



**UNITED STATES DEPARTMENT OF EDUCATION**

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

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In the Matter of

**CAROLYN,**

Respondent.

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**Docket No. 06-04-WA**

Waiver Proceeding

**DECISION GRANTING WAIVER**

Respondent, a U.S. Department of Education (Department) employee, requested waiver of a salary overpayment debt arising from the Department's premature award of Respondent's within-grade salary increase. Based on the reasons articulated in this decision, I find that waiver of this debt is warranted. Accordingly, Respondent's request for a waiver is granted.

**Jurisdiction**

Respondent's waiver request arises under 5 U.S.C. § 5584, 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>1</sup> 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) (June 2005), specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).<sup>2</sup>

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

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<sup>1</sup> See General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828; see also *In re Tanya*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 18, 2006) at 1, n.1.

<sup>2</sup> Information regarding the Department's salary overpayment process including the Handbook, ACS-OM-04, is available on OHA's website at: [www.ed-oha.org/overpayments](http://www.ed-oha.org/overpayments).

request for waiver and attached documentation, and documents compiled by the Department's Human Resources office.<sup>3</sup> This decision constitutes a final agency decision.

### **Procedural History**

According to the April 15, 2003 Notice of Debt Letter and attached Bill of Collection (BoC), the \$236.24 overpayment arises from the Department's premature award of Respondent's within-grade increase which is also commonly referred to as a "step increase" in a federal employee's salary. The BoC notes that Respondent's within-grade increase was processed one pay period early (Pay Period 06 of 2003) although it should not have been awarded until March 9, 2003 (Pay Period 07 of 2003).

By letter dated April 24, 2003, Respondent filed a timely request for waiver.<sup>4</sup> On April 27, 2006, Respondent's request for waiver was transferred to OHA. In a May 10, 2006 Order Governing Proceedings, Respondent was afforded an opportunity to supplement the record. Respondent relied upon her earlier April 24, 2003 submission and did not file an additional response with the tribunal.

### **Discussion**

Waiver is an equitable remedy.<sup>5</sup> To secure a waiver of an erroneous payment of pay, a debtor must demonstrate that he or she is not at fault in accepting or not recognizing an erroneous payment of pay. The debtor also must demonstrate that collection of the debt would be against equity and good conscience, and not in the best interests of the United States. At issue in this instant proceeding is whether Respondent's arguments and submissions support a request that a portion or the entire erroneous salary overpayment be waived.<sup>6</sup>

### **Fault Standard**

In waiver cases, the fault standard is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. Fault is determined by assessing whether a reasonable person should have known or suspected that he or she was receiving an overpayment of salary.<sup>7</sup> An employee who neither knows nor has reason to know that he or she was erroneously compensated lacks fault under the application of this standard.<sup>8</sup> If an employee has records at his or her disposal, which, if reviewed, would indicate a salary overpayment, and the

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<sup>3</sup> These documents include three Notifications of Personnel Action (SF-50) for Respondent and Human Resources' April 28, 2003 investigation report regarding this salary overpayment.

<sup>4</sup> Respondent's request for a waiver was originally filed with the Department's Human Resources Services office.

<sup>5</sup> See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

<sup>6</sup> An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to his or her salary. See 34 C.F.R. Part 32 (2005). It is apparent from the BoC that the overpayment constitutes an erroneous payment of pay. The Department's error was in its premature award of Respondent's within-grade salary increase.

<sup>7</sup> See *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

<sup>8</sup> See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

employee fails to review those documents, the employee is not without fault.<sup>9</sup> Thus, every waiver case must be examined in light of its particular facts and circumstances.<sup>10</sup>

Respondent asserts that she did not realize the timing of her within-grade increase was in error. Respondent argues that the overpayment was an administrative error and does not indicate fraud or lack of good faith on her part. Respondent states that she was hired at the Department for a career ladder position under the federal government's Outstanding Scholar Program. According to Respondent, on February 23, 2003, she was eligible, with her supervisor's approval, for promotion to a GS-9 grade. Respondent states that she was aware that her supervisor submitted the necessary paperwork approving her promotion several weeks before her one-year anniversary with the Department. Respondent also argues that repayment of the salary overpayment debt would be financially burdensome.

Within-grade increases are periodic increases in an employee's basic rate of pay from one step of the grade of his or her position to the next higher step of that grade.<sup>11</sup> For advancements between each of the first four steps, an employee must wait one year or 52 weeks.<sup>12</sup> Advancements between steps five through seven require a waiting period of two years or 104 weeks of service and steps eight through ten require three years or 156 weeks of service.<sup>13</sup> A within-grade increase is effective on the first day of the pay period beginning on or after the completion of the required waiting period.<sup>14</sup> For most within-grade increases, the waiting period begins upon the date of the employee's last equivalent increase.<sup>15</sup> There are several bases for determining when an employee's last equivalent increase has occurred, including the two pertinent to this matter - the date an employee was hired and the date an employee received a career ladder promotion.<sup>16</sup>

A career ladder position is intended to prepare an employee for the position being filled.<sup>17</sup> To that end, a career ladder specifies the full performance level (i.e. grade) of the position.<sup>18</sup> To receive a career ladder promotion to the next higher grade, an employee must perform at a fully successful level and have served the typically required one-year waiting period in the lower grade.<sup>19</sup> Generally, when an employee is entitled to a within-grade increase that is effective at the same time as a promotion, the agency must process that increase before processing the promotion.<sup>20</sup>

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<sup>9</sup> See *In re Cynthia*, Dkt. No. 05-16-WA, U.S. Dep't of Educ. (October 31, 2005).

<sup>10</sup> See *In re Veronce* at 5.

<sup>11</sup> See 5 C.F.R. § 531.405(a).

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See 5 C.F.R. § 531.412. See also, *Office of Personnel Management's Q & A on General Schedule Within-Grade Increases*, available at <http://www.opm.gov/oca/pay/HTML/wgiqa.asp>.

<sup>15</sup> See 5 C.F.R. § 531.405(b).

<sup>16</sup> See 5 C.F.R. § 531.407.

<sup>17</sup> See 5 C.F.R. 335.103(c)(2)(i).

<sup>18</sup> See *id.*

<sup>19</sup> See 5 C.F.R. § 335.104.

<sup>20</sup> See 5 C.F.R. § 531.214.

Prior waiver decisions have established the general rule that an employee is expected to know the required waiting periods between within-grade increases and to inquire about increases that do not conform to those waiting periods.<sup>21</sup> On the other hand, if an employee is new to federal service, does not have specialized knowledge about the federal pay structure, has no prior experience with an erroneous within-grade increase, and has no specific knowledge or reason to know a particular within-grade increase was erroneous, the applicability of this general rule may not be appropriate.<sup>22</sup> Thus, there may be mitigating circumstances which warrant an exception to this general rule. Pertinently, the newness of an employee's federal service has been used as the primary consideration in mitigating the general rule.<sup>23</sup>

The record reflects that Respondent began her employment at the Department on February 25, 2002. The record further demonstrates that Respondent's one-year waiting period for both her within-grade increase and her promotion ended on or about February 25, 2003.<sup>24</sup> Respondent's one-year waiting period ended during Pay Period 06 of 2003. Thus, her within-grade increase would not be effective until the following pay period.

In applying the fault standard to this case, the tribunal concludes that Respondent is not at fault. As an initial matter, the tribunal finds no evidence indicating that Respondent was aware that her within-grade increase was erroneous. As noted above, Respondent was only employed by the federal government for one year when the error occurred. Respondent's short federal employment is a key factor in the tribunal's determination that her failure to recognize the premature within-grade increase was reasonable. The tribunal also finds that the personnel rules regarding career ladder promotions and within-grade increases, including when a within-grade increase is effective, may not be readily apparent or known to an employee not involved in personnel matters. Finally, Respondent was expecting her promotion at the same time her within-grade increase was processed and, in fact, the Department processed both her within-grade increase and promotion on the same day. Consequently, the slightly premature timing of her within-grade increase also may not have alerted her to a possible error.

In light of the foregoing facts, this case comes within the clear ruling of *In re Jay*, Dkt. No. 06-01-WA, U.S. Dep't of Educ. (June 23, 2006) (*Jay*). In *Jay*, the tribunal held that there when there are sufficient mitigating factors to warrant an exception to the general rule holding an employee accountable for recognizing an erroneous grade increase, the employee is not at fault. The employee in *Jay* also received a premature within-grade increase. The tribunal concluded that the employee was not at fault because he was unaware that the time served during his temporary promotion did not count towards the required waiting period for a step increase and that the

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<sup>21</sup> See *In re Jay*, Dkt. No. 06-01-WA, U.S. Dep't of Educ. (June 23, 2006) at 4, n.20.

<sup>22</sup> See *id.* at 4, n.21.

<sup>23</sup> See *In the Matter of Richard G. Anderegg*, 1989 WL 237527 (Comp. Gen.), 68 Comp. Gen. 629 (August 23, 1989) (The employee had only two years of federal service when he received a premature within-grade increase. The tribunal concluded that the employee's relatively brief federal service warranted an exception to the general rule holding employees accountable for recognizing erroneous within-grade increases.)

<sup>24</sup> According to Respondent's March 9, 2003 Notification of Personnel Action processing her within-grade increase, the date of her last equivalent increase was February 25, 2002 (i.e. the date she was hired). Respondent's career ladder promotion from a GS-7, step 2 position to a GS-9, step 1 position was also processed on March 9, 2003.

timing of the within-grade increase approximated the time he was temporarily promoted. The facts of this case compel the same result. Therefore, the tribunal concludes there are sufficient mitigating factors to warrant an exception to the general rule holding an employee accountable for recognizing an erroneous within-grade increase.

### 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>25</sup> There are no rigid rules governing the application of the equity and good conscience standard. The tribunal must balance equity and/or appraise good conscience in light of the particular facts of the case.<sup>26</sup> Factors weighed by the tribunal include the following: whether recovery of the claim would be unconscionable under the circumstances; whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment; and whether collection of the debt would impose an undue financial burden.<sup>27</sup>

Respondent argues that collection of the salary overpayment debt would go against equity and good conscience because her failure to recognize the Department's administrative error does not indicate fraud or her lack of good faith. Respondent also indicates that repayment would create a financial hardship.

In applying the equity and good conscience standard in this case, the tribunal concludes that waiver of Respondent's debt would not go against this standard. First, there is no evidence in this case suggesting Respondent did not act in good faith or was aware of the overpayment. Next, the tribunal notes that the Department's Human Resources office persuasively recommended that Respondent be granted a waiver based on its conclusion that Respondent would not have known the formula for calculating pay increases and, therefore, was not at fault.<sup>28</sup> Finally, the tribunal is convinced that repayment of this debt would be financially burdensome to Respondent.

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<sup>25</sup> 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.

<sup>26</sup> See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (December 14, 2005); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (September 14, 2005).

<sup>27</sup> See *id.*

<sup>28</sup> See Human Resources' April 28, 2003 investigation report regarding this salary overpayment

**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 of the entire \$505.32 debt is **GRANTED**.

So ordered, this 28th day of June 2006.

A handwritten signature in black ink that reads "Greer Hoffman". The signature is written in a cursive style with a large, sweeping flourish at the end of the word "Hoffman".

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Greer Hoffman