



## UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS

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In the Matter of

**VALERIE,**

**Docket No. 06-09-WA**

Waiver Proceeding

Respondent

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### **DECISION GRANTING WAIVER**

Respondent, a U.S. Department of Education (Department) employee, requested waiver of a salary overpayment debt arising from the Department's premature award of Respondent's within-grade salary increase causing the employee to be paid at a higher hourly wage than due. For the reasons that follow, I find the waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

### **JURISDICTION**

Respondent's waiver request arises under 5 U.S.C. § 5584, authorizing 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 promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 *seq.*) and its *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04)(June 2005), specifically delegated the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).<sup>2</sup>

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 the proceeding. The record in this case includes Respondent's initial

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<sup>1</sup> See General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828; see also *In re Tanya*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 18, 2006) at 1, n. 1.

<sup>2</sup> Respondent's request for a waiver was filed with the Human Resources Services (HRS) office on January 13, 2000. Cases predating the delegation of OHA's waiver authority were not automatically transferred to OHA. On April 26, 2006, this waiver request for file No. 00LCB424 was transferred to OHA.

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

request for waiver and documents compiled by the Department's Human Resources office, including Federal Personnel Payroll Systems (FPPS) printouts covering pay detail for PP24/99, SF-50/52 data, employment history data, and copy of the BoC. The record also includes an Investigative Report prepared by the Human Resources Team.<sup>4</sup> This decision constitutes a final agency decision.

### **Procedural History**

According to the January 3, 2000, Notice of Debt Letter and attached Bill of Collection (BoC), the \$ 63.97 overpayment arises from the Department's promotion of Respondent incorrectly to a GS-07/07 level, instead of the GS-07/05 level as she was due. The BoC was generated on December 15, 1999. The promotion action and the correction action were both processed according to the FPPS tracking systems on the same day, November 7, 1999. In initiating the promotion, an SF-50 shows the promotion from a GS-05/00 to a GS-07/07 (hourly rate, \$15.82), with effective date of November 7, 1999. However, another SF-50 form processed on the same date shows a correction of GS-07/00 to GS-07/05 (hourly rate of \$14.94).

The award of the wrong step led to Respondent receiving the higher hourly rate than she was due. Consequently, for PP24 of 1999, the higher hourly salary of \$15.82 was paid for a total of 80 hours, instead of the correct hourly salary of \$14.94. Payment of this higher \$0.88 hourly salary differential resulted in an overpayment of \$70.40, less deductions, for the sum of \$63.97. The hourly rates of pay are handwritten on the respective FPPS SF-50 forms. These forms were computer generated on December 8, 1999, and are not the hard copy SF-50s sent to the employee.

Respondent asserts that she became aware of a pay discrepancy by comparing her leave and earnings statements. For pay period 24 of 1999 her LES showed her promotion to the GS-07/07 grade level; however her subsequent LES reflected the grade level lowered to a GS-07/05 and a decrease in salary. The promotion was from Respondent's GS-05/00 grade level. Respondent says upon noticing this decrease in salary, she immediately brought this matter to the attention of her personnel specialist for her organization. She learned after a period of about 45 days from her personnel specialist that personnel had made an error in calculating her promotion and went back to correct it. Respondent contends that a waiver of the debt is warranted because through her own diligence she discovered the salary difference and made inquiry to the appropriate officials, the personnel specialist for her organization.

By letter dated January 13, 2000, Respondent filed a timely request for waiver. Respondent's request for a waiver was originally filed with the Department's Human Resources Office. On April 27, 2006, Respondent's request for waiver was transferred to OHA. On May 15, 2006, an Order Governing Proceedings was issued, giving Respondent an opportunity to supplement the record. Respondent relied upon her original submission and did not file an additional response with the tribunal.

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<sup>4</sup> February 2, 2000 investigation report by Linda Barnes of Human Resources' Team for this salary overpayment.

## **Discussion**

Waiver is an equitable remedy.<sup>5</sup> To secure a waiver of an erroneous payment of pay, a debtor must demonstrate that he or she is not at fault in accepting, or not recognizing, an erroneous payment of pay. The debtor also must demonstrate that collection of the debt would be against equity and good conscience, and not in the best interests of the United States. At issue in this proceeding is whether Respondent's arguments and submissions support a request that a portion or the entire erroneous salary overpayment be waived.

In waiver cases, the fault standard is a broad one, not limited to a debtor's acts or omissions. Fault is determined by assessing whether, under the particular circumstances, a reasonable person should have known or suspected that he or she was receiving an overpayment of salary.<sup>6</sup> If an employee has records at his or her disposal, which, if reviewed would indicate a salary overpayment, and the employee fails to review those documents, the employee is not without fault.<sup>7</sup>

## **Fault Standard**

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 case law and regulations promulgated by the Department. In a waiver proceeding, the debtor acknowledges the validity of the debt; consequently, issues regarding the existence or the accuracy of debt are not before the tribunal.

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 rate of pay." As the BoC identifies the Employee has been overpaid \$70.40 during PP 9924, which after deductions amounts to the \$63.97 overpayment. The employee was erroneously paid an hourly rate of \$15.82. The employee should have been paid at \$14.94. This kind of debt 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>8</sup>

Respondent had no knowledge that the Department made this mistake in her salary until after she received the second payroll statement with the promotion, and compared it with the first payroll statement, so contends she is without fault for this. She did act swiftly and responsibly to clarify why she received one higher salary payment than the following one. In doing this, she may have avoided a continuing payroll problem. Respondent admits she did not understand the decrease in salary between the

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<sup>5</sup> See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

<sup>6</sup> See *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (Nov. 9, 2005).

<sup>7</sup> See *In re Cynthia*, Dkt. No. 05-16-WA, U.S. Dep't of Educ. (October 31, 2005), *In re Jerry*, Dkt. No. 05-29-WA, U.S. Dep't of Educ. (February 16, 2006).

<sup>8</sup> 34 C.F.R. § 32.5 (2004).

two pay periods but seeing that decrease caused her to be concerned about whether her salary payments were accurate. Respondent was monitoring changes here and asked for clarification after the fact of the decrease. Respondent did not cause the salary correction to be made; that was already done by personnel, but she questioned it appropriately with concern for salary accuracy as soon as she had reason to do so. At no time was there an attempt on her part to misrepresent or defraud the Department.

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>9</sup> Notably, fault may derive from an act or a failure to act.<sup>10</sup> As probative here, we will focus on what impacted Respondent's ability to act in this case.

Since Respondent here believed she had received her promotion correctly and would have had no reason to suspect or look for and find a salary error under the circumstances, we will go on to review pertinent considerations in finding whether she should have known about an error in pay and if her actions were reasonable.<sup>11</sup> As a starting point, it would be extremely difficult for an employee like Respondent to recognize or even discover a salary overpayment occurred, because of the minimal dollar differential in her pay. The hourly rate difference in salary amounts she received was less than a dollar an hour (\$0.88). Aside from the minimal monetary rate difference, it was erroneously paid for a short time. The payment occurred over 80 hours in one pay period, PP 24/99. Thus, because of the minor salary impact, Respondent may have faced additional challenges to her ability to effectively monitor her pay to ensure accuracy.

Next, Respondent's Management Analyst position<sup>12</sup> does not reflect fiscal or accounting duties or training in matters involving compensation or monetary supervision. A person with such training or duties would be expected to more readily discern pay discrepancies arising from even minor salary differences as occurred here.

In addition, the Department's Investigative Report in February 2000<sup>13</sup> adopts the conclusion that the employee was not aware of the overpayment and there is no reason the employee should have known. As such, the employee may not have failed in her duty to ensure her pay was accurate. The Report, while noting that the employee was not responsible for calculating her promotion, unequivocally recommended that the employee's request for waiver be granted.

In light of all these circumstances, Respondent's actions were reasonable and showed due diligence. Respondent cannot be found at fault from an act or a failure to act. Without fault, the threshold factors for a waiver have been met and a waiver may be

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<sup>9</sup> See *In re Richard*, Dkt. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

<sup>10</sup> *Id.* In this regard, unlike fraud, fault does not require a deliberate intent to deceive.

<sup>11</sup> See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005), which references the Dep't of Treasury's Standards for Waiver, at ft. 13.

<sup>12</sup> Report prepared by Linda Barnes, HR Staff, for File #00LCB424, recommends dispositive action favorable to the employee

<sup>13</sup> Investigative Report, *supra*.

granted in this case, unless a balancing of the equities does not fall in Respondent's favor. That is the next prong in the analysis of whether or not to grant Respondent a waiver.

### **Equity and Good Conscience**

Next, the tribunal must determine whether collection of the debt would be against equity and good conscience. To secure equity and good conscience, an individual must have acted fairly, without fraud or deceit and in good faith.<sup>14</sup> The tribunal must balance equity concerns in light of the particular facts of the case.<sup>15</sup> There is no evidence in this case suggesting Respondent did not act in good faith or would be aware of the overpayment (caused by two actions initiated by Human Resources Personnel on the same date, November 7, 1999.) Respondent says after her inquiry there was a delay of some 45 days to receive clarification as to why personnel took corrective action and explain to her what the correct salary payment was.<sup>16</sup> The ability to discover an overpayment by personnel's contemporaneous actions in this case was clearly challenging, if not impossible, under the circumstances. Despite this, her actions to then correct the salary problem were reasonable. Factors supporting a waiver of the debt include Respondent's timely bringing the salary error to the attention of persons responsible for correcting it, the amount of the debt, and the significant length of time which has elapsed since Respondent requested the waiver. Since collection of debts has been struck down when pursuit of the debt is "beyond the bounds of what is customary or reasonable; ridiculously or unjustly excessive...,"<sup>17</sup> the lengthy delay in resolving this matter, over seven years since its initiation, leads to the conclusion that recovery here would be unconscionable. Consequently, waiver of the overpayment here would not be against equity and good conscience.

On the basis of the aforementioned, the tribunal finds that Respondent is without fault for the overpayment, and that it would be against equity and good conscience to deny waiver under the circumstances. Accordingly, waiver of Respondent's debt is warranted.

### **ORDER**

Respondent requested waiver of the entire debt. Having found that the circumstances of this case conform to the threshold factors warranting waiver, Respondent's request for waiver of the \$63.97 overpayment is **GRANTED**.

So Ordered this 2nd day of August 2006.

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Nancy S. Hurley  
Waiver Official

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<sup>14</sup> See 5 U.S.C. § 5584 and *In re Anh-Chau*, Dkt. No. 05-01-WA, U.S. Dep't of Educ. (June 17, 2005).

<sup>15</sup> See *In re Jay*, Dkt. No. 06-01-WA, U.S. Dep't of Educ. (June 23, 2006).

<sup>16</sup> Respondent's January 13, 2000 letter seeking waiver identifies a lag time of 45 days for personnel to advise her office they had made an error in calculating her promotion.

<sup>17</sup> See *Aguon v. Office of Personnel Management*, 42 M.S.P.R. 540, 50 (1989); See *In re Leo*, Dkt. 05-27-WA, U.S. Dep't of Educ. (December 23, 2005).