



## UNITED STATES DEPARTMENT OF EDUCATION

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

TELEPHONE (202) 619-9700

FACSIMILE (202) 619-9726

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In the Matter of

**HAROLD,**

Respondent

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**Docket No. 07-291-WA**  
Waiver Proceeding

### DECISION DENYING WAIVER

The OFFICE OF HEARINGS & APPEALS (OHA)<sup>1</sup> maintains authority and jurisdiction to waive<sup>2</sup> claims of the United States against a former or current employee of the Department.<sup>3</sup> The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.<sup>4</sup> At issue in this case is whether a former employee of the Department of Education (Department) should be granted waiver of a debt arising from an overpayment of salary occurring as a result of the Department's payment of a **\$4,022** cash award to Respondent two months after he left the agency. For reasons that follow, I find that waiver of the debt is unwarranted. Accordingly, Respondent's request for waiver is denied.

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<sup>1</sup> The Department'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, June 2005 (revised Dec. 2006)).

<sup>2</sup> *Waiver* is defined as "the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee as [provided] by 5 U.S.C. 5584...or any other law." 5 C.F.R. § 550.1103.

<sup>3</sup> *See also*, 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 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: [www.ed-oha.org/overpayments/](http://www.ed-oha.org/overpayments/).

<sup>4</sup> *See*, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

In a waiver proceeding, the debtor acknowledges the validity of the debt, but argues that he or she should not be required to repay the debt on the basis of the circumstances of the debt and argues that there is no indication of fraud, misrepresentation, fault, or lack of good faith by Respondent or anyone else having an interest in obtaining a waiver of the claim.<sup>5</sup> In doing so, 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) identify all the facts and documents that support the debtor's position that a waiver should be granted.

The record in this case constitutes the narrative briefs and what I accepted into evidence, including: a copy of a written statement dated June 21, 2007 establishing Respondent's reasons for waiver of the salary overpayment, a copy of Respondent's waiver request dated March 13, 2007, copies of Respondent's Leave and Earnings Statements for 9-16-06, 6-20-06, 9-28-04, and 9-27-05, copies of Respondent's payroll records from 2006, a copy of a Bill of Collection (BoC) issued on February 26, 2007, and a copy of a Notice of Debt Letter sent to Respondent, dated March 8, 2007.

## DISCUSSION

### I.

The Department employs an "incentive awards" policy that includes an awards program that links cash awards to performance.<sup>6</sup> Under the program, an annual cash award is based directly on an employee's annual performance rating. Generally, employees who receive an outstanding or highly successful performance appraisal are eligible for a baseline cash award. The Department's policy follows 5 U.S.C. 4505a, which instructs that a federal worker "whose most recent performance rating was at the Fully Successful level or higher (or the equivalent thereof) may be paid a cash award." In this regard, the standards for eligibility for performance-based cash awards are set forth by statute and agency policy.

### II.

After a review of the record, I find the following facts pertinent to this case. Respondent resigned from his position with the Department in July 2006. Shortly thereafter, in September of 2006, Respondent received a gross cash payment of \$4,022.<sup>7</sup> Not until March of 2007, when he received a notice of debt letter, was Respondent aware that the \$4,022 payment was an erroneous amount. There is no dispute that Respondent was authorized to receive a performance-based

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<sup>5</sup> Under waiver decisions issued by the Comptroller General interpreting 5 U.S.C. § 5584, "pay" has been held to include "nonpay" or nonsalary compensation, which covers recruitment bonuses, accrual of annual leave, health and life insurance premiums, retention allowances, and all forms of remuneration in addition to salary. *See*, U.S. Government Accountability Office, *Scope of Waiver Authority*, B-307681 (May 2, 2006).

<sup>6</sup> *See, e.g.*, Personnel Manual Instruction, (PMI) 451-1, effective May 26, 2006. Although the 2006 policy supersedes PMI 451-1, dated October 15, 1997, the awards program mandated by the previous policy was not changed by the new policy in any respect relevant to the matter at issue in this case.

<sup>7</sup> Respondent was paid \$4,022 in the 20<sup>th</sup> pay period of 2006. The Department seeks to recover the net amount of half of the cash award or \$1,857.16.

cash award for 2006; the amount of the cash award, however, was \$2011, rather than the \$4,022 actually paid to Respondent. Respondent erroneously received a duplicate cash award.

The standard for determining whether waiver of a debt is appropriate requires a consideration of two factors; namely, (1) whether there is no indication of fraud, misrepresentation, fault,<sup>8</sup> or lack of good faith on the part of Respondent, and (2) whether Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment.<sup>9</sup> Respondent must satisfy both factors to obtain a waiver.

The resolution of this matter begins with an analysis of the fault standard. Although *fault* is often used in a conventional sense to refer to blunder, mistake or responsibility, *fault*, as the term is used in the Waiver Statute and in accordance with factor (1) above, has specialized and particular meaning. Rather than its conventional use, fault is examined in light of the following considerations: (a) whether there is an indication of fraud; (b) 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> (c) 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 (d) 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> After a review of the evidence and guided by the facts found pertinent to this case, I find that that notwithstanding that the debtor neither was the cause of the erroneous payment nor lacked good faith in complying with general personnel policy, the debtor's arguments and evidence fall short of establishing that the erroneous payment occurred under circumstances that the debtor should not have known was incorrect.

In support of his request for waiver, Respondent argues that he should be granted a waiver of the duplicate payment because "the Department of Education has not provided sufficient evidence for me to determine if the overpayment is in fact true."<sup>12</sup> More directly - - with regard to the fault standard - - Respondent argues that waiver of the debt is appropriate because he was not alerted to the erroneous payment and, therefore, is without fault. Expanding on this argument, Respondent argues that there are several factors that precluded him from

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<sup>8</sup> In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

<sup>9</sup> See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

<sup>10</sup> Under the fault standard, the scope of Respondent's duty extends to include the obligations to: (1) verify bank statements and/or electronic fund transfers of salary payments, (2) question discrepancies or unanticipated balances from salary payments, and (3) 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). As such, in a waiver proceeding, the debtor must either acknowledge the validity of the debt or urge the absence of any reason to recognize the salary payment at issue as an overpayment. *Id.*

<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> Respondent also made clear that he requested "waiver of the debt rather than a hearing to contest the alleged salary overpayment."

detecting that the amount of the cash award was erroneous:<sup>13</sup> Respondent received an outstanding performance for the 2005-06 performance period, which led to his expectation of receiving a performance award in an amount commensurate with other performance-based cash awards offered to Respondent. In addition, according to Respondent, it was not apparent that the September 2006 payment was entirely an incentive award rather than a mix of a cash award and regular pay for hours worked prior to his departure.

I find these factors nonavailing. Contrary to Respondent's position, he was quite capable of determining whether the September payment was erroneous. To determine whether he was eligible for the September payment, Respondent need only contact his former employer and inquire about the basis for the salary payment and the correct amount, if any, owed to him. Nothing less than the unexpected September payment, itself, should have triggered such a response; namely, Respondent should have inquired about the appropriateness of any unexpected salary or cash payment from his former government-employer. Indeed, an employee is expected to verify the accuracy of salary payments, question discrepancies or unanticipated payments when they occur, and disclose errors to supervisors or payroll officials. This expectation is presumptively recognized in a case where may be receiving an inadvertent windfall in the amount of the cash award. Employees awarded cash are entitled to the award only if they are otherwise eligible to receive it.<sup>14</sup> I know of no rule that would alter this outcome.

Within the context of an employee's duty to prevent or discover an improper salary overpayment, an employee is expected to inquire about increases that do not appear to conform to salary or pay statements. Although in this case Respondent vigorously argues that the Department's human resources personnel are better situated to discover and ferret out errors in employee pay, the argument misses the point. There is no doubt that personnel staff should and often do take on the task of correcting mistakes of the type at issue in this case, but the equitable remedy of waiving a debt resulting from an improper salary payment for which an employee is not lawfully entitled imposes a duty on the employee as well. Despite the expertise of a personnel or payroll specialist, it is often the case that an employee is in the best position to recognize a mistake in his or her pay.<sup>15</sup>

What is more, Respondent had a duty to examine documentary records, including notices of personnel action and/or leave and earning statements, which, if examined, would have shown or identified the payment as an overpayment. Therefore, I must conclude that Respondent accepted an erroneous salary payment that he knew or should have known was erroneous. The employee's failure to alert the Department to the circumstances of receiving a salary payment weeks after his employment with the Department ended sufficiently demonstrates that Respondent overlooked an opportunity to check or correct the salary payment. Indeed, Respondent concedes that he discovered the actual amount of his cash award at the time he

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<sup>13</sup> Indeed, Respondent contends in this proceeding as well that he still has no basis to determine that the amount of the cash award was erroneous.

<sup>14</sup> See, *In re John*, Dkt. No. 06-17-WA, U.S. Dep't of Educ. (August 24, 2006).

<sup>15</sup> Respondent states that when she inquired about the validity of her WIGI she was told that the WIGI "was valid." Respondent does not, however, identify to whom she communicated or the nature and substance of the communication.

received the cash award payment, but viewed the payment accurate because of his outstanding performance rating and the similarity of the amount to amounts awarded him in 2004 and 2005.<sup>16</sup> In this light, I find that Respondent is not without fault as that term is defined under waiver standards.

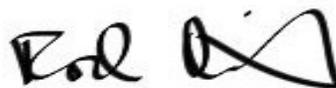
### III.

Having concluded that Respondent's arguments and evidence fail to show that Respondent accepted an erroneous salary payment that he neither knew nor should have known was erroneous, the remaining question is irrelevant. To secure a favorable ruling on the equity standard, Respondent must show that he acted fairly, without fraud or deceit, and in good faith with regard to all matters concerning the overpayment. But, a debtor can never show that it is against equity and good conscience for the Federal government to recover a debt in cases where the debtor accepts an erroneous salary payment, notwithstanding that the debtor knew or should have known the payment to be erroneous. This follows because employees are held accountable for recognizing or having reason to recognize that he or she received an erroneous salary payment. Accordingly, I find that in the interests of the United States waiver of Respondent's debt is unwarranted. This decision constitutes a final agency decision.

### 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 **\$1,857.16** is **HEREBY DENIED**.

So ordered this 2<sup>nd</sup> day of September 2009.



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Rod Dixon  
Waiver Official

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<sup>16</sup> Respondent's Leave and Earnings Statements from 2004 and 2005 support his assertions.