



**UNITED STATES DEPARTMENT OF EDUCATION**  
OFFICE OF HEARINGS AND APPEALS  
400 MARYLAND AVENUE, S.W.  
WASHINGTON, D.C. 20202-4616

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In the Matter of

**DANIELLE,**

Respondent.

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**Docket No. 05-18-WA**

Waiver Proceeding

**DECISION DENYING WAIVER**

This proceeding is based on a U.S. Department of Education (Department) employee's request for waiver of a salary overpayment of \$573.53.<sup>1</sup> The waiver request arises under 5 U.S.C. § 5584, 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>2</sup> The Department has promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 *et. seq.*), and set forth policy governing the overpayment process in its *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (June 2005). Together, these legal authorities prescribe procedures for handling debts, authorizing deductions from wages of federal employees and/or former employees to pay debts to the United States for such things as salary overpayments, and setting standards for waiving those debts.<sup>3</sup> The Handbook, ACS-OM-04, specifically delegated the Secretary's waiver authority for salary

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<sup>1</sup> The overpayment is identified as File No. 05LCBRN2 in the May 11, 2005 notice.

<sup>2</sup> See General Accounting Office Act of 1996, Pub.L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828 (Act); see also *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005), footnote # 1.

<sup>3</sup> When the Department issues a notice informing the employee/former employee of a salary overpayment, the alleged debtor has the opportunity to request a hearing concerning the existence and correct amount of the overpayment and/or modification of the repayment schedule due to financial hardship, to request a waiver of the debt in whole or in part, or to request an opportunity to pursue both proceedings.

overpayments to the Office of Hearings and Appeals (OHA). The undersigned is the authorized waiver official who has been assigned this matter by OHA. 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 Respondent's statements and attached documentation, the Department's Bill of Collection (BoC), documents generated by the Federal Personnel Payroll System (FPPS), and documentation submitted by Respondent's Executive Officer. 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**

On May 11, 2005, the Department's Office of Management (OM) authorized the issuance of an initial notice of salary overpayment and attached Bill of Collection (BoC) identifying that Respondent owed a debt to the Department. The BoC stated that a corrected timesheet was submitted changing 40 hours of sick leave (Pay Code 030) to Leave Without Pay (LWOP) (Pay Code 101) for Pay Period 05 of 2005.<sup>4</sup> The change resulted in an overpayment of 40 hours, or \$597.27. By letter dated June 1, 2005, Respondent filed a written request for waiver.

In a June 10, 2005, Order Governing Proceedings, Respondent's request for a waiver was deemed timely. On June 24, 2005, Respondent filed a statement and documents supporting her waiver request in accordance with the tribunal's April 1, 2005, Order. On July 22, 2005, Respondent's Executive Officer submitted copies of documents pertaining to the overpayment.<sup>5</sup> Respondent filed a response to her Executive Officer's submissions on September 30, 2005.<sup>6</sup> These submissions constitute the complete record upon which the decision in this case is based.

### **DISCUSSION**

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 the case law and regulations promulgated by the Department. 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

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<sup>4</sup> Pay Period 5 ran from February 6, 2005 until February 19, 2005.

<sup>5</sup> The documents submitted were copies of Respondent's time and attendance report for Pay Period 05 of 2005, Respondent's request for leave for Pay Period 05, Respondent's February 1, 2005 Memo to her supervisor, William Haubert, regarding her leave usage during her maternity leave, the March 16, 2005 request to amend Respondent's time and attendance report for Pay Period 05, and Respondent's Leave and Earnings Statement (LES) for Pay Period 05.

<sup>6</sup> On September 21, 2005, upon learning that Respondent had not received a copy of her Executive Officer's submission, the tribunal transmitted a copy to her by facsimile. On September 22, 2005, Respondent was given one week to file a response.

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>7</sup> and, secondly, whether Respondent lacks fault.<sup>8</sup> As waiver constitutes an equitable remedy, it is not available to a party who is not entirely without fault.<sup>9</sup>

Respondent does not dispute the validity of the debt. The pay the Department has asserted authority to collect from Respondent reflects 40 hours of salary for Pay Period 05 of 2005. Respondent was initially paid for 80 hours although she was in a nonpay status (i.e. LWOP) for 40 hours during Pay Period 05. Consequently, there is no dispute that this case involves an “erroneous payment of pay.”

The standard employed to determine whether a person was at fault in accepting or not recognizing an overpayment is whether, under the particular circumstances, a reasonable person should have known or suspected that he or she was receiving more than their entitled salary. An employee who knows or should know that he or she received an erroneous payment is obliged to return that amount, or set aside an equivalent amount for refund to the government when the error is corrected.<sup>10</sup> Pertinent circumstances such as an employee’s actual knowledge of the overpayment, as well as her position, grade level, education and training may also be taken into consideration in assessing the reasonableness of an employee’s failure to recognize an overpayment.<sup>11</sup> Furthermore, where a reasonable person would have made inquiry, but the employee did not, then he or she is not free from fault.<sup>12</sup>

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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* 34 C.F.R. Part 32 (2004)

<sup>8</sup> Although it may seem counterintuitive, the fact that the Department may have erred in making the overpayment does not relieve the overpaid person from liability. More precisely, although erroneous salary overpayments usually arise as a result of mistakes by those with the responsibility for making salary payments, the overpayment, nevertheless, is in excess of the amount authorized; therefore, the government has the right to recover the excess amount.

<sup>9</sup> *See* DOHA Case No. 02040401 (May 21, 2002).

<sup>10</sup> *See* 5 U.S.C. § 5584 and DOHA Case No. 99111916 (December 8, 1999) (Affirmed on Appeal December 12, 2000).

<sup>11</sup> *See In re Richard*, Dkt. No. 04-04-WA, U.S. Dep’t of Educ. (June 14, 2005).

<sup>12</sup> *See In re Vincent L. Brown*, Dkt. No. D 2003-118 (U.S. Dep’t of Int.) (August 5, 2004).

On February 1, 2005, Respondent states that she submitted documentation from her physician stating that she was unable to continue working due to pregnancy-related medical complications. Along with her medical documentation, Respondent also submitted a memo to her supervisor outlining both her anticipated leave usage and her requests for advance sick leave. According to Respondent she requested 40 hours of advance sick leave for each pay period in which she anticipated being absent. Respondent indicates that on February 1, 2005, she also enrolled in the Department's Voluntary Leave Transfer Program (VLTP).<sup>13</sup> Respondent asserts that she intended to use 40 hours of donated leave for each pay period along with the aforementioned requested advance sick leave.

Respondent claims that she was not aware of the overpayment until she received the Department's BoC. Respondent argues that the amendment of her time and attendance was taken over 30 days after the Payroll Coordinator released the LES. Respondent asserts that because of her enrollment in the VLTP she would not know from pay period to pay period what leave she would have acquired through the program, and consequently, would not know what her salary would be. Respondent states that another error resulted in a modification of the information she submitted in her flex sheet for Pay Period 04, which changed 24 hours of advance sick leave to LWOP.<sup>14</sup>

Respondent argues that she should not be held responsible for the overpayment at issue because she had no prior knowledge of the overpayment nor could she have anticipated it. Respondent further argues that being a participant in the VLTP hindered her ability to know both what her leave balance is and what amount to expect to be paid. Finally, Respondent asserts that her Executive Officer's statement that her February 1, 2005, memo to William Haubert was not located prior to the release of the time and attendance reports for Pay Period 05 should not be held against her.

LWOP means an absence from duty in a nonpay status.<sup>15</sup> In most cases, LWOP is granted at the employee's request. In most instances, granting LWOP is a matter of supervisory discretion and may be limited by an agency's internal policy.<sup>16</sup> Under the Department's promulgated

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<sup>13</sup> In accordance with the Federal Employees Leave Sharing Act of 1988, the Department adopted a VLTP in 1989. *See* Federal Employees Leave Act, Pub. L. 100-566 and U.S. Dep't of Educ. Personnel Manual Instruction, Voluntary Leave Transfer Program – Administrative Procedures, PMI 630-10 (October 2, 1989).

<sup>14</sup> In her September 30, 2005, Response, Respondent also argues that she was underpaid for Pay Period 04. The tribunal notes, however, Respondent's salary payment for Pay Period 04 is not before the tribunal. The tribunal further notes that Respondent received a notice of overpayment for Pay Period 04, and did not challenge this overpayment.

<sup>15</sup> 5 C.F.R. § 630.1202.

<sup>16</sup> *See* Leave Without Pay, available at <http://www.opm.gov/oca/leave/HTML/lwop.htm>.

guidance on LWOP, an employee upon request may be granted LWOP regardless of length of service, type of appointment, or amount of annual and sick leave to their credit.<sup>17</sup> At the Department, LWOP is a matter of supervisory administrative discretion.<sup>18</sup>

Under the VLTP, Department employees may transfer part of their unused accrued annual leave to other federal employees having medical or family medical emergency situations. Generally, a recipient may use transferred annual leave in the same manner and for the same purposes as if he or she had earned and received approval to use the leave with the exception that during each pay period a leave recipient is affected by the medical emergency, he or she shall use any accrued annual and/or sick leave before using transferred leave. Transferred annual leave may be retroactively substituted by the leave recipient for periods of LWOP or used to liquidate an indebtedness for advanced annual or sick leave granted on or after a date fixed by the Department's office running the VLTP.

In applying the fault standard to this case, the tribunal concludes that Respondent does not lack fault. A review of Respondent's flex sheet and Request for Leave or Approved Absence for Pay Period 05 reveals that Respondent requested 40 hours of advance sick leave and 40 hours of LWOP. Respondent signed and dated her request on February 18, 2005. Her request was approved on February 22, 2005. Respondent's time and attendance report was, however, coded as 80 hours of advanced sick leave (Pay Code 030). On March 16, 2005, Respondent's Payroll Coordinator filed an amended time and attendance report for Pay Period 05, recoding Respondent's leave as 40 hours of LWOP (Pay Code 101) and 40 hours of advance sick leave (Pay Code 030).

Respondent clearly and without question should have been on notice that she received an overpayment of salary when she was paid for 80 hours for Pay Period 05. Respondent herself requested and was approved for only 40 hours of advance sick leave for Pay Period 05. As Respondent herself requested 40 hours of LWOP, she should have anticipated receiving only half her salary or 40 hours of pay for Pay Period 05. Respondent not only had a duty to review her documentary records such as her LES,<sup>19</sup> her receipt of a full salary payment for Pay Period 05 should have immediately alerted her to an error.

Although Respondent was newly enrolled in the VLTP, she could not have expected to have 40 hours of leave credited to her donated leave account at the time she received her salary for Pay Period 05. In fact, Respondent's application to be a leave recipient was not approved until March 21, 2005. Although the effective date of the medical emergency began on February 1, 2005, there was no opportunity for a balance of donated leave to accrue by the end of Pay Period 05 – which occurred prior to her approved enrollment in the VLTP. At a later date, it

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<sup>17</sup> See U.S. Dep't of Educ. Personnel Manual Instruction, Non-Pay: Absence without Leave (AWOL) and Leave without Pay (LWOP), PMI 630-8 (May 11, 1981).

<sup>18</sup> *Id.*

<sup>19</sup> See *In re Anh-Chau*, Dkt. No. 05-01-WA, U.S. Dep't of Educ. (June 17, 2005) and *In the Matter of Ray E. Lundquist*, Dkt. No. D-2003-105 (U.S. Dep't of Int.) (June 21, 2004).

may have been possible for transferred leave to be used to ameliorate advance sick leave owed to the Department or to reimburse the employee for periods of LWOP, however, this is not the issue before the tribunal. In fact, the transferred leave Respondent received under the VLTP was exhausted by absences subsequent to Pay Period 05 and necessitated by her then ongoing medical emergency. Consequently, Respondent should have been on notice at the time she received her salary for Pay Period 05 that an overpayment had occurred.

### **CONCLUSION**

The tribunal finds that Respondent should have known that an error in salary payment existed. Therefore, 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 threshold factors warranting waiver, Respondent's request for waiver is **DENIED**.

So ordered, this 11 day of October 2005.

A handwritten signature in black ink that reads "Greer Hoffman". The signature is written in a cursive style with a large, sweeping flourish at the end.

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Greer Hoffman  
Waiver Official