



## UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS

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December 2, 2005

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In the Matter of

**RALPH,**

**Docket No. 05-30-WA**

Waiver Proceeding

Respondent

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### **DECISION GRANTING WAIVER**

This proceeding concerns a U.S. Department of Education (Department) employee's request for waiver of salary overpayment of \$129.48.<sup>1</sup> Respondent filed a request for review of the overpayment on January 24, 1997, the amended narrative notice followed in April 1997, and an Investigative Report followed in May 1997, which is part of the background here.

This waiver request arises under 5 U.S.C. § 5548, authorizing the waiver of claims of the United States against debtors as a result of an erroneous payment of pay to a federal employee<sup>2</sup>. The Department has also promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 et seq.), and set forth policy governing the overpayment process in its *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (June 2005). Together, these legal authorities prescribe procedures for processing salary overpayments made to current or former federal employees and set standards for waiving those debts. The Handbook, ACS-OM-04, specifically delegated 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 initial overpayment review request and attached documents.

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<sup>1</sup> The overpayment is identified as File No.LCB9701 in the April 8, 1997 notice. This notice amends the Bill of Collection (BoC) sent to the employee on January 9, 1997, in the amount of \$113.28.

<sup>2</sup> See General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828 (Act); see also *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005), footnote #1.

For reasons that follow, the circumstances of this case conform to the standard factors warranting waiver. Therefore, Respondent's request for waiver is granted. This decision constitutes a final agency decision.

### **PROCEDURAL HISTORY**

On January 9, 1997, the Department's Human Resources Team within the Office of Management (OM) authorized the issuance of an initial notice of salary overpayment and attached Bill of Collection (BoC) identifying that the Respondent owed a debt to the Department. An Amended Notice was issued on April 8, 1997, based on a payroll adjustment on March 22, 1997, to reflect a corrected amount of \$129.48, as owed. An Amended Narrative by payroll showing deductions supports this correction. On May 6, 1997, a Report of Investigation was prepared in File #LCB9701 which discusses the circumstances of overpayment in this case,<sup>3</sup> and which recommends dispositive action. File documents include multiple Payroll Requests for Bill of Collections dating back to June 1, 1996, as well as a series of Respondent's Personnel Actions (SF-50s) documents.

The matter was inactive for a substantial period of time but was transferred to the Office of Hearings and Appeals (OHA) on October 14, 2005, and an Order Governing Proceedings (OGP) issued on October 27, 2005<sup>4</sup> informing Respondent of OHA's review of the matter and allowing Respondent to supplement the record. No further information was received. The record is now closed and will stand upon Respondent's initial submission in the case.

As established by the Department, the agency erroneously overpaid Respondent \$149.60 for Pay Period 10 in 1996 (pay date 05/09/96) when he was paid at a higher hourly rate of \$34.45 instead of the rate of \$32.58. Respondent was on a temporary promotion to a GS-14 grade effective February 4, 1996, not to exceed June 3, 1996. Corrective action for Pay Period 10 was implemented because the employee was on the temporary promotion and was being paid at a higher hourly rate but was changed back to his lower grade (GS-13, Step 9) effective April 13, 1996, the day before the promotion was made permanent, effective April 14, 1996. While his promotion was effectively implemented in Pay Period 12 of 1996, personnel's action in changing him back to a lower grade took away \$149.60 for pay period 10. The payroll system's programming features led to the overpayment here because as explained, an action which is effective the last day of the pay period, as was the change to the lower grade action, is assumed to be effective for the whole preceding pay period (PP) and not just for the effective date and into the future.

In tracing how the system processing led to the overpayment, the following conclusions apply: Respondent received proper pay for PP#10 but was underpaid

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<sup>3</sup> The Investigative Report was prepared by Linda Barnes of the Human Resources Team, and reflects the feedback obtained from Denver payroll as to how the overpayment resulted over the course of three pay periods (pay dates; 05/09/96, 05/23/96 & 06/08/96).

<sup>4</sup> The Order called for any further submissions to be filed by November 16, 2005. The OGP was sent certified mail, but returned unclaimed. Record was then closed based on existing submissions.

\$149.60 for PP#11. Respondent was then overpaid \$149.60 for PP#12 due to the system backing up to PP#10 and making an unnecessary adjustment for the lower grade action. Respondent was then overpaid \$149.60 for PP#13 to catch up with the same amount underpaid in PP#11. So, an overpayment of \$149.60 remains after PP#13 as charged to Respondent. While payroll responded by appropriate action in accordance with Respondent's personnel actions (SF-50s), Respondent was charged the overpayment as a result of the system backing up, making an unnecessary adjustment and then compensating for it in a subsequent pay period.

As part of the Investigative Report and file here, the Department's Human Resources Team received and included further clarification about this repayment matter from Respondent's Regional Office. This confirmed that the personnel actions of the SF-50s making the employee change to a lower grade from a temporary promotion before his immediate and permanent re-promotion were actually processed smoothly and did not cause the overpayment situation. The reason why Respondent was changed back to a lower grade for one day, the last day of the pay period has to do with proper sequences of personnel actions. For a correct sequence of personnel actions, unless an agency does not require it,<sup>5</sup> an employee is not promoted from a temporary position but must take the action from a permanent position, which is the reason for cutting back the employee to his permanent lower graded position. When this is done on the last day of a pay period, with a new grade effective next day, the promotion grade, this usually avoids a monetary consequence like an overpayment because the new pay starts the new period. However, a problem did occur here according to payroll's tracking system operations. While there was no problem with the SF-50s, the problem instead appears to be in how the payroll system programmed its response to such actions. This programming caused the system to back up to PP# 10 and made an unnecessary adjustment for the whole period, not just for the effective date (one day) or into the future.<sup>6</sup>

## **DISCUSSION**

A waiver proceeding is a narrowly focused proceeding: at issue is whether Respondent's arguments and submissions support a request that a portion or the entire overpayment be waived in accordance with standards prescribed by statute and consistent with the case law and regulations promulgated by the Department. A waiver of claims of the United States against a debtor arising out of erroneous payments of pay is possible only when the collection of the erroneous payment would be against equity and good conscience, and not in the best interests of the United States. Only when there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the Respondent, or any others having an interest in obtaining a waiver may it be granted.

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<sup>5</sup> OPM's online reference, The Guide to Processing Personnel Actions (The Guide), Chapter 14 on Promotions, Changes to Lower Grade, Reassignments, Position Changes and Details, p. 14-6.01, however, now seems to give more flexibility to agencies to determine whether it is necessary to return an employee on a temporary promotion to his former position before making the permanent promotion. This reference notes the very practice applied in this case. The Guide specifies the correct processing codes used to process by SF-52s to SF-50s, all Respondent's sequential personnel actions.

<sup>6</sup> Per an email review from Respondent's Regional Office, Human Resources personnel to Linda Barnes, May 7, 1997, as it covers PP#10, 11, 12, 13 (1996) and reliance on DOI payroll's explanation.

The standard for determining whether a waiver is appropriate in salary overpayment cases considers, first, two threshold matters; namely, whether the overpayment to Respondent constitutes an *erroneous payment of pay*<sup>7</sup> and *secondly, whether Respondent lacks fault*.<sup>8</sup>

There is no dispute that this case involves an “erroneous payment of pay.” The nature of the debt in this case involves an error in payment of excess salary, which is identified in the Department’s regulatory designation of salary overpayment as a type of payment of pay subject to both waiver and administrative offset proceedings.<sup>9</sup>

The standard employed to determine whether a person was at fault in accepting or not recognizing an overpayment is whether, under the particular circumstances, a reasonable person should have known or suspected that he or she was receiving more than their entitled salary. An employee who knows or should know that he or she received an erroneous payment is obliged to return that amount, or set aside an equivalent amount for refund to the government when the error is corrected.<sup>10</sup> Pertinent circumstances such as an employee’s actual knowledge of the overpayment, as well as his position, grade level, education and training may also be taken into consideration in assessing the reasonableness of an employee’s failure to recognize an overpayment. Furthermore, where a reasonable person would have made inquiry, but the employee did not, then he or she is not free from fault.<sup>11</sup>

In his January 1997 response to the BoC, Respondent contends that being in the temporary promotion since February 4, 1996, and having the promotion made permanent on April 14, 1996 with the temporary promotion order terminated on April 13<sup>th</sup>, he would have had no break in time and would expect the GS-14 salary to be paid continuously. He would have expected the continuous receipt of his GS-14 salary from February 4, 1996 through to the present because there was no noticeable interruption; no break in time between when the temporary promotion order was terminated and the promotion made permanent. Respondent submits that this was the intent and that is what his attached Notification of Personnel Actions show with those identified effective dates.

Under these circumstances, questioning whether the employee should have known or suspected he was receiving an erroneous payment, the tribunal concludes that Respondent is without fault because he had no reason to recognize the overpayment as an erroneous payment.

Although the Respondent has a duty to check salary payment records to ensure that his pay is accurate, the circumstances here may have thwarted his exercise of that

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<sup>7</sup> An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to the employee’s salary. *See* 34 C.F.R. Part 32 (2004).

<sup>8</sup> The fact that the Agency may have erred in making the overpayment does not relieve the overpaid person from liability, since an overpayment is presumptively in excess of the amount of authorized salary. *See In re Richard*, Dkt. No. 04-04-WA, U.S. Dep’t of Educ. (June 14, 2005).

<sup>9</sup> 34 C.F.R. § 32.5 (2004).

<sup>10</sup> *See* 5 U.S.C. § 5584 and DOHA Case No. 99111916 (Dec. 8, 1999) (Aff’d on Appeal, Dec. 12, 2000).

<sup>11</sup> *See In re Vincent L. Brown*, Dkt. No. D2003-118 (U.S. Dep’t of Int.) (August 5, 2004).

duty. Specifically, with the Department's payroll system action in backing up two full pay periods and making an unnecessary adjustment, then causing subsequent corrective catch-up actions, a resulting overpayment would not be something Respondent would notice, expect or have been alerted to in any way. Moreover, because Respondent believed he was being paid at a continuous GS-14 salary and without any break in service, he would have no reason to look for or find a salary error. Since his temporary promotion not to exceed date of June 3, 1996, was well after the time of his permanent promotion action, Respondent had a clearly reasonable basis to rely on getting paid at the GS-14 rate, with no reason to suspect any overpayment from the application of a lower rate of pay, which could cause a recalculation of his salary.

Also, because of the minor salary impact here, Respondent may have faced additional challenges to his ability to do effective monitoring of his pay to ensure accuracy. In fact, it is highly likely that in this situation, Respondent would not easily see any overpayment because the salary amount difference, based on close hourly rates, is not conspicuous or easy to discern from pay records like his bank deposits or pay statements. On the other hand, if Respondent did happen to see some pay discrepancies, it is equally plausible that in any review of his pay statements, he may have believed that the various offsetting adjustments payroll made corrected all to a zero balance. If so, he could then conclude there would be no resulting payment error.

Even the Department's own Investigative Report in May 1997 supports a conclusion that Respondent may not have failed his duty to ensure that his pay was accurate. In its Recommendation Section, at page 3, the recommendation is to grant Respondent's request for waiver. The Report concludes there was a system problem here due to the system backing up to pay period 10 and making an unnecessary adjustment for that period. Since this was not the normal procedure, this was a further obstacle for accurate monitoring. Although the employee is responsible for verifying his Earnings and Leave Statements for accuracy, a supportable position and conclusion was, that it might have been difficult for him to keep track of the deductions/adjustments due to the system problem.<sup>12</sup>

Next, the tribunal must determine whether collection of the debt would be against equity and good conscience. To secure equity and good conscience, an individual must have acted fairly without fraud or deceit and in good faith.<sup>13</sup> There is no evidence in this case suggesting Respondent did not act in good faith or was aware of the overpayment. Respondent insists he was unaware of anything except the regularity of being paid at the GS-14 level as he went from his temporary promotion to permanent. The ability to discover an overpayment by the payroll system's actions in this case would be clearly challenging, if not impossible, under the circumstances. Human resources individuals even verified the tracking difficulties caused by the payroll system's actions of offsetting and correcting Respondent's pay, as this occurred. Consequently, waiver of the overpayment here would not be against equity and good conscience.

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<sup>12</sup> Department of Interior (DOI) system problem, as cited in the May 1997 Report of Investigation

<sup>13</sup> See 5 U.S.C §5584 and *In re Anh-Chau*, Dkt. No. 05-01-WA, U.S. Dep't of Educ. (June 172005).

On the basis of the aforementioned, the tribunal finds that Respondent is without fault for the overpayment, and that it would be against equity and good conscience to deny waiver under the circumstances. Accordingly, waiver of Respondent's debt is warranted.

**ORDER**

Respondent requested waiver of the entire debt. Having found that the circumstances of this case conform to the threshold factors warranting waiver, Respondent's request for waiver is **GRANTED**.

So Ordered this 2nd day of December 2005.

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Nancy S. Hurley  
Waiver Official