



## UNITED STATES DEPARTMENT OF EDUCATION

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In the Matter of  
**WILLIAM,**

**Docket No. 05-11-WA**  
Waiver Proceeding

Respondent

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### **DECISION DENYING WAIVER**

At issue in this case is whether a former employee may obtain a waiver of a debt arising from an unpaid annual leave balance existing at the time the debtor terminates employment with the Federal government. For reasons that follow, I find that Respondent's arguments and submissions fail to persuade me that granting waiver of the entire debt in this case is warranted. Accordingly, Respondent's request for waiver is denied.

This case emerges out of a request for waiver of a salary overpayment arising under the General Accounting Office Act of 1996 (the Waiver Statute), which authorizes 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 waiver requests include the Waiver Statute, the United States Department of Education's (Department) implementing regulations at 34 C.F.R. Part 32, and the policy set forth in the Department of Education, Administrative Communications System, *Handbook for Processing Salary Overpayments* (Salary Overpayment

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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 (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) (the Waiver Statute); *see also* 5 U.S.C. § 5584, 5 U.S.C. § 5514, and 31 U.S.C. § 3716. The Waiver Statute 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. *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 of current and former employees).

Handbook, ACS-OM-04) (June 2005); these authorities prescribe procedures for processing debts, authorizing deductions from salary and wages to pay debts, and setting standards for waiving debts when appropriate.<sup>2</sup> The Salary Overpayment 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>3</sup>

The resolution of this case is based on the matters accepted as argument and evidence in this proceeding, including the written statements of Respondent (and the documents attached therein), Respondent's submission of Leave and Earning Statements, the Department's Bill of Collection (BoC), and Flexible Schedule Certification Forms, and printed copies of electronic communications between Respondent and the Waiver Official.

### PROCEDURAL HISTORY

In the case at bar, on September 22, 2004, the United States Department of Education, Office of Management (OM), Human Resources System Team authorized issuance of an initial notice of salary overpayment identifying that Respondent owed a debt to the Department in the amount of \$294.04. The notice authorized the Department to initiate an administrative offset of pay from Respondent as a result of an unpaid annual leave balance existing on the effective date of Respondent's resignation on April 9, 2004. In response to this notice, Respondent timely requested waivers of the overpayment on January 28, 2005, March 1, 2005, and March 9, 2005. Respondent also submitted a statement and documents supporting the requests on March 1, 2005, and March 9, 2005, (as well as on April 5, 2005, as required by the tribunal's March 22, 2005, Order Governing Proceedings).

### DISCUSSION

#### I.

Pursuant to the plain language of 5 U.S.C. § 6303, a Federal employee is entitled to annual leave with pay that accrues in hours at four hours, Six hours or Eight hours per pay period depending on the number of years of service completed by the employee. Based on his number of years of service, Respondent was entitled to annual leave with pay that accrued at a rate of four hours per pay period. At that rate, however, Respondent had not earned sufficient annual leave to meet his desired use of leave in 2004.<sup>4</sup> Therefore, Respondent requested advance

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<sup>2</sup> See also government-wide regulations issued by the Office of Personnel Management (OPM) (5 C.F.R. Part 550, Subpart K) and *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at 1 & n. 2 (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). These standards, along with those cited in note 1, *supra*, establish the minimum due process rights that must be afforded to a debtor when an agency seeks to collect a debt by administrative offset.

<sup>3</sup> See, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

<sup>4</sup> Respondent obtained annual leave in excess of that which he had earned in both 2003 and 2004; the total amount of advance annual leave used by Respondent during his brief tour of duty is not clear from the record.

annual leave. Pursuant to 5 U.S.C. § 6302(d), Federal agencies may grant annual leave at any time during a leave year in advance of its accrual, but, generally, where leave is so advanced, it must be repaid or recovered by biweekly annual leave earnings over the balance of the leave year.

As established by the Department, the reconstruction of Respondent's leave record shows that he obtained and used annual leave in excess of that to which he was entitled. When his 2003 annual leave year was reconstructed Respondent had no annual leave accumulation that could be carried forward to the 2004 leave year as a beginning balance. In 2004, Respondent used more hours of annual leave than he properly earned. As reconstructed, he used eight more hours of annual leave than earned, which resulted in an overpayment of salary in 2004 of \$294.04. This eight hour "negative leave balance" constitutes the salary overpayment or debt that is the subject of this waiver proceeding.

Since in a waiver proceeding, the debtor acknowledges the validity of the debt or urges that there exists an absence of any reason to recognize the overpayment as an erroneous payment, issues regarding the specific existence or accuracy of debt are not before the tribunal. Accordingly, to the extent that Respondent's arguments or defenses raise issues concerning the validity of the debt, those arguments will not -- because they cannot -- be addressed in this proceeding.

## II.

Only when there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the Respondent, or any other person having an interest in obtaining a waiver, may waiver be granted. Regarding fault, fault is examined in light of the following considerations: (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>5</sup>

With regard to salary payments - - although the scope of the duty under the fault standard 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 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.<sup>6</sup> In applying these considerations to this case, the tribunal concludes that Respondent is not without fault because there can be no question that

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<sup>5</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>6</sup> See, e.g., Department of Defense, Office of Hearings & Appeals (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").

Respondent's obligations under the fault standard extended to checking Leave and Earning Statements (LES), which would clearly identify Respondent's annual leave balance.

The case law on waiver has repeatedly recognized that waiver of a salary overpayment should never be granted for employees who shirk their obligation to ensure the accuracy of their pay.<sup>7</sup> In this context, Respondent had a duty to check salary payment records to ensure that his pay is accurate. More important, notwithstanding that the Department had not discovered the overpayment error until months after Respondent separated from Federal service, it remains fundamental to the analysis of when waiver may be granted 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.<sup>8</sup> More to the point, if the fault standard is not met, waiver cannot be granted.

Respondent began repayment of his *advance* annual leave through credits of *earned* annual leave, but his entire excess annual leave had not been repaid by the date Respondent separated from Federal service. Respondent's final LES, dated May 15, 2005, clearly identifies that Respondent used 20 hours of advance leave and maintained only 12 hours of earned leave that could be used to repay the advance leave account. Once a subtraction of 12 hours from 20 hours is accomplished, Respondent is left with a negative leave balance or unpaid advance leave of 8 hours.<sup>9</sup> Moreover, this is not a case in which it may be said that under the fault standard Respondent's position or grade level should diminish the on-going duty employees have to know and to inquire, when appropriate, about the accuracy of their compensation or salary payment. At Respondent's senior grade level, GS-14, Respondent should have known that his LES disclosed that Respondent had not fully repaid his advance annual leave at the time he separated from Federal service.

Despite the foregoing facts, Respondent presses forward with three reasons supporting waiver of the debt. According to Respondent, he is entitled to waiver because: (1) it was not "clear from records provided that [he] owed time upon leaving [Federal service]," (2) that he worked more hours than "expected or required," which should offset or compensate for the 8 hours owed, and (3) that his 72 hour unused sick leave account shows that effectively the "Department was more than fairly compensated in time worked to cover the 8 hours owed."

Although Respondent raises what may be noteworthy questions concerning the fairness of collecting a debt based on a negative leave balance when probative evidence points in the direction of showing that the employee also provided uncompensated hours of work to the employer, answers to such questions need not be provided in this case. Respondent's evidence

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<sup>7</sup> See, *In re Russell*, Dkt. No. 05-19-WA, U.S. Dep't of Educ. (June 23, 2005).

<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 right to recover an excess amount. See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

<sup>9</sup> A leave year begins on the first day of the first full biweekly pay period in a calendar year. A leave year ends on the day immediately before the first day of the first full biweekly pay period in the following calendar year. The pertinent beginning dates of leave years 2003 and 2004 were: January 12, 2003 and January 10, 2004, respectively. See, <http://www.opm.gov/oca/leave/html/Leaveyeardates.asp> (last visited October 17, 2005).

not only falls short of establishing those facts, but most important, the evidence undermines Respondent's arguments. Respondent's LES could not be clearer in identifying that Respondent had been advanced leave in excess of that to which he had earned. In addition, Respondent's submission of his Flexible Schedule Certification Forms covering each pay period of his tour of duty unmistakably shows that Respondent could not have had a reasonable expectation of receiving "compensation" resulting from a schedule of work that included excessive hours; Respondent's own statement indicated that he frequently worked near or in excess of 100 hours per pay period without being "expected or required" to do so.

Finally, 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>10</sup> In this case, Respondent did not do so. Accordingly, a further inquiry into whether the collection of the debt would be against "equity and good conscience" has no bearing here.

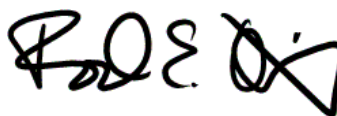
#### CONCLUSION

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 this case do not conform to the factors warranting waiver, Respondent's request for waiver is **DENIED**. This decision constitutes a final agency decision.

So ordered this 19th day of October 2005.



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Rod Dixon  
Waiver Official

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<sup>10</sup> See, e.g., DOHA Case No. 99111916 (December 8, 1999).