



## UNITED STATES DEPARTMENT OF EDUCATION

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In the Matter of  
**JAY,**

**Docket No. 05-25-WA**  
Waiver Proceeding

Respondent

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### DECISION GRANTING WAIVER

At issue in this case is whether Respondent, a former employee of the U.S. Department of Education (Department), should be granted waiver of a debt based on an overpayment of salary arising from the Department's erroneous calculation of locality pay during 1998 and 1999. For the reasons that follow, I find that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

#### DISCUSSION

##### I.

The pertinent statutory authority for waiver of a salary overpayment is set forth 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 Department's *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>2</sup> and jurisdiction is proper because this case clearly involves

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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 Waiver Statute); *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, more fully, the statutory framework governing all salary overpayment debt collection) and 5 U.S.C. § 5514 and 31 U.S.C. § 3716 (these statutory sections constitute significant provisions of the Debt Collection Improvement Act of 1996, Pub.L. No. 104-134, April 26, 1996, 110 Stat. 1321). *See also* government-wide regulations issued by the Office of Personnel Management (OPM) (5 C.F.R. Part 550, Subpart K) and overpayment procedures on the Office of Hearings & Appeals website at: [www.ed-oha.org/overpayments/](http://www.ed-oha.org/overpayments/)

<sup>2</sup> *See*, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

an erroneous payment of pay subject to waiver under the Waiver Statute at 5 U.S.C. 5584.<sup>3</sup>

The resolution of this case is based on the matters accepted as argument and evidence in the proceeding. The record in this case is unusually extensive, and includes Respondent's submission of a sworn written statement (and the documents attached therein), Leave and Earning Statements (LES) covering the pay periods at issue in 1998 and 1999, a copy of Respondent's September 9, 1999 electronic message addressed to officials in Human Resources concerning the BoCs, copies of two BoCs dated July 30, 1999, a copy of an August 24, 1999 letter addressed to Respondent from Linda Barnes, a debt collection official from the Department's Human Resources Systems Team, and copies of the Department's Bills of Collection and Notices of Salary Overpayment applicable to this case. The Department's Human Resources as well as the Department of Interior's Payroll Processing Section (DOI) submitted copies of detailed Federal Personnel Payroll System Records on salary payments to Respondent for 1998 and 1999.

## II.

Under the Federal Employees Pay Comparability Act (FEPCA),<sup>4</sup> Congress, among other things, modified the annual computation of pay for most Federal employees by adopting a compensation calculation that added to basic pay a locality-based payment. Each year since FEPCA's enactment, under the modified calculation, most Federal employees receive the sum of a two-part annual pay adjustment: an across-the-board pay adjustment of basic pay and an adjustment of pay that varies by locality. Generally, an employee's position of record and corresponding official duty station are determinative of an employee's applicable locality. For example, Federal employees whose official duty station is New York, New York may receive a different annual locality pay adjustment than those whose official duty station is Los Angeles, California. Although the rates of locality pay for any given year are set by law, Federal agencies are responsible for performing locality pay calculations for their employees.

Respondent's official duty station for 1998 and 1999 was Kansas City, Missouri. In 1998 and 1999, the statutory locality payments ranged from 5.42 percent to 12.06 percent of pay and from 5.87 percent to 13.06 percent of pay, respectively.<sup>5</sup> In 1998, Respondent was paid at a rate of pay of \$26.73 per hour instead of \$26.52 per hour, and in 1999 was paid at a rate of \$27.70 per hour instead of \$27.45 per hour. This error stems from calculating Respondent's payment of pay by reference to the locality pay adjustments for Dallas, Texas, instead of Kansas City, Missouri. It is undisputed that during 1998 and 1999, the Department erroneously paid Respondent a locality pay adjustment appropriate for Federal employees whose official duty station is Dallas, Texas rather than Kansas City, Missouri. Since the locality pay adjustments for Dallas exceeded those for Kansas City, the error resulted in Respondent receiving pay in

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<sup>3</sup> An erroneous salary overpayment is created by an administrative error in an employee's pay. The fact that the agency erred in making an overpayment does not relieve the overpaid employee from liability. *See, In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

<sup>4</sup> Pub. L. No. 101-509, 104 Stat. 1465 (1990).

<sup>5</sup> See Definitions of 1998 Locality Pay Areas, <http://www.opm.gov/oca/98TABLES/GSANNUAL/HTML/locality.htm> and Definitions of 1999 Locality Pay Areas, <http://www.opm.gov/oca/99TABLES/GSannual/html/locdef.htm>. For purposes of clarity and relevance, the somewhat intricate calculation of locality pay is referred to in a simplified form throughout this decision.

excess of what he was entitled to receive.<sup>6</sup>

On September 1, 1999, the Department's Human Resources System Team (Human Resources) authorized issuance of two Bills of Collection (BoC)<sup>7</sup> indicating that Respondent owed a debt to the Department in the amount of \$152.89 regarding overpayments occurring in 1998<sup>8</sup>, and owed a debt to the Department in the amount of \$121.00 regarding overpayments occurring in 1999.<sup>9</sup> The total debt at issue is \$273.89.

Respondent timely requested waiver of the overpayment for each BoC. For reasons unknown, the Department did not carry out an action in response to Respondent's request until on October 14, 2005, when Respondent's case was transferred to the Office of Hearings & Appeals for resolution. On November 1, 2005, I issued an order requesting Respondent's submission of argument and evidence supporting his position that the debt in this case should be waived. In response to my order, Respondent identified the seven-year passage of time between his request for waiver and now, and his good-faith attempts to resolve this matter in 1998 as equitable arguments warranting waiver.

### III.

The standard for determining whether waiver is appropriate requires a consideration of two factors; namely, (1) whether there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of Respondent, and (2) whether Respondent can show that it is against *equity and good conscience* to recover the overpayment.<sup>10</sup> In applying the first factor to the facts and issues in this case, I find that Respondent shows that there is no indication of fraud, misrepresentation, fault, or lack of good faith.

Respondent provided Human Resources with notice in October 1998 that he had been overpaid as a result of an administrative error in the calculation of his pay by payroll; thereafter, Human Resources issued a BoC, which Respondent promptly repaid. Respondent's repayment, however, did not end the matter. Apparently, the Department made errors in the calculation of the debt in the initial BoC; subsequently, two additional BoCs each dated August 2, 1999 were issued seeking repayment of salary overpayments totaling \$3,696.86. After Respondent provided proof that the debts covered by the August 2, 1999 BoCs had been repaid, Linda Barnes, a Human Resources official, sent a letter dated, August 24, 1999, to Respondent indicating that the August 2, 1999 BoCs had been cancelled because Respondent's "debt to the Department ha [d] been satisfied in full." Attached to Barnes' letter was a copy of an

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<sup>6</sup> The calculation of locality pay may involve errors because of factors related to the peculiar circumstances of an employee's pay such as an annual pay adjustment accompanying an increase in salary due to a promotion or a statutory change in a locality area. Respondent contends that he was promoted in 1998, and that the erroneous calculation of locality pay is related - - at least in time - - to that event. This error also was reflected in inaccuracies in Respondent's additional pay for law enforcement duties.

<sup>7</sup> As a matter of record, Human Resources identifies the BoCs for 1998 and 1999 under file numbers 99LCBBE8 and 99LCBBE9, respectively.

<sup>8</sup> This BoC sought recovery of overpayments for pay period 19 of 1998 and continuing through pay period 01 of 1999.

<sup>9</sup> This BoC sought recovery of overpayments for pay period 02 of 1999 and continuing through pay period 07 of 1999.

<sup>10</sup> See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

“Authorization to Terminate Bill of Collection Request” signed and approved on August 24, 1999.<sup>11</sup> That action, too, did not end the matter since eight days later, on September 1, 1999, the Department authorized issuance of the two BoCs at issue here, which cover the same pay periods as the August 2, 1999 BoCs.

Respondent’s initial discovery of the payment error and his prompt satisfaction of the debt identified in the initial BoC are viewed in a favorable light. Respondent acted consistent with an employee’s duty to resolve erroneous salary payments as soon as he knows of the erroneous compensation. Moreover, the erroneous payments were made as a result of an administrative error for which there is no indication of fraud, misrepresentation, or lack of good faith on Respondent’s part. As such, this case comes within the clear ruling of *In re Cheryl*, Dkt. No. 05-28-WA, U.S. Dep’t of Educ. (February 17, 2006) (*Cheryl*). In *Cheryl*, the waiver official held that where there is no otherwise indication of fault, an employee who promptly offers to repay or actually repays a salary overpayment satisfies the initial factor for determining whether waiver is appropriate.

Notwithstanding the aforementioned, the ultimate question of whether waiver may be granted also requires a showing that it is against equity and good conscience for the Federal government to recover the overpayment. As noted by the Department’s prior waiver decisions, the phrase “against equity and good conscience” is neither defined by statute, nor circumscribed by pure bright-line rules. Even so, our waiver decisions have adopted a number of factors pertinent to determining whether collection of a claim against an employee is against equity and good conscience, including the following: (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; (c) whether recovery of the claim would impose an undue financial burden upon the debtor under the circumstances, (d) whether the time elapsed between the erroneous payment and discovery of the error and notification of the employee is excessive, (e) whether an agency’s response to inquiries regarding an overpayment is unreasonably excessive, and (f) whether an agency’s handling an overpayment case demonstrates gross negligence.<sup>12</sup>

Respondent argues that even if the calculation of overpayment in the initial BoC was inaccurate, given the August 24, 1999 letter from Barnes, it is against equity and good conscience for the Department to issue BoCs after notifying the employee that the debt was fully satisfied.<sup>13</sup> In addition, Respondent argues that seven years for resolution of his waiver request is an extensive amount of time for closure of a debt collection action. In light of Respondent’s arguments, notwithstanding that the September 1, 1999 BoCs accurately identify a modest portion of a debt that remains unpaid, I am persuaded that collection of the debts identified in the September 1, 1999 BoCs would be inequitable.

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<sup>11</sup> Notably, on its face, the cancelled BoCs covered precisely the same pay periods at issue here, notwithstanding that the earlier debt also included erroneous law enforcement pay.

<sup>12</sup> See, e.g., *In re David*, Dkt. No. 05-22-WA, U.S. Dep’t of Educ. (Dec. 14, 2005); *In re William*, Dkt. No. 05-11-WA, U.S. Dep’t of Educ. (October 19, 2005); *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep’t of Educ. (July 22, 2005).

<sup>13</sup> The September 1, 1999 BoCs facially appear to concern the same matter as the cancelled August 2, 1999 BoCs.

To begin with, the seven-year time period that elapsed during the pending resolution of Respondent's case is excessive. Undeniably, seven years is beyond what would be customary or expected to resolve a waiver request in a debt collection action.<sup>14</sup> Waiver requests are viewed as administrative appeals that should be resolved or adjudicated in a relatively expeditious manner. The Department's *Salary Overpayment Handbook* advises that waiver requests be resolved within 60-days of receipt of the request. Mindful of that policy, it may nonetheless be presumed that a number of circumstances could require extending the time period beyond 60-days, however, no such presumption is warranted for enlarging a 60-day time period beyond 60-months. What is more, despite the extensive record in this proceeding, there is no apparent explanation for the seven-year delay. Of course, even if the Department could assert a basis for the extensive delay in resolving Respondent's waiver request, it is doubtful that such a delay could be deemed reasonable. In the balance of equities, it must be regarded that a seven-year delay in adjudicating a waiver request doubtlessly is detrimental to a debtor's interests.

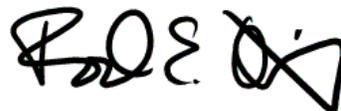
Underscoring the factors favoring equity in this case are the errors in the calculation of Respondent's salary overpayment for the pay periods at issue. No less than five BoCs were issued covering pay periods during 1998 and 1999. The Department apparently made errors in the calculation of the debt in the initial BoC; that notwithstanding, Respondent repaid the debt as required. Thereafter, additional BoCs were issued, cancelled, and reissued. This unusual treadmill of errors runs counter to Respondent's interest in the finality of form and substance of the debt collection process. This is especially so, given the unambiguous statement in the Barnes August 24, 1999 letter identifying that Respondent's debt had been "satisfied in full." Reissuing the BoCs after the Barnes letter was issued had the effect of undermining the importance and reliability of the government's action in canceling the BoCs and rendering a conclusion that a debt is satisfied.

Based on the aforementioned, I find that in equity and good conscious and in the interests of the United States waiver should be granted. This decision constitutes a final agency decision.

#### ORDER

Pursuant to the authority of 5 U.S.C. § 5584, Respondent's entire debt to the United States Department of Education in the amount of \$273.89 is **HEREBY WAIVED**.

So ordered this 18<sup>th</sup> day of April 2006.



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Rod Dixon  
Waiver Official

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<sup>14</sup> See *In re Cheryl*, Dkt. No. 05-28-WA, U.S. Dep't of Educ. (February 17, 2006) (holding that over seven years - - or nearly eight - - is beyond what would be customary or expected to resolve a waiver request).