



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202-4616

TELEPHONE (202) 619-9700

FACSIMILE (202) 619-9726

In the Matter of

ELIZABETH,

Respondent

Docket No. 06-46-WA
Waiver Proceeding

DECISION GRANTING WAIVER

At issue in this case is whether an employee of the Department of Education (Department) should be granted waiver of a debt arising from an overpayment of salary in the amount of **\$1,022.92**. The debt resulted from an erroneous payment of salary paid to Respondent after the term of the temporary promotion had expired. For the reasons that follow, I find that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted, and Respondent is entitled to a refund.

I.

The facts are undisputed, and the resolution of this case is based on matters accepted as argument and evidence. The record includes a copy of a signed letter of acceptance of temporary promotion dated March 3, 2003, a copy of Respondent's Leave & Earning Statement for the pay period ending on November 29, 2003, copies of three Notices of Personnel Action relating to the temporary promotion at issue, printed copies of email communications between Respondent and the waiver official, Respondent's signed and sworn written statement dated September 25, 2006, a copy of a notice of debt letter dated December 10, 2003, and a copy of a Bill of Collection (BoC) dated November 25, 2003.

The debt in this case arises from an error concerning the term of appointment for Respondent's temporary promotion. A debt may arise if an employee is paid a salary for a period that exceeds the term of appointment. Under Personnel Manual Instruction (PMI) 335-1 (Jan. 11, 1993, as amended, April 12, 2000), competitive procedures must be followed in personnel actions resulting in a temporary promotion that *exceeds* 60-days for bargaining unit positions. Similarly, a collective bargaining agreement binds the Department to using competitive procedures to fill positions involving temporary promotions. In effect, the Department's merit promotion plan as set forth in the PMI and the collective bargaining

agreement impose a 60-day restriction on the Department's discretion to select and appoint an employee to a position that results in a temporary promotion, if the position is included in the bargaining unit. To temporarily promote an employee to a position in the bargaining unit for a term that exceeds 60-days, the Department must follow competitive procedures for selection and appointment.

On March 13, 2003, Respondent signed an acceptance letter dated March 7, 2003 for a temporary promotion to the position of "Education Program Specialist," which is a position in the bargaining unit. Respondent was promoted from GS-12 to GS-13. The acceptance letter informed Respondent that the term of her promotion would not exceed "120 days." Respondent was issued a Notice of Personnel Action (also known as a Standard Form 50 or SF 50) with an approval date of March 7, 2003. The SF-50 also indicated that the effective date of Respondent's promotion was March 9, 2003, and that Respondent's temporary promotion could not exceed July 6, 2003.¹ As noted *supra* and in light of the Department's promotion plan, Respondent's acceptance letter and her March 7, 2003 SF-50 erroneously indicated or authorized Respondent's appointment for 120-days.²

On August 4, 2003, the Department issued a corrective SF-50 indicating that Respondent's temporary promotion was effective from March 9, 2003 through May 7, 2003. An additional corrective SF-50 also was issued on August 4, 2003 that retroactively changed Respondent's pay status to GS-12 effective May 8, 2003, rather than July 7, 2003. The effect of these corrective measures was to invalidate the pay rate of 370 hours of Respondent's pay. Respondent had been overpaid between May 8, 2003 and July 12, 2003 while she continued to work as an Education Program Specialist.

II.

The pertinent statutory authority for waiver of a salary overpayment is set forth by 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.³ 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

¹ The "remarks" box on the SF-50 indicated that Respondent's promotion was not to exceed March 3, 2003. This is assumed to be a conspicuous error that both the Department and Respondent ignored.

² This error is likely to be the result of applying the default rule under the Department's promotion plan that is applicable to positions that are not in the bargaining unit; for those positions, competitive procedures must be followed if the temporary promotion exceeds 120-days. *See also*, 5 C.F.R. § 335.103(c)(3)(iii) (OPM providing any agency the discretion to select and appoint an employee to a temporary promotion for 120-days or less without complying with competitive procedures).

³ 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/

authority on behalf of the Secretary. The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁴ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. 5584.⁵

Respondent argues that a waiver of the entire debt is warranted. In Respondent's view, she is not at fault for the erroneous salary payments, and it is "unfair" to "penalize" her for an error she neither caused, nor could have recognized as having occurred. In addition, Respondent asserts that she believed that her temporary appointment was for 120-days as indicated by the signed letter of acceptance of temporary promotion dated March 3, 2003. Respondent also points out that the only SF-50 she received during her temporary appointment - - the SF-50 dated March 7, 2003 - - indicated that the appointment would not exceed 120-days. On this basis, Respondent argues that she was unaware that she had been erroneously overpaid and, therefore, could not have alerted the Department to the erroneous payments. Building upon this claim, Respondent argues that the Department erred in making the overpayment and, thus, is, itself, at fault for the overpayment. According to Respondent, the personnel rules regarding the proper term of appointment for a temporary promotion were unknown by her and appear to have been unknown by the officials who drafted her acceptance letter. Respondent further argues that waiver is warranted because she performed the same job functions and duties as required by the temporary job assignment throughout the period that she was overpaid.

In a waiver proceeding, the debtor acknowledges the validity of the debt or urges an absence of any reason to recognize the overpayment as an erroneous payment; consequently, issues regarding the existence or the accuracy of debt are not before the tribunal. 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,⁶ or lack of good faith on the part of Respondent, and (2) whether Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment.⁷ Measured against these factors, fault is examined in light of the following considerations: (a) whether there is an indication of fraud; (b) whether the erroneous payment resulted from an employee's incorrect, but not fraudulent, statement that the employee under the circumstances should have known was incorrect;⁸ (c) 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 (d) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.⁹

⁴ See, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

⁵ Under the waiver decisions issued by the Comptroller General interpreting 5 U.S.C. § 5584, "pay" has been held to include "nonpay" or nonsalary compensation, which covers recruitment bonuses, accrual of annual leave, health and life insurance premiums, retention allowances, and all forms of remuneration in addition to salary. See, U.S. Government Accountability Office, *Scope of Waiver Authority*, B-307681 (May 2, 2006).

⁶ In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

⁷ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

⁸ Broadly stated, under the fault standard, the scope of Respondent's duty extends to include 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. See, *In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (October 19, 2005).

⁹ 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).

Guided by the facts and issues pertinent to this case in applying the fault standard, I find that there is no misrepresentation, fraud, fault, or lack of good faith on Respondent's part. As has been made evident by our prior cases, it is fundamental to the analysis of when waiver may be granted that when an employee fails to review documentary records, including notices of personnel action and/or leave and earning statements, which, if examined, would have shown or identified an overpayment and provided the employee with an opportunity to correct the overpayment, the employee is not free of fault. Applying this standard to the facts, I find Respondent's presentation persuasive that she neither knew nor should have known that the salary payments at issue were erroneous.

To reach a determination on fault, the aforementioned factors are examined in light of the scope of Respondent's on-going duty to know and a duty to inquire, when appropriate, about the accuracy of her salary payments. The scope of Respondent's duty includes the obligation 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.¹⁰

The paradigm for resolving the fault standard in a temporary promotion case is set forth in the case of *In re Richard (Richard)*.¹¹ In *Richard*, the tribunal addressed the standard for granting waiver of a debt arising from a salary overpayment involving an employee who was in a temporary appointment.¹² In that case, a supervisory employee was paid at the salary rate of his temporary promotion, GS-15/4, for two pay periods for which he should have been paid at the GS-14/7 salary rate because his temporary promotion had expired. The tribunal held that the employee did not lack fault for the overpayment because the employee had failed to inquire about or dutifully track the expiration of his 120-day temporary appointment. An important factor in that case included the fact that the employee was a supervisory employee who had been temporarily promoted to an acting director position paid at the GS-15 level. The tribunal concluded that as a result of the employee's grade level and position of responsibility, the employee should have known when his appointment was scheduled to expire.¹³

Applying *Richard* to the case at bar, the tribunal concludes that Respondent could not have alerted the Department to an erroneous payment because she neither had reason to know, nor did know that she was working in the temporary position beyond the point appointed.¹⁴ During the temporary promotion, Respondent was informed that the appointment would not exceed 120-days, and it did not do so. Consequently, even the most careful review of the employee's salary payment for accuracy would not alert Respondent to consider whether she was being overpaid. Moreover, there were no bank statements and/or electronic fund transfers of

¹⁰ See, e.g., 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").

¹¹ *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

¹² *Id.*

¹³ *Id.*

¹⁴ Strictly speaking, Respondent's SF-50 authorized her pay throughout the time she was paid. The Department did not invalidate that authorization until it issued a corrective SF-50 after the 120-day period had expired.

salary payments to track to verify whether Respondent's pay was accurate since Respondent's pay reflected the pay rate during the time period Respondent was expected to be in the temporary appointment. Nor were there discrepancies to question or unanticipated balances from salary payments to inquire about; indeed, Respondent had no basis to question whether she was legally authorized to remain in a temporary promotion for 120-days. Respondent's appointment acceptance letter as well as the only existing SF-50 consistently disclosed that her appointment was not to exceed 120-days.¹⁵ Accordingly, I find that there is no indication of fault on Respondent's part.

III.

Having found no fault or lack of good faith on Respondent's part, the remaining question is whether it is against equity and good conscience for the Federal government to recover Respondent's debt. The tribunal's waiver decisions have adopted a number of factors pertinent to determining whether collection of a salary overpayment 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 or affects the magnitude of the debt, (e) whether an agency's response to inquiries regarding an overpayment is unreasonably excessive, (f) whether an agency's handling an overpayment case demonstrates gross negligence, and (g) whether the cost of collecting the claim equals or exceeds the amount of the claim.¹⁶

¹⁵ The SF-50 does indicate that Respondent's bargaining unit status was "0030." Although the code indicates that the position is assigned to the bargaining unit, I am not convinced that it is reasonable to conclude that the significance that status with regard to the term of a temporary promotion is within the scope of knowledge of employees who are neither supervisors nor trained in matters pertinent to human resources. *See e.g., 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) (noting that "where an employee is promoted to a higher grade but the step level for the employee's new grade is miscalculated, it may be appropriate to conclude that there is no fault on the employee's part because employees are not typically expected to be aware of and understand the rules regarding determination of step level upon promotion. On the other hand, a different conclusion as to fault potentially may be reached if the employee in question is a personnel specialist or an attorney who concentrates on personnel law.").

¹⁶ *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), and U.S. Dep't of Energy Order 533.1, *Collection from Current and Former Employees for Indebtedness to the United States*, (September 26, 2003), at <http://www.directives.doe.gov/pdfs/doe/doetext/neword/533/o5331.html>. The aforementioned factors notwithstanding, when reading meaning into the phrase "equity and good conscience" one necessarily draws upon precepts of fairness and justice rather than confining judgment to rigid rules of uncommon meaning. *See, e.g., Perrin v. United States*, 444 U.S. 37 (1979) and *Gilles v. Department of Human Resources Development*, 11 Cal.3d 313 (1974).

In the case at bar, Respondent states that it is against equity and good conscience to recover the debt because throughout the term of her temporary promotion she performed the work of an Education Program Specialist at the GS-13 level with the same level of responsibilities. In addition, Respondent argues that it is against equity and good conscience to collect the debt because the debt arose as a result of the Department's error and that she is unfamiliar with policies or procedures applicable to bargaining unit members. In Respondent's view, she had no basis to conclude that the acceptance letter or the SF-50 was erroneous. Finally, Respondent notes that the fundamental unfairness in the collection of the debt is illustrated by the fact that the Department initiated debt recovery in the pay period ending November 29, 2003; in that pay period the Department recovered \$343.35 of the debt through involuntary salary offset. According to Respondent, the offset occurred prior to receipt of a notice of debt collection.

As observed *supra*, there is neither a hint nor an explicit account in the record to support a conclusion that Respondent was aware she was being overpaid; indeed, Respondent has submitted a sworn statement to the contrary. More directly, Respondent provides a persuasive argument that underscores why the balance of equities should disfavor collection of the debt in this case; namely, Respondent's November 29, 2003 Leave and Earning Statement shows that a salary offset occurred prior to issuance of the notice of debt collection. Under the Debt Collection Act of 1982, as amended, (DCA), a salary offset may not exceed 15 percent of an employee's disposable pay for any given pay period without written consent of the employee.¹⁷ What is more, the DCA contains specific statutory conditions precedent to an authorized salary offset, including requirements of procedural due process. Deducting a portion of the debt from Respondent's pay prior to complying with the DCA's requirements constitutes an equitable factor that could favor waiver of a debt. Beyond those factors, the tribunal is persuaded that Respondent performed the job functions and duties of her temporary promotion for 120-days, and did so under a reasonable expectation that the appointment was not to exceed 120-days. Under the circumstances, Respondent's performance of the duties of a GS-13 Education Program Specialist during the temporary promotion also favors waiver of the debt.

ACCORDINGLY, 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.

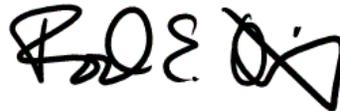
¹⁷ 5 U.S.C. § 5514(a)(1).

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 **\$1,022.92** is **HEREBY WAIVED**.

Pursuant to the authority of 5 U.S.C. § 5584(c) and upon timely request of Respondent, the United States Department of Education shall REFUND the repaid debt in the amount of **\$343.35**.

So ordered this 7th day of November 2006.

A handwritten signature in black ink, appearing to read "Rod Dixon", with a stylized flourish at the end.

Rod Dixon
Waiver Official