



## UNITED STATES DEPARTMENT OF EDUCATION

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In the Matter of  
**ANH-CHAU,**

**Docket No. 05-01-WA**  
Waiver Proceeding

Respondent

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### **DECISION DENYING WAIVER**

Respondent, an employee of the U.S. Department of Education (Department), filed a timely request for waiver of a debt caused by an erroneous salary overpayment. The General Accounting Office Act of 1996 authorizes the waiver of claims of the United States against debtors as a result of an erroneous payment of pay to federal employees.<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,

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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. 04-04-WA, 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> 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 the correctness of the amount of the overpayment, request a proceeding concerning the waiver of the debt in whole or in part, or request an opportunity to pursue both a waiver proceeding and a hearing. In addition to regulations promulgated by the Department, standards prescribed by the Department of Justice and the Department of the 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

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), 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. Therefore, Respondent's request for waiver is denied.

### PROCEDURAL HISTORY

In the case at bar, on November 23, 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 \$447.52. 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. In response to this notice and the tribunal's February 3, 2005 Order Governing Proceedings, Respondent submitted a statement and documents supporting a waiver request on January 28, 2005 and February 4, 2005. Respondent's submissions constitute the complete record upon which the decision in this case is based.

### DISCUSSION

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. 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>5</sup> and, secondly, whether Respondent lacks fault.<sup>6</sup>

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31 C.F.R. ch. IX, Parts 900 – 904 (2000). Prior to collecting debts owed to the United States through 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 notes 1 & 2, *supra*, establish the minimum due process rights that must be afforded to the debtor when an agency seeks to collect a debt by administrative offset.

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

<sup>5</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).

## I. Fault Standard

A waiver proceeding is a narrowly focused proceeding. At issue in this case is whether Respondent's arguments and submissions warrant granting 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 that there is an absence of any reason to recognize the overpayment as an erroneous payment. To the extent that Respondent's arguments or defenses raise issues concerning the validity or accuracy of the debt, they will not 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 time and attendance records," 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>7</sup>

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>8</sup> Notably, fault may derive from an act or a failure to act.<sup>9</sup> Pertinent considerations in finding whether a debtor should have known about an error in pay include: (a) whether the erroneous payment resulted from an employee's incorrect, but not fraudulent, statement that the debtor under the circumstances should have known was incorrect; (b) 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 (c) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.<sup>10</sup> In applying the threshold factors to this case, the tribunal concludes that Respondent knew or should have known of the error in salary payment and, therefore, the circumstances of overpayment do not warrant granting waiver of the debt.

The Department seeks to collect salary for pay period 10 of 2004, during which Respondent was overpaid by 27 hours. As determined by the Department, the overpayment resulted from an excessive payment of 72 hours of advanced sick leave. For pay period 10, the Department erroneously paid Respondent 72 hours of "advanced sick leave," 5 hours of donated "leave share," and 3 hours of annual leave<sup>11</sup> instead of paying Respondent 45 hours of sick leave, 5 hours of donated "leave share," and 3 hours of annual leave, which would have

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<sup>6</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 right to recover an excess amount.

<sup>7</sup> 34 C.F.R. § 32.5 (2004).

<sup>8</sup> See *In re Richard*, Dkt No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

<sup>9</sup> *Id.* In this regard, unlike fraud, fault does not require a deliberate intent to deceive.

<sup>10</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>11</sup> Totalling 80 hours for the pay period.

totaled only 53 hours.<sup>12</sup> The difference between what Respondent was erroneously paid and what the Department has determined that Respondent should have been paid constitutes 27 hours. At Respondent's rate of pay, the 27 hours of pay resulted in a \$447.52 salary overpayment.

In this case, Respondent asserts that she was unaware of the erroneous overpayment. According to Respondent, the salary payment received for pay period 10 was "true and accurate to [her] knowledge." Building upon this claim, Respondent also asserts that she did not "question the check amount [of her pay] because by then [she] was enrolled in the leave share/Donated leave program" and, as a result, "assumed that the hours were there for me."<sup>13</sup>

Under these circumstances, the standard employed to determine whether Respondent is at fault is whether Respondent should have known that her use of annual leave, sick leave, and donated leave would not cover 80 hours of pay during the pay period for which she was entirely unable to work. For her part, Respondent does not argue that her sick leave or annual leave were sufficient and appropriate to cover her time of absence; nor does Respondent make an affirmative showing that her leave share account had sufficient hours that should have retroactively relieved her indebtedness.<sup>14</sup>

Respondent has a duty to check salary payment records to ensure that her pay is accurate.<sup>15</sup> If employees could shirk their obligation to ensure the accuracy of their pay by assuming that whatever they were paid was accurate, then the sense of duty to inquire would not appear to be an obligatory duty.<sup>16</sup> 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. Respondent presents no evidence showing that her leave and earning statement fails to disclose the erroneous payment; nor does the tribunal have reason to

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<sup>12</sup> The voluntary leave transfer program allows Federal employees to "donate" earned annual leave to each other by authorizing the unused accrued annual leave of one employee to be transferred for use by another employee who needs such leave because of a medical emergency. See 5 C.F.R. § 630.901; PMI 630-10, Department of Education, Voluntary Leave Transfer Program (October 2, 1989).

<sup>13</sup> See, Respondent's Statement, February 4, 2005

<sup>14</sup> In some circumstances, annual leave transferred to an employee under the leave share program may be substituted retroactively for a "period of leave without pay (LWOP) or used to liquidate an indebtedness for advanced annual or sick leave" granted on or after the beginning of the period of the medical emergency. 5 C.F.R. §§ 630.906(e) & 630.909; see also PMI 630-10, Department of Education, Voluntary Leave Transfer Program (October 2, 1989).

<sup>15</sup> The application for the leave share program requires Respondent to determine the amount of any annual leave, sick leave, compensatory time, and credit hours currently existing in the prospective leave share program recipient's account. Respondent is also required to submit the amount of any outstanding advanced sick leave and/or leave without pay used in connection with the medical emergency as well as submit the number of transferred leave hours requested to cover the absence caused by the medical emergency. In this light, Respondent's reliance on mere assumptions about the quantum of leave she maintained in pay period 14 is genuinely baffling. It seems doubtful that there are circumstances where the exact quantum of an employee's leave hours would be clearer. See PMI 630-10, Department of Education, Voluntary Leave Transfer Program (October 2, 1989).

<sup>16</sup> 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.")

conclude otherwise. Accordingly, the tribunal finds that Respondent is not without fault for the overpayment and, as such, a waiver of her debt is not warranted under the circumstances of this case.

## II. Equity and Good Conscience

Notwithstanding the aforementioned determination that the threshold factors for waiver are not met in this case due to the tribunal's fault finding, the tribunal will briefly consider Respondent's multiple arguments regarding equity. It is worth noting, however, in cases where it is determined that an employee does not lack fault, Respondent's further arguments establishing whether the collection of the debt would be "against equity and good conscience" have no bearing on the decision to deny waiver.

To secure equity and good conscience, Respondent must have acted fairly and without fraud or deceit as to the controversy at issue. Beyond that framework, however, there is actually little guidance on the balance of equities or the appraisal of good conscience.<sup>17</sup>

In balancing the equities under similar circumstances, 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 a claim against an employee is against equity and good conscience or otherwise not in the best interests of the United States, the factors include: (a) whether recovery of the claim would be unconscionable under the circumstances; (b) whether, because of the erroneous payment, the employee either has relinquished a valuable right or changed positions for the worse, regardless of the employee's financial circumstances;<sup>18</sup> (c) whether recovery of the claim would impose an undue financial burden upon the debtor under the circumstances,<sup>19</sup> and (d) whether the time elapsed between the erroneous payment and discovery of the error and notification of the employee is excessive.<sup>20</sup> These factors are neither exhaustive, nor mutually exclusive; a debtor depending upon the circumstances may raise other factors pertinent to equity and good conscience.

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<sup>17</sup> The phrase "against equity and good conscience" is not defined by statute. More generally, some courts have found the phrase "against equity and good conscience" to be a phrase of uncommon generality, not at all amenable to efforts to channel a meaning into rigid rules. *See, e.g., Gilles v. Department of Human Resources Development*, 521 P.2d 110, 117 (Cal. 1974).

<sup>18</sup> To establish that a valuable right has been relinquished, it must be shown that the right was, in fact, valuable; that it cannot be regained; and that the action was based chiefly or solely on reliance on the overpayment. To establish that the employee's position has changed for the worse, it must be shown that the decision would not have been made but for the overpayment, and that the decision resulted in a loss. An example of a "detrimental reliance" would be a decision to sign a lease for a more expensive apartment based chiefly or solely upon reliance on an erroneous calculation of salary, and the funds spent for rent cannot be recovered. *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>.

<sup>19</sup> *See, e.g., In the Matter of Mrs. Kathryn H. Vandegrift*, 55 Comp. Gen. 1238, B-182, 704 (July 2, 1976).

<sup>20</sup> *See, e.g., the generally similar "Guidelines for Determining Requests [For Waiver]"* U.S. Department of the Treasury Directive 34-01 (2000), available at <http://www.treasury.gov/regs/td34-01.htm> With regard to this latter factor, it is important to note, that the passage of time may not always lead to successful invocations of the doctrine of equity and good conscience since equity may refuse its aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time.

Respondent argues that a waiver should be granted because she is financially unable to repay the debt due to a series of unfortunate events that have occurred recently. According to Respondent, some of the recent misfortunes she has experienced include unpaid medical expenses due to her own poor health as well as the poor health of her youngest son. Respondent indicates that her son's monthly medication expenses typically cost \$150.00. In addition, Respondent's unpaid absence, itself, caused financial hardship, and resulted in a depleted savings account. Further, Respondent had had to rely on out-of-state family members to cover costs of living in northern Virginia for a family of three headed by a single woman on a GS-9 salary.<sup>21</sup> Although these arguments illustrate incredibly unfortunate circumstances, none are supported with evidence. Notwithstanding the tribunal's January 5, 2005 Order Governing Proceedings urging Respondent to obtain and submit any "documents, affidavits, or otherwise supporting evidence that may substantiate the claims in the [January 28, 2005] statement," Respondent did not do so. Consequently, Respondent's decision not to substantiate the living condition of hardship and distress that she clearly identifies, leaves the tribunal unable to weigh these factors favorably in the balance of equity and good conscience.

## 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. FURTHER, the tribunal finds that the interests of equity and good conscience do not otherwise warrant waiver in this case.

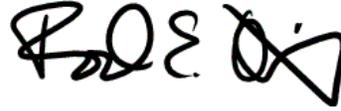
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<sup>21</sup> Although the concern, here, is necessarily restricted to matters pertinent to Respondent's request for waiver of the debt, the tribunal acknowledges that Respondent raises arguments regarding the financial hardship that repayment of the debt could impose. 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).

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 17<sup>th</sup> day of June 2005.

A handwritten signature in black ink, appearing to read "Rod E. Dixon". The signature is stylized and somewhat cursive.

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Rod E. Dixon  
Waiver Official

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