

**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  
**MARY,**

**Docket No. 04-03-WA**  
Waiver Proceeding

Respondent

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**DECISION DENYING WAIVER**

This case emerges out of a request arising under a statute- the General Accounting Office Act of 1996 – 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 legal authorities pertinent to this waiver request draw from the aforementioned statute, the Department’s implementing regulations at 34 C.F.R. Part 32 (§ 32.1 *et seq.*) , and the policy set forth in the Department of Education, Administrative Communications System, *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (June 2005).<sup>2</sup> Taken together, these authorities prescribe procedures for processing debts, authorizing deductions from wages to pay debts, and setting standards for waiving those debts when appropriate.<sup>3</sup> The 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

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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 (5 U.S.C. § 5584); *see also In re Richard*, Dkt. No. 04-040WA, U.S. Dep’t of Educ. (June 14, 2005) at 1 & n. 1 (setting forth the statutory framework governing debt collection by salary and administrative offset).

<sup>2</sup> *See also* government-wide regulations issued by the Office of Personnel Management (OPM) (5 C.F.R. Part 550, Subpart K) (OPM’s Subpart K regulations provide the standard followed by federal agencies when promulgating agency-specific regulations implementing 5 U.S. C. § 5514).

<sup>3</sup> In addition to regulations promulgated by the Department, standards prescribed by the Department of Justice and the Department of Treasury govern administrative debt collection efforts; those standards are widely known as the Federal Claims Collection Standards (FCCS). *See* 31 U.S.C. § 3711 (2000) and 31 C.F.R. ch. IX, Parts 900 – 904 (2000).

matter by OHA<sup>4</sup> The 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 written statements of Respondent with her earnings and leave statements for pay period 17 and 18, and the Department's Bill of Collection (BoC). This decision constitutes a final agency decision.

For reasons that follow, the circumstances of this case, do not conform to the threshold factors warranting waiver. Therefore, Respondent's request for waiver is denied.

### PROCEDURAL HISTORY

In the case at bar, on December 9, 2004, the United States Department of Education, Office of Management (OM), Human Resources System Team authorized the issuance of an initial notice of salary overpayment identifying that Respondent owed a debt to the Department in the amount of \$351.55. The notice authorized the Department to initiate offset of pay from the salary of Respondent as a result of an erroneous salary payment to Respondent. In response to this notice and the tribunal's January 5, 2005 Order Governing Proceedings (OGP), Respondent submitted a statement and documents supporting a waiver request dated December 16, 2004 and January 12, 2005.<sup>5</sup> Respondent succinctly states her position in her December 16, 2004 request: "Although I understand there was an overpayment, I am requesting the waiver because I meet the conditions described above,<sup>6</sup> I brought the mistake to the attention of the Department when I realized it, and it would be a financial burden to my family to repay the money at this time." Respondent's submissions constitute the complete record upon which the decision in this case is based.

### DISCUSSION

The pay the Department is trying to collect from Respondent reflects salary paid for pay period 17, the pay period ending August 7, 2004. As Respondent explains, she was promoted in July 2004 from a GS-14, Step 6 to a GS-15. Respondent points out that according to the OMB FY 2004 GS Salary Scale, the equivalent salary for a promotion from a GS-14, step 6 is GS-15, step 3. However, Human Resources calculated Respondent's salary at GS-15, step 6 and paid her at that rate for the one paycheck. Following Respondent's notification that she was being paid at the incorrect, higher rate, the next paycheck for pay period 18, reflected the correct GS-15, step 3 pay level. The notice to respondent identifies an overpayment of \$351.55, which the Department now seeks to recover.

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

<sup>5</sup> Date error appears here, with Respondent misidentifying the year (2004) when the correct year is 2005, as here reflected in the date of the document.

<sup>6</sup> The above conditions presumably relate to her assertion that,..." [t]he overpayment occurred through an administrative error and there is no fraud, misrepresentation, fault, or lack of good faith by me or anyone else in obtaining a waiver of the claim. I identified the mistake in my pay when I received my first paycheck resulting from a recent promotion." Per Respondent's December 16, 2004 waiver request.

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 payments would be against equity and good conscience and not in the best interests of the United States. Since, only when there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the Respondent, or any other persons having an interest in obtaining waiver may waiver be granted in a salary overpayment case, the standard for determining whether waiver is appropriate requires consideration of two threshold matters: first, whether the overpayment to Respondent constitutes an *erroneous payment of pay*<sup>7</sup> and, secondly, whether Respondent lacks fault.<sup>8</sup>

### Fault Standard

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 case law and regulations promulgated by the Department. In a waiver proceeding, the debtor acknowledges the validity of the debt; consequently, issues regarding the existence or the accuracy of debt are not before the tribunal. To the extent that Respondent's arguments or defenses raise issues concerning the validity of the debt, they will not – because they cannot – be addressed in this proceeding.

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 rate of pay.” As stated in the BoC, “Personnel processed an action correcting the employee’s salary from \$56.030 per hour to \$51.230 per hour effective 07/25/04. Employee was overpaid by \$4.80 per hour for 80 hours (sic) in pay period 0417.” This kind of debt 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>

Respondent asserts that she was aware she had been erroneously overpaid when she examined her pay check for pay period #17, and saw a salary level higher than expected following her promotion. She was the person who took steps to bring this matter to the attention of the appropriate official, Darlene Thornton, who serves as OSERS Human Resource Team for handling payroll issues. Respondent says she sought clarification from Darlene Thornton, who informed her she was correct and that her salary had been inadvertently miscalculated at the higher GS-15, step 6, instead of the correct GS-15, step 3. Ms. Thornton advised Respondent the Department’s error would

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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 also*, Salary Offset To Recover Overpayments of Pay or Allowances From Department of Education Employees, 34 C.F.R. Part 32 (2004) (notwithstanding the caption for Part 32, the agency regulations apply with equal force to former and current employees).

<sup>8</sup> The fact that the Agency may have erred in making the overpayment does not relieve the overpaid person 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 fight to recover an excess amount.

<sup>9</sup> 34 C.F.R. § 32.5 (2004).

be corrected and an adjustment reflected on her next paycheck, which it was as pay period #18 accurately reflects Respondent's GS-15, step 3 pay level.<sup>10</sup>

Respondent further asserts that waiver is warranted because she had no knowledge that the Department made this mistake in her salary until after she received the first payroll statement with the promotion, and is without fault for this. Yet, it was because of her actions in demonstrating there was an error and initiating corrective action to modify the salary calculation, that it was corrected immediately. Respondent finally asserts that at no time was there an attempt on her part to misrepresent or (de)fraud the government.

In determining whether Respondent is at fault, pertinent circumstances such as position, grade level, education, and training of the debtor may be taken into consideration.<sup>11</sup> Notably, fault may derive from an act or a failure to act.<sup>12</sup> However, Respondent acted directly and promptly, as above, to call attention to the error (salary miscalculation) and to get a correction made, to avoid perpetuating it beyond one pay period. Respondent acted quickly and effectively as soon as she was aware of a possible error in salary. Under these circumstances, it is unnecessary to conduct the usual analysis of pertinent considerations in finding whether a debtor should have known about an error in pay and if the debtor's actions were reasonable.<sup>13</sup> Human Resources made the incorrect step calculation upon Respondent's promotion; this was not Respondent's doing, but because of her careful observation, she assured corrective action almost immediately. Respondent's actions were reasonable and showed due diligence. Accordingly, Respondent cannot be found at fault from an act or a failure to act.

Without fault, the threshold factors for a waiver have been met and a waiver may be granted in this case, unless a balancing of the equities does not fall in Respondent's favor. That will be the next prong in the analysis of whether or not to grant Respondent a waiver.

## II. Equity and Good Conscience

Inasmuch as the threshold factors for waiver have been met, our inquiry proceeds to consider the balance of equities, or, in the language of the statute, to determine whether "the collection of [the debt] would be against equity and good conscience and not in the best interests of the United States." Here, however, the tribunal finds that the equities do not balance in Respondent's favor.

At the outset, this inquiry requires consideration of whether there is evidence of fraud or misrepresentation by Respondent. To secure equity and good conscience, Respondent must have acted fairly and without fraud or deceit as to the controversy at

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<sup>10</sup> See, Respondent's Statement, January 12, 2005.

<sup>11</sup> See *In re Richard*, Dkt. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

<sup>12</sup> *Id.* In this regard, unlike fraud, fault does not require a deliberate intent to deceive.

<sup>13</sup> See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) which references the Dep't of Treasury's Standards for Waiver, at ft. 13.

issue. Beyond that framework, however, there is actually little guidance on the balance of equities or the appraisal of good conscience.<sup>14</sup>

In balancing the equities, tribunals have drawn upon the concept of fairness by exercising judgment in light of the particular facts of the case. In this regard, a number of factors have been found pertinent to determining whether collection of the claim against an employee is against equity and good conscience or otherwise not in the best interests of the United States. For enumeration of these factors, see *In re Anh-Chau*, Dkt. No. 05-04-WA (June 17, 2005), which includes, whether recovery of the claim would impose an undue financial burden upon the debtor under the circumstances. This is the one argument Respondent has raised, claiming in her December 16, 2004 response to the BoC, that a waiver should be granted because it would be a financial burden to her family to repay the money at this time.<sup>15</sup>

In all respects, the facts of this case illustrate that Respondent did make reasonable efforts to make sure that she was paid correctly. Respondent should be commended for her actions in paying close attention to her new rate of pay upon her promotion and in questioning it, when the amount was higher than expected. Respondent was cognizant that an error in the Step paid could cause an overpayment of salary and questioned the payroll person on that. Respondent's timely intercession about her salary rate clearly prevented this from becoming an ongoing overpayment situation. However, Respondent's proper action does not overcome the existence of a debt or the propriety of repaying it.<sup>16</sup> While Respondent did all the right things to address the overpayment, that certainly does not free this Respondent from liability, when it is clear that the employee never did acquire title to the excess amount, and has a duty to hold the money for eventual repayment. This is a basic principle of waiver case law.<sup>17</sup>

In Respondent's assertion that repayment would be a financial burden, she does not support the argument with any evidence. Possible ways of supporting that claim would be for her to submit information about other financial indebtedness, money constraints, unexpected expenses, or other such contingencies. This was not done.

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<sup>14</sup> See, *In re Anh-Chau*, Dkt. No. 05-01-WA (June 17, 2005) at footnote 17, which explores the phrase "against equity and good conscience."

<sup>15</sup> Respondent raises an argument that financial hardship (burden) will result from the imposition of this debt. In this regard, Respondent may find it appropriate to consider seeking a voluntary repayment schedule as provided for by 5 U.S.C. 5514(a)(2)(C). This is not before the waiver official. This may be something Respondent may clarify through contact with the Department's HR representative, Linda Barnes.

<sup>16</sup> It has been consistently held that where an employee was aware or should have been aware of an overpayment of pay when it occurred, the employee cannot reasonably expect to retain such payments, but should set them aside and expect the Government to seek recovery. See, e.g., *In the Matter of Ray E. Lundquist*, Dkt. No. D-2003-105 (U.S. Department of Interior) (June 21, 2004) referencing that this is well settled by decisions of the Comptroller General, and instructing that the employee should make provision for repayment.

<sup>17</sup> See, e.g., DOHA Case No. 02032601 (May 31, 2002), which relies on 5 U.S.C. § 5584, stating that waiver is precluded when an employee is aware that he is being overpaid. The employee does not acquire title to any excess payments merely because the government has committed an administrative error. He has the duty to hold the overpayment for the eventual repayment to the Government.

It is undisputed that the debt arose from Respondent being promoted from a GS-14 to a GS-15 salary level. From her earnings and leave statement, we know that she receives an annual salary of \$106,914 as shown for pay period 18. There is nothing in the record to identify why, with that salary capacity, payment of \$351.55 would be a financial burden to Respondent and her family. There is no doubt that repayment of any sum may be inconvenient and unplanned in terms of any household budget, but that does not equate to a showing of financial burden such that the equities call for waiver. There is simply no persuasive evidence in this record to show how repayment of this debt would be a financial burden. Notwithstanding the tribunal's January 5, 2005 Order Governing Proceedings urging Respondent to "fully identify and explain with reasonable specificity all the facts, documents, and sworn statements, if any, which Respondent believes supports her position," Respondent did not do so. In fact, Respondent's January 12, 2005, formal reply to the Order Governing Proceedings, does not even restate Respondent's financial burden claim, much less provide relevant facts to support the claim.

Lacking evidence to support the claim that repayment would be a financial burden, this leaves the tribunal unable to weigh factors favorably for Respondent in the balance of equity and good conscience. Respondent has not shown that it would not be in the best interest of the United States to require her to repay this debt.

#### CONCLUSION

The tribunal finds that Respondent did know an error in salary payment existed and took steps to correct it so it would not reoccur; for those reasons, the tribunal examined the waiver request under the balancing of equity and good conscience. The tribunal finds that the interests of equity and good conscience do not otherwise warrant waiver in this case. Respondent's request for waiver must be denied.

#### ORDER

Respondent requested waiver of the entire debt. Having found that the circumstances of this case do not conform to the threshold factors warranting waiver, Respondent's request for waiver is denied.

So ordered this 27th day of June, 2005

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Nancy S. Hurley  
Waiver Official

To arrange payment of this debt, the employee should contact Linda Barnes of the Office of Management (OM), Human Resources Team.