



## UNITED STATES DEPARTMENT OF EDUCATION

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In the Matter of

**KENNETH,**

Respondent

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**Docket No. 06-52-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 **\$8,029.31**. The debt resulted from an erroneous payment of salary paid to Respondent after the term of a grade retention expired under rules governing the implementation of reduction-in-force (RIF) procedures. For the reasons that follow, I find that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

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.<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 & APPEALS (OHA), which, thereby, exercises waiver authority on behalf of the Secretary. On July 20, 2006, Respondent's case was transferred to OHA for resolution. The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.<sup>2</sup> Jurisdiction is proper under the Waiver Statute at 5 U.S.C. 5584.<sup>3</sup>

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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).

## I.

The resolution of this case is based on matters accepted as argument and evidence. The record includes copies of three Notices of Personnel Action relating to grade and pay retention, a copy of a letter addressed to the Human Resources Systems Team, Debt Collection Coordinator, Linda Barnes, from Respondent dated October 9, 2001, Respondent's signed and sworn written statement dated September 6, 2006, a copy of a notice of debt letter dated October 3, 2001, and a copy of a Bill of Collection (BoC) dated September 1, 2001.

This case involves the effect upon salary of the implementation of RIF procedures. Since the full extent of the statutory and regulatory standards governing pay under RIF procedures are extensive and somewhat obscure, for the sake of clarity, only the standards applicable to Respondent's circumstance are identified in this decision.

Under RIF procedures, changes in an employee's pay that result in a demotion or lower graded position, wherein the change occurs as a result of a formal RIF notice, entitles an employee to the protections of grade and pay retention.<sup>4</sup> Generally, these protections provide an employee with the right to retain the grade (i.e., *grade retention*) of the position from which he or she held prior to the RIF for a two-year period. In addition, an employee may also receive protection from diminution in salary (i.e., *pay retention*) for an indefinite period. There is no dispute that Respondent was eligible for both grade and pay retention protection.

In June 1994, Respondent, a management analyst in the Office of Postsecondary Education, was subject to RIF procedures and, as a result, Respondent was demoted. Under the applicable RIF procedures, Respondent was entitled to retain his GS-12 pay grade for work performed in his new position for a two-year period. In other words, Respondent was allowed to retain his old pay while performing the functions of his new position for two years. In June 1996, Respondent's two-year grade retention expired; therefore, the Department was required to adjust Respondent's pay accordingly.

Pay is adjusted in accordance to the following statutory formula: an employee's pay is established at a rate equal to the "employee's allowable former rate of basic pay, plus...50 percent of the amount of each increase in the maximum rate of basic pay payable for the grade of the employee's position" after the RIF.<sup>5</sup> As indicated above, this protection is commonly known as pay retention, which, at the expiration of a period of grade retention, provides a level of protection of pay for certain employees subject to RIF procedures. In Respondent's circumstance, he was entitled to receive 50 percent of the annual increases in the rate of pay for the grade of the position to which he was assigned following the RIF.

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<sup>3</sup> 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).

<sup>4</sup> An agency may not provide grade retention to an employee who--is reduced in grade for personal cause or at the employee's request. See 5 CFR 536.102(b) for additional exclusions.

<sup>5</sup> 5 U.S.C. § 5363(a).

Due to an administrative error, from June 1996 through the second pay period of 2001, Respondent's pay increases exceeded the authorized amount by surpassing the 50 percent threshold set forth by the pay retention formula. More to the point, the salary overpayment occurred because Respondent was paid 100 percent of the annual increases in his rate of pay.

## II.

There is no dispute that this case involves an erroneous payment of pay. An employee is not entitled to a salary payment that exceeds the statutory pay retention formula applicable to RIF procedures. Consequently, the central focus of this case is whether Respondent is entitled to waiver of the obligation to repay the Department the salary overpayment paid to him while he was in pay retention status.

Respondent argues that a waiver of the entire debt is warranted. In Respondent's view, he is not at fault for the erroneous salary payments. Respondent argues that it is unfair to require him to pay for an error he neither caused, nor could have recognized as having occurred. According to Respondent, since he was unaware that he had been overpaid erroneously, he could not have alerted the Department to the erroneous payments. Building upon this claim, Respondent argues that the standards regarding grade and pay retention were not only unknown by him, but appear, at least, to have been confusing to the Department human resources or payroll officials who did not discover the erroneous payments for four years. Respondent further argues that despite his timely request for waiver of the overpayment, the Department did not act on his request for five years; in Respondent's view, the passage of time has occurred to his detriment since he is scheduled to retire in January of 2007, and repayment of the debt at this time would cause financial hardship. I find Respondent's arguments that he neither knew nor should have known that the salary payments at issue were erroneous to be persuasive.

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. 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,<sup>6</sup> 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.<sup>7</sup> The former factor 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;<sup>8</sup> (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

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

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

<sup>8</sup> 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).

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.<sup>9</sup> As noted in several of the Department's published waiver cases, it is fundamental to the analysis of whether waiver of a debt may be granted that when an employee fails to review documentary records, including notices of personnel action, leave and earning statements, and other payroll statements, which, if examined, would show or identify an overpayment and provide the employee with an opportunity to correct the overpayment, the employee is not free of fault.

Applying this standard to the facts in this case, however, reveals that even the most careful review of the aforementioned documents for accuracy would not alert Respondent to consider whether he was being overpaid. Moreover, there were no bank statements and/or electronic fund transfers of salary payments to track to verify whether Respondent's pay was accurate since Respondent's pay is calculated under a complex pay retention formula that few employees are likely to be able to routinely replicate to check the accuracy of the payroll office's pay retention calculation. Therefore, this is not the type of routine case where an employee's review of documentary records would show or identify an overpayment and provide the employee with an opportunity to correct the overpayment. Instead, the facts of this case illustrate circumstances where it is appropriate to expect the Department to perform the routine checks for discrepancies or question unanticipated salary payments under the mathematical precision required to check the accuracy of pay.

Under the pay retention formula, an employee in Respondent's circumstance receives 50 percent of the locality pay<sup>10</sup> increase for the pay region in which his duty station is located, and 50 percent of the annual basic pay increase of the rate of pay for the grade of the position to which he was assigned following the RIF. These pay increases are added to Respondent's retained basic rate of pay. Since, under the formula, Respondent's dollar amount of basic annual rate of pay exceeded the maximum rate of basic pay (i.e., the rate of pay for step 10 of the general schedule of the post-RIF position), the published General Schedule of Pay Tables would not have provided a generally accessible check on the accuracy of the Department's application of the pay retention formula.<sup>11</sup> 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

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<sup>9</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>10</sup> See, *In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006) (each year 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).

<sup>11</sup> To illustrate, in 2000, Respondent received an annual increase in pay that included incorporating the 3.80% general schedule increase and a locality payment of 7.66% for the locality pay area of Atlanta, Georgia. Applying the pay retention formula under RIF procedures alters Respondent's annual pay from \$72,135 (Respondent's retained grade) to \$67,928 (Respondent's proper pay retention); hence, the Department overpaid Respondent \$3476.66 in 2000, but, not surprisingly, the proper salary does not appear on the 2000 General Schedule Pay Table.

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.<sup>12</sup>

Respondent argues that it is against equity and good conscience to recover the debt because requiring him to repay the debt would create an undue financial burden since the recovery of the debt would occur at the time he is scheduled to retire rather than during his full-time employment with the Department. According to Respondent, the time that has elapsed between the discovery of the erroneous payment - - the BoC was issued on October 3, 2001 - - and the current attempt to collect the debt is excessive. In support of this argument, Respondent points out that the Department is seeking to recover a debt extending back to 1997.

In addition, Respondent asserts that it is against equity and good conscience to recover the debt because the amount of the debt is not only substantial, but also directly related to the extensive time period that elapsed before a Department official discovered the debt. Respondent also argues that it is unfair to collect the debt because the debt arose as a result of the Department's error and that he is unfamiliar with policies or procedures applicable to pay retention matters. In Respondent's view, he had no basis to conclude that his pay was erroneous.

In light of the facts of this case, I am persuaded that collection of the debt would be inequitable. To begin with, as Respondent points out, there is no basis in the record of this case to support a conclusion that Respondent was aware he was being overpaid; indeed, Respondent has submitted a sworn statement to the contrary. Although this factor is often relevant to the finding of no fault, it is also pertinent to the equities of fairness in light of the explicit purpose of pay retention under RIF procedures, which is to protect the pay of an employee who must face the unfortunate circumstances of a job loss or forced demotion. Under such circumstances, the expectation that the protective measures mandated by Congress are carefully and accurately implemented rarely could be higher. Certainly, the fact that an employee is in little or no position to mitigate against the likelihood of a costly error arising from the mandatory

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<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), 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).

application of RIF procedures underscores why the equities of fairness should favor the employee adversely affected by the occurrence of a significant debt.

Beyond the circumstances of the erroneous application of pay retention under RIF procedures, another factor that is pertinent to the balance of equities in this case is the five-year time period that elapsed during the pending resolution of Respondent's case; the five-year time period, at least, borders on excessive. Although this case does not come within the precise contours of prior cases adopting a *per se* rule that on its face a seven-year lapse in the time used to resolve a waiver request accrues to a debtor's detriment, the tribunal does not doubt Respondent's assessment that the financial burden of repayment of the debt is greater now than it would have been five years ago when he first requested a waiver.<sup>13</sup>

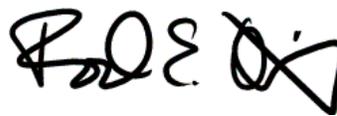
More generally, the tribunal is mindful that waiver requests are administrative appeals that should be adjudicated in a relatively expeditious manner. The Department's *Salary Overpayment Handbook* advises that waiver requests be resolved within 60-days of receipt of the request. Notwithstanding that a number of circumstances could require extending the time period beyond 60-days, enlarging an administrative appeals time period from a 60-day period to 60-months, without explanation or justification for the delay, undermines the presumption of fairness that a due process proceeding should provide. What is more, 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 should be deemed reasonable under the circumstances of this case, wherein Respondent asserts that the delay imposes a direct financial burden upon his capacity to repay the debt.

ACCORDINGLY, in light of 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 **\$8,029.31** is **HEREBY WAIVED**.

So ordered this 12<sup>h</sup> day of December 2006.



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Rod Dixon  
Waiver Official

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<sup>13</sup> See *In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006) (holding that a seven-year time period that elapsed during the pending resolution of Respondent's waiver case is excessive) and *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).