was subsumed in the BoC issued on September 16, 2005.

<sup>5</sup> Since the "benefit of [social security] coverage and the obligation to pay the [FICA TAX] go hand-in-hand," the unpaid tax represents a debt. See, *In re Darryl*, Dkt. No. 05-24-OP, U.S. Dep't of Educ. (December 8, 2005).

wages.<sup>6</sup> As a result of erroneously classifying Respondent's FICA status, Human Resources did not enter appropriate payroll deductions for Respondent during his entire tour of duty with the Department.<sup>7</sup>

Respondent argues that waiver should be granted because at the time of his initial appointment as a temporary staff member of OSERS, he was advised by Human Resources that his temporary appointment made him ineligible for health and retirement benefits, and that this advice precluded him from recognizing that he was overpaid. For purposes of this decision, I accept Respondent's assertion that at the commencement of his employment, an official from the Department's Human Resources office informed Respondent that he was ineligible for retirement and health benefits. According to Respondent, when Human Resources issued Respondent's various personnel action forms (also known as SF-50 forms) it classified Respondent's health benefit/retirement code as "none." Respondent argues that as a result of both the advice of Human Resources and the health benefit/retirement classification recorded on each SF-50 issued to Respondent during his two-year employment with the Department, the absence of a FICA deduction for social security from his pay (as conspicuously noted on Respondent's LES statements) did not alert him that he was erroneously overpaid.

The standard for determining whether waiver is appropriate in this case involves an initial consideration of two threshold matters; namely, whether the failure to deduct social security FICA tax constitutes an *erroneous payment of pay* and, secondly, whether under the facts Respondent lacks fault for the existence of the debt.<sup>8</sup> There is no dispute that this case involves an erroneous payment of pay. Respondent was overpaid because the Department mistakenly failed to deduct the appropriate FICA taxes from Respondent's pay. Consequently, the primary threshold issue is whether Respondent lacks fault.<sup>9</sup>

Only when there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of Respondent, or any other person having an interest in obtaining a waiver, may waiver be granted. As such, Respondent's waiver request must show that he can satisfy the

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<sup>6</sup> The combined taxes withheld for Social Security is also referred to as OASDI — Old Age Survivor and Disability Insurance — and Medicare. The Internal Revenue Service issues guidelines to determine FICA withholding exemptions, none of which are known to be pertinent here. Those who are eligible for FICA benefits must pay FICA taxes. For payroll tax purposes, withholding is the mechanism that taxing authorities use to compel employers to collect taxes owed by their employees on their wages and other compensation. Under FICA, employers are required to withhold 6.2% of an employee's wages for social security taxes and to pay a matching amount. Similarly, a Medicare tax rate of 1.45% must be withheld as the Medicare portion of the FICA tax. This case involves the Social Security portion of FICA.

<sup>7</sup> Despite the advice of Human Resources, all Federal employees (including employees with temporary, seasonal and intermittent appointments) are eligible for certain health benefits.

<sup>8</sup> An erroneous salary overpayment is created by an administrative error in an employee's pay. The fact that the Agency erred in making an overpayment does not relieve the overpaid employee from liability. More precisely, since an overpayment is presumptively in excess of the amount of authorized salary, the issuance of a BoC initiates the government's authorization to recover an excess amount. *See, In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

<sup>9</sup> Since in a waiver proceeding, the debtor acknowledges the validity of the debt or urges that there exists an absence of any reason to recognize the overpayment as an erroneous payment, issues regarding the specific existence or accuracy of debt are not before the tribunal.

requisites of what is known as the *fault* standard. In assessing whether the fault standard is met, the Waiver Official must determine: (a) 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;<sup>10</sup> (b) 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 (c) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.<sup>11</sup>

In applying the fault standard to this case, I find that Respondent is without fault. The erroneous payments were made as a result of an administrative error for which there is no indication of fraud, misrepresentation, or lack of good faith on the employee's part.<sup>12</sup> This is not a case in which an employee receives a significant unexplained increase in pay that would alert the employee to a possible error in pay. Nor is this the type of case that an employee would otherwise know or reasonably should know that an erroneous payment has occurred, and subsequently fails to make inquiries or bring the matter to the attention of the appropriate officials. Instead, in this case, several factors persuaded Respondent that his pay was accurate and that the absence of a FICA deduction from his pay was intentional and correct, rather than erroneous; these factors include, the advice<sup>13</sup> of Human Resources, and documentary statements consistent with that advice such as Respondent's LES statements, and the classification recorded on each of Respondent's SF-50s indicating no eligibility for health benefits.

In light of the foregoing facts, this case comes within the clear ruling of *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005) (*Veronce*). In *Veronce*, the Waiver Official held that under applicable circumstances where there is no otherwise indication of fault, an employee who neither knows nor has reason to know that he or she was erroneously compensated lacks fault under the application of the fault standard. In *Veronce*, the employee was hospitalized while in a leave without pay (LWOP) status. The Department paid the employee, notwithstanding her LWOP status. The Waiver Official determined that, *ipso facto*, the hospitalized employee could not have known that she was erroneously compensated while in a non-pay status. The employee did not - - because she could not - - check her pay statements or

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<sup>10</sup> The fault standard imposes a duty on Federal employees that includes the following obligations regarding pay: (1) the duty to verify bank statements and/or electronic fund transfers of salary payments, (2) to question discrepancies or unanticipated balances from salary payments, and (3) to set funds aside for repayment when appropriately recognizing a salary overpayment. See, *In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (October 19, 2005).

<sup>11</sup> See generally, *Guidelines for Determining Requests* U.S. Department of the Treasury Directive 34-01 (2000), available at <http://www.treasury.gov/regs/td34-01.htm>; Standards for Waiver, 4 C.F.R. § 91.5 (2000).

<sup>12</sup> This is not to say that the erroneous advice of a government official cuts off the Federal government's authority to correct the error or collect a debt resulting from the error, if an employee relies on the advice. Clearly, there is no legal authority for such a proposition. Here, however, the question is whether Respondent should have known an error occurred in his pay.

<sup>13</sup> Respondent filed a statement affirming the truth of the matter stated therein; in this declaration, Respondent asserted that he received the aforementioned advice from Sonja Brown in the office of Human Resources. Two attempts by the undersigned to obtain a response from human resources ultimately were unsuccessful. As such, the record in this case persuades the tribunal that Respondent's claim accurately portrays the advice offered by the office of Human Resources. More to the point, the tribunal knows of no reason - - and the Department offers none - - to doubt Respondent's position that he genuinely relied on the advice of the office of Human Resources when he was informed that he was ineligible for any retirement benefit.

her bank balance. The facts of this case compel the same result.

Respondent was not aware that the government had mistakenly overpaid him by assigning him the wrong health benefit and retirement code. The wrong health benefit and retirement code was marked on Respondent's SF-50s. The erroneous code, however, was consistent with the expectations of Respondent who had been informed by Human Resources that he was ineligible for health and retirement benefits when he was hired. Similarly, Respondent's LES statements showing no payroll deductions for social security FICA tax were consistent with the expectations of Respondent and, therefore, could not have alerted him to the circumstances that rendered his pay incorrect. Indeed, Respondent's LES statements and SF-50's confirmed the advice of Human Resources that no deductions for social security were appropriate. It is consistent with basic logic that, without more, an employee is not on notice that an error in pay has occurred, if the employee has received a document that on its face corroborates the information provided by a human resources official, and is otherwise consistent with all information readily available to the employee. Therefore, I find that Respondent could not have known that an error in salary payment existed; as such, the employee can have no duty under the fault standard to seek corrective action.<sup>14</sup> Accordingly, Respondent is without fault for the overpayment.

## II.

If Respondent is without fault for the overpayment, Respondent may successfully obtain waiver of a debt, *if* Respondent also can show that it is against *equity and good conscience* to recover the overpayment.

There is little guidance on the balance of equities or the appraisal of good conscience. The phrase "against equity and good conscience" is not defined by statute. As such, tribunals facing these circumstances have balanced the equities by drawing upon the concept of fairness and exercising fairness in a manner that ensures that every case is examined in light of its particular facts.

In this regard, a number of factors have been found pertinent to determining whether collection of a claim against an employee is against equity and good conscience or otherwise not in the best interests of the United States. The factors include: (a) whether recovery of the claim would be unconscionable under the circumstances; (b) whether, because of the erroneous payment, the employee either has relinquished a valuable right or changed positions for the

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<sup>14</sup> It remains fundamental to the analysis of when waiver may be granted that when an employee fails to review documentary records, including leave and earning statements, which, if examined, would have shown the overpayment and provided the employee with an opportunity to correct the overpayment, the employee is not free from fault.

worse, regardless of the employee's financial circumstances;<sup>15</sup> (c) whether recovery of the claim would impose an undue financial burden upon the debtor under the circumstances,<sup>16</sup> and (d) whether the time elapsed between the erroneous payment and discovery of the error and notification of the employee is excessive.<sup>17</sup> These factors are neither exhaustive, nor mutually exclusive; equitable factors pertinent to equity and good conscience also may include arguments on unconscionability. Such claims may be based on arguments that, under the circumstances, collecting a debt is "beyond the bounds of what is customary or reasonable; ridiculously or unjustly excessive."<sup>18</sup> Generally, circumstances that may support such a claim, include: (1) an agency's failure to respond within a reasonable period of time to inquiries regarding an overpayment; (2) an agency's gross negligence in handling an overpayment case; and (3) the unreasonable terms of a one-sided agreement.<sup>19</sup>

In the case at bar, Respondent argues that it is against equity and good conscience to recover the debt because requiring him to repay the debt would create a "severe financial hardship" or an undue financial burden. In support of this argument, Respondent submits a signed statement from his former direct first-line supervisor, Paul V. O'Connell, the Executive Officer of OSERS, who, in his statement, confirms that repayment of the debt would "place an enormous economic hardship" on Respondent. O'Connell notes the difficulty adult persons with disabilities have in obtaining employment and asserts that this general problem is likely reflected in Respondent's unsuccessful attempts to obtain employment. The record shows that Respondent is currently unemployed, and has been unemployed since his temporary appointment with the Department ended over five months ago. To underscore the significance of the financial burden that would be imposed by repaying the social security FICA tax debt, Respondent submits a copy of a \$496.00 bill for his monthly health insurance premium, which is paid to Care First/Blue Cross Blue Shield of Washington, DC. According to Respondent, he has no income other than unemployment insurance, and he lives with his mother who pays for part of his living expenses.

Undoubtedly, an inquiry into whether the collection of the debt would be against "equity

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<sup>15</sup> To establish that a valuable right has been relinquished, it must be shown that the right was, in fact, valuable; that it cannot be regained; and that the action was based chiefly or solely on reliance on the overpayment. To establish that the employee's position has changed for the worse, it must be shown that the decision would not have been made but for the overpayment, and that the decision resulted in a loss. An example of a "detrimental reliance" would be a decision to sign a lease for a more expensive apartment based chiefly or solely upon reliance on an erroneous calculation of salary, and the funds spent for rent cannot be recovered. *See generally, Guidelines for Determining Requests* U.S. Department of the Treasury Directive 34-01 (2000), available at <http://www.treasury.gov/reg/td34-01.htm>.

<sup>16</sup> *See, e.g., In the Matter of Mrs. Kathryn H. Vandegrift*, 55 Comp. Gen. 1238, B-182, 704 (July 2, 1976).

<sup>17</sup> *See, Guidelines for Determining Requests [For Waiver]*, *supra*, (the guidelines also note that with regard to the latter factor, it is important to note, that the passage of time may not always lead to successful invocations of the doctrine of equity and good conscience since equity may refuse its aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time).

<sup>18</sup> *Aguon v. Office of Personnel Management*, 42 M.S.P.R. 540, 549-50 (1989); see also *Harrison v. Office of Personnel Management*, 57 M.S.P.R. 89, 95 (1993).

<sup>19</sup> *See, In re Cynthia*, Dkt. No. 05-16-WA, U.S. Dep't of Educ. (October 31, 2005); *Aguon v. Office of Personnel Management*, 42 M.S.P.R. 540, 550 (1989); *Irvine v. Office of Personnel Management*, MSPB, Docket No. SF-831M-97-0757-I-1 (October 4, 1999).

and good conscience” has some bearing on this case. In applying the aforementioned factors of equity to this case, I find that recovery of the claim would be unconscionable.<sup>20</sup>

Nothing in the record indicates misrepresentation or malfeasance on the part of Respondent. Instead, the record reveals that Respondent has limited financial resources, is unemployed, and has significant monthly health care expenses. The debt in this case is not insignificant, and the size of the debt grew under circumstances that Respondent could not mitigate or prevent. Therefore, I am convinced that collection of the debt is beyond the bounds of what is customary or reasonable and the undue hardship and inequity that could be imposed on the unemployed former employee, who has substantial health care expenses, limited income, and restricted prospects of future employment, should be avoided.

#### CONCLUSION

Respondent requested waiver of the entire debt. In light of the foregoing, tribunal finds: (1) that Respondent could not have known that an error in salary payment existed and, as such, had no duty under the fault standard to seek corrective action of the salary overpayment, and (2) that the collection of Respondent’s debt arising from the Department’s failure to initiate payroll deductions for social security FICA taxes is against equity and good conscience, and is otherwise not in the best interests of the United States. Accordingly, Respondent’s request for waiver of the debt is granted. This decision constitutes a final agency decision.

#### ORDER

Under the authority of 5 U.S.C. § 5584, Respondent’s entire debt to the Department in the amount of \$4,098.08 is **HEREBY WAIVED**.

So ordered this 14<sup>th</sup> day of December 2005.



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Rod Dixon  
Waiver Official

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<sup>20</sup> See, *In re Cynthia*, Dkt. No. 05-16-WA, U.S. Dep’t of Educ. (October 31, 2005) (setting forth the factors of unconscionability that support a determination that the collection of the debt would be against “equity and good conscience”).