



## 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

---

In the Matter of  
**RICHARD,**

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

Respondent

---

### 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 authority pertinent to this case also draws from the Debt Collection Act of 1982, as amended, the implementing

---

<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 law authorizing the waiver of claims of erroneous overpayments to Federal Respondents has harbingers throughout the United States Code and has undergone numerous changes, the earliest of which appears at Pub.L. No. 90-616, § 1(a), Oct. 21, 1968, 82 Stat. 1212); *see also* 5 U.S.C. § 5584, 5 U.S.C. § 5514, and 31 U.S.C. § 3716. The General Accounting Office Act of 1996, *inter alia*, amended 5 U.S.C. § 5584 by transferring the authority to waive claims for erroneous payments exceeding \$1,500 from the Comptroller General of the United States to the Office of Management and Budget (OMB). OMB subsequently re delegated this waiver authority to the executive agency that made the erroneous payment. The authority to waive claims not exceeding \$1,500, which was vested in the head of each agency prior to the 1996 amendment, was unaffected. In 1996, Congress also enacted the Debt Collection Improvement Act of 1996 (DCIA), Pub.L. No. 104-134, April 26, 1996, 110 Stat. 1321. Among its many objectives, the DCIA was designed to: "centralize management of Federal debt collection," enhance the use of collection tools, including "demand letters, administrative offsets, and negotiated repayment agreements," recover "salary payments" erroneously paid to Federal employees, "maximize the collection of delinquent, non-tax debts owed to the Federal Government," and "enhance [] government wide debt collection" through garnishment of wages. Further, Congress provided Federal agencies an incentive to "collect delinquent debts by being allowed to retain a portion of their annual delinquent-debt collections." Government Waste, Fraud, & Error Reduction Act of 1999, H.R. Rep. No. 9(I), 106<sup>TH</sup> Cong. (1<sup>ST</sup> Sess.1999) 1-2 (the report reviewed the objectives of the DCIA before noting why Federal debt collection measures required additional refinements).

regulations at 34 C.F.R. Part 32 (§ 32.1 *et seq.*), and the policy set forth in the U.S. Department of Education (Department), Administrative Communications System, *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (June 2005).<sup>2</sup> Together, these authorities prescribe procedures for handling debts, authorizing deductions from wages of federal employees, and setting standards for waiving debts.<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 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 statement of Respondent, the Department's Bill of Collection (BoC), the General Schedule Salary Table 2005, Respondent's submission of Leave & Earning statements and payroll records, a Flexible Schedule Certification Form, and printed copies of electronic communications between Respondent and the Waiver Official. 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. Accordingly, Respondent's request for waiver is denied.

#### PROCEDURAL HISTORY

In the case at bar, on November 10, 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 \$321.15. The notice authorized the Department to initiate an offset of pay from the salary of Respondent as a result of an erroneous salary payment to Respondent paid beyond September 26, 2004, which was the last date of Respondent's temporary promotion. In response to this notice, Respondent requested a waiver of the overpayment on December 22, 2004, and submitted a statement and documents supporting the request on January 18, 2005, as required by the tribunal's January 5, 2005, Order Governing Proceedings.

---

<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> 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 correctness of the amount of the overpayment, request a waiver of the debt in whole or in part, or request an opportunity to pursue both proceedings. In addition to regulations promulgated by the Department, standards prescribed by the Department of Justice and the Department of the Treasury govern certain aspects of the agency's 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). Prior to collecting debts owed to the United States by administrative offset, agencies are required to: (1) adopt the FCCS; or (2) prescribe agency regulations for collecting such debts by administrative offset, which are consistent with the FCCS. 31 U.S.C. § 3716. These standards, along with those cited in note 1, *supra*, establish the minimum due process rights that must be afforded to a former or current employee/debtor when the Department seeks to collect a debt by salary or administrative offset.

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

## DISCUSSION

The overpayment for which the Department has asserted authority to collect is derived from salary for pay periods 21 and 22 of 2004, during which time Respondent was paid at the rate of pay for a temporary promotion despite the fact that the time period of the temporary promotion had expired. More precisely, following the date when the temporary appointment was scheduled to expire, the Department continued to pay Respondent at the GS-15/4 temporary appointment level, thus, ultimately, creating an overpayment of pay totaling \$321.15.<sup>5</sup>

A waiver proceeding is a narrowly focused proceeding. What is at issue in this case is whether Respondent's arguments and submissions warrant granting a waiver of a portion or the entire overpayment in accordance with standards prescribed by statute and consistent with the case law and regulations promulgated by the Department. In a waiver proceeding, the debtor acknowledges the validity of the debt or urges an absence of any reason to recognize the overpayment as an erroneous payment; 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.

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. In addition, 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 a waiver may waiver be granted.

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>6</sup> and, secondly, whether Respondent lacks fault.<sup>7</sup> There is no dispute that this case involves an erroneous payment of pay. An "erroneous salary rate" comes within the regulatory definition of the type of debt subject to waiver or offset.<sup>8</sup> Consequently, the primary focus of the threshold issue, here, is whether Respondent lacks fault.

Respondent asserts that he was unaware that he had been erroneously overpaid. Building

---

<sup>5</sup> See, n.14 (during the period of overpayment Respondent received a scheduled and approved "with-in grade" salary increase).

<sup>6</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>7</sup> The fact that the agency erred in making the overpayment does not relieve the overpaid person from liability. Notably, although erroneous salary overpayments arise as a result of mistakes by those with the responsibility for making salary payments, the overpayment, nevertheless, is in excess of the amount of authorized salary; therefore, the issuance of a BoC is presumptively the agency's exercise of the right to recover the excess amount.

<sup>8</sup> 34 C.F.R. § 32.5 (2004).

upon this claim, Respondent argues that the Department erred in making the overpayment and, thus, is, itself, at fault for the overpayment.<sup>9</sup> Indeed, the record indicates that responsibility for making the erroneous payment rests clearly upon the Department. In this regard, the bill of collection issued on behalf of the Department declares that an administrative error caused Respondent to be paid at a rate that exceeded his lawful rate of pay. That notwithstanding, while it is accurate to state that the overpayment was caused by an agency administrative error, the existence of administrative error does not, itself, entitle Respondent to waiver.<sup>10</sup> No employee has a reasonable expectation of an entitlement to pay for performing the job functions of a temporary appointment after the time period of the temporary appointment has expired; this follows because employees have an independent duty to hold onto the overpayment for eventual repayment to the government.<sup>11</sup>

According to Respondent, he is not responsible for tracking the date his 120-day appointment expires and, even if he were, the Department's failure to provide him with a completed and official personnel action form (known as the SF-50) before the date his temporary appointment actually expired dissolves any accountability or fault that could be ascribed to him.<sup>12</sup> Respondent further argues that waiver is warranted because he performed the same job functions and duties as required by the temporary job assignment throughout the period that he was overpaid. This latter argument only differs slightly from Respondent's immediately preceding argument by attempting to illustrate that an employee who has "earned" erroneous pay is not likely to be at fault for receiving the excessive salary payment. No doubt, Respondent succeeds in identifying a genuine concern for workers in Respondent's general circumstance; namely, those who provide services to an employer that are subsequently not compensable at the salary rate expected or desired. Even so, this is not the standard employed to determine whether, under the particular circumstances involved, a reasonable person would have been aware that he or she was receiving more pay than lawfully entitled.

In assessing fault, the tribunal must focus upon whether Respondent knew or should have known that he was paid at the salary rate of GS-15/4 during the two pay periods<sup>13</sup> for which

---

<sup>9</sup> See, Respondent's Statement, January 18, 2005.

<sup>10</sup> This is not to say, however, that errors, committed by the agency that are of a type or magnitude of sufficient severity, could never be held against the party committing error in the first place. See, e.g., *Brandt v. Hickel*, 427 F.2d 53, 56 (9th Cir.1970) ("some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped"); *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 103 (9th Cir.1970) ("the dictates of both morals and justice indicate that the Government is not entitled to immunity from equitable estoppel in this case"). Moreover, the tradition of disfavoring application to the Federal government of the broad doctrine equitable estoppel necessarily is inapposite in waiver cases, wherein the equitable remedy conspicuously turns on a determination of whether the government should be estopped from collecting a debt. Of course, the default rule followed in overpayment cases is that the appropriateness of waiver turns on the knowledge and conduct of the employee/debtor who has *received* the erroneous payment, rather than the actions of the agency in *making* the erroneous payment. See *Export-Import Bank Employees*, B-272467 (Dec. 13, 1996).

<sup>11</sup> See, e.g., DOHA Case No. 01092001 (Department of Defense, Office of Hearings & Appeals [DOHA]) (October 29, 2001); DOHA Claims Case No. 99111916 (December 8, 1999).

<sup>12</sup> See, Respondent's Statement, January 18, 2005.

<sup>13</sup> Respondent's temporary promotion was effective through the end of week 1 of pay period 21. Consequently, Respondent's waiver request applies to week 2 of pay period 21 and both weeks of pay period 22.

the employee should have been paid at the GS-14/7 salary rate.<sup>14</sup> An employee who knows or who should know that he or she is receiving erroneous overpayments cannot acquire title to the erroneous amounts under any condition.<sup>15</sup> This narrow inquiry requires an examination of pertinent factors such as an employee's position, grade level, education, and training.<sup>16</sup> To reach a determination, the aforementioned factors are examined in light of the following considerations: (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; (b) whether the erroneous payment resulted from the 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 payment, notwithstanding that the employee knew or should have known the payment to be erroneous.<sup>17</sup>

In applying the fault standard to this case, the tribunal concludes that Respondent does not lack fault. Respondent failed to inquire about and dutifully track the expiration of his short 120-day temporary appointment. With regard to salary payments - - although the scope of the duty may vary among employees of different positions and different grade levels - - all employees have an on-going duty to know and a duty to inquire, when appropriate, about the accuracy of their salary payments. The scope of Respondent's duty includes the obligation 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.<sup>18</sup> Respondent had been temporarily promoted to an acting director position paid at the GS-15 level. At Respondent's grade level and position of responsibility, Respondent should have known when his appointment was scheduled to expire.<sup>19</sup> No more than a reasonable effort to calculate or otherwise ascertain the date when the temporary appointment ended would have enabled Respondent to determine that the payment of his salary for his temporary appointment beyond the appointment period was erroneous.<sup>20</sup>

---

<sup>14</sup> During the period at issue, Respondent was entitled to a with-in grade pay increase. Consequently, Respondent was paid at the GS-15/5 salary rate for pay period 23. *See*, Reissued Leave and Earning Statement for Pay Period 23.

<sup>15</sup> *See, e.g.*, DOHA Case No. 01092001 (October 29, 2001).

<sup>16</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>17</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>18</sup> *See, e.g.*, DOHA Case No. 97052111 (September 30, 1997) (holding that a "financial officer is expected to be familiar with the regulations" and regardless of a supervisor's mistake "a finance officer should have questioned the [over]payment").

<sup>19</sup> For example, the Department of Treasury guidelines on waiver provide: "where an employee is promoted to a higher grade but the step level for the employee's new grade is miscalculated, it may be appropriate to conclude that there is no fault on the employee's part because employees are not typically expected to be aware of and understand the rules regarding determination of step level upon promotion. On the other hand, a different conclusion as to fault potentially may be reached if the employee in question is a personnel specialist or an attorney who concentrates on personnel law." *Id.*

<sup>20</sup> Indeed, Respondent's fulfillment of his duty would have had the additional benefit of ensuring that his supervisors were alerted in a timely manner to extend his appointment or to do otherwise; thus, protecting the Department's

It is also entirely reasonable to expect a supervisory employee, by monitoring bank accounts or pay statements, to note the occurrence of an appropriate and expected change in pay connected to the expiration of a temporary promotion.<sup>21</sup> In this regard, the absence of the expected change in pay should have alerted the employee to the fact that his rate of pay or the calculation of his salary in some manner may be erroneous.<sup>22</sup> Moreover, the fact that Respondent received a with-in grade pay increase in pay period 23 reinforces the expectation that a careful review of the employee's salary payment for accuracy would alert Respondent to consider whether he was being overpaid.<sup>23</sup>

Respondent knew the effective commencement date of his temporary promotion; consequently, the 120-day expiration date could have been derived with little effort.<sup>24</sup> Under such circumstances, even the fact that the Department failed to issue a timely SF-50 cannot overcome Respondent's duty to check printed or electronic leave and earning statements or payroll records appropriately to ensure that the employee is paid the legitimate and appropriate rate of pay.<sup>25</sup> The equitable interests favoring waiver do not reach an employee who does not inquire into the validity or accuracy of his pay or attempt to bring the matter to the attention of an appropriate official or supervisor when the circumstances clearly warrant doing so. Employees are expected 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.<sup>26</sup> Respondent did not do so.

## CONCLUSION

The tribunal finds that Respondent should have known that an error in salary payment existed; as such, waiver cannot be granted in this case.

## ORDER

Respondent requested waiver of the entire debt. Having found that the circumstances of

---

interests in ensuring that the person performing the duties of Respondent is legally authorized to serve in that capacity.

<sup>21</sup> See, e.g., DOHA Case No. 97013102 (July 23, 1997).

<sup>22</sup> Respondent describes his position as "Acting Group Director." See, Respondent's Statement, January 18, 2005.

<sup>23</sup> Respondent is silent as to whether he reviewed his leave and earning statements for the pertinent pay periods.

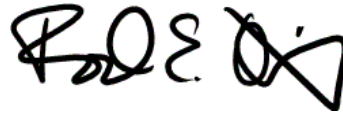
<sup>24</sup> See, Respondent's Statement, January 18, 2005.

<sup>25</sup> It has been consistently held that when an employee is aware or should be aware of an overpayment of pay when it occurs, he is not entitled to waiver, if under the circumstances he accepts the erroneous overpayment. See, e.g., *In the Matter of Ray E. Lundquist*, Dkt. No. D-2003-105 (U.S. Department of Interior) (June 21, 2004) (holding that when an employee fails to review documentary records, including leave and earning statements, which, if examined, would have shown the overpayment, the employee is not free from "fault" as that "term is used in the statute.")

<sup>26</sup> See, e.g., DOHA Case No. 99111916 (December 8, 1999).

this case do not conform to the threshold factors warranting waiver, Respondent's request for waiver is **DENIED**.

So ordered this 14th day of June 2005.

A handwritten signature in black ink, appearing to read "Rod Dixon". The signature is stylized and somewhat cursive, with a large "R" and "D" being the most prominent features.

---

Rod Dixon  
Waiver Official