



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

**TRAVIS,**

Respondent.

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**Docket No. 06-57-WA**

Waiver Proceeding

**DECISION GRANTING WAIVER**

Respondent, a U.S. Department of Education (Department) employee, requested waiver of a \$143.52 salary overpayment debt arising from the Department's failure to place him in the appropriate retirement classification. Based on the reasons articulated in this decision, I find that waiver of this debt is warranted. Accordingly, Respondent's request for a waiver is granted.

**Jurisdiction**

Respondent's waiver request arises under 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 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)<sup>2</sup>, specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).<sup>3</sup>

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 initial

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<sup>1</sup> See 5 U.S.C § 5584 and the General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828 (Waiver Statute); 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> The Handbook, ACS-OM-04, was revised and reissued by the Department on March 30, 2007.

<sup>3</sup> Information regarding the Department's salary overpayment process including the Handbook, ACS-OM-04, is available on OHA's website at: [www.ed-oha.org/overpayments](http://www.ed-oha.org/overpayments).

request for waiver and attached documentation, and documents compiled by the Department's Human Resources Services (HRS) office. This decision constitutes a final agency decision.

### **Procedural History**

According to the May 10, 2003 Notice of Debt Letter and attached Bill of Collection (BoC), the \$143.52 overpayment arises from the Department's erroneous retirement classification of Respondent. Specifically, Respondent's classification was changed from the Federal Insurance Contributions Act (also known as FICA) only to the Federal Employees Retirement System (FERS) plus FICA. The BoC also identified an error regarding Respondent's Federal Employees Group Life Insurance (FEGLI) coverage. On June 10, 2003, Respondent paid the portion of the overpayment attributable to the FEGLI error, \$75.96, and he requested a waiver of the balance of the overpayment, \$143.52, the amount attributable to the Department's erroneous retirement classification.<sup>4</sup> In a November 17, 2006 Order Governing Proceedings, Respondent was given an opportunity to supplement his prior statement. On January 8, 2007, Respondent informed the tribunal that he would be relying on the information previously submitted.

### **Discussion**

Waiver of an erroneous salary payment<sup>5</sup> is an equitable remedy available only when there is no indication of fraud, misrepresentation, fault, or lack of good faith by the debtor.<sup>6</sup> 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 overpayment be waived in accordance with standards prescribed by statute and consistent with the case law and regulations promulgated by the Department.

### **Fault Standard**

In waiver cases, the fault standard is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. For the most part, if a debtor is aware of an error, he or she cannot reasonably expect to retain the overpayment.<sup>7</sup> Fault also is determined by assessing whether a reasonable person should have known or suspected that he or she was receiving more than his or her entitled salary.<sup>8</sup> An employee who neither knows nor has reason to know that he or she was erroneously compensated lacks fault under the application of this standard.<sup>9</sup> In assessing the reasonableness of a debtor's failure to recognize an overpayment, the tribunal may consider the employee's position and grade level, newness to federal employment, and whether an employee has records at his or her disposal, which, if reviewed, would indicate a

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<sup>4</sup> Respondent's request for a waiver originally was filed with the Human Resources Services (HRS) office. On July 20, 2006, Respondent's request for a waiver was transferred to OHA.

<sup>5</sup> An erroneous payment of pay (i.e. a 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). The fact that an administrative error created an overpayment does not relieve the overpaid person from liability. *See In re Robert*, Dkt No. 05-07-WA, U.S. Dep't of Educ. (July 8, 2005), n. 12.

<sup>6</sup> *See In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

<sup>7</sup> *See In re Danielle*, Dkt. No. 05-18-WA, U.S. Dep't of Educ. (October 11, 2005).

<sup>8</sup> *See In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

<sup>9</sup> *See In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005) (*Veronce*).

salary overpayment.<sup>10</sup> Thus, every waiver case must be examined in light of its particular facts and circumstances.<sup>11</sup>

Respondent argues that he did not recognize the error. Respondent asserts that the overpayment is the result of an administrative error that was not caused by him. Respondent contends that he did not initiate or approve of the change in his retirement classification. Respondent also avers that there is no indication of fraud, misrepresentation, fault, or lack of good faith by him.

According to the Office of Personnel Management's (OPM) Guide to Personnel Data Standards, the FICA only retirement classification is identified with the code "2", and the code used for the FERS plus FICA retirement classification is "K".<sup>12</sup> The Department's payroll contractor, the U.S. Department of Interior, recognized that Respondent was placed in an erroneous retirement classification (i.e. Code "2") from Pay Period 23 of 2002 through Pay Period 8 of 2003. The erroneous FICA only classification resulted in an overpayment because the appropriate deductions for the FICA plus FERS classification were not taken from Respondent's pay.

In applying the fault standard to this case, the tribunal concludes that Respondent lacks fault. As an initial matter, the tribunal recognizes that this salary overpayment was the result of an administrative error that does not reflect any fraud, misrepresentation, or lack of good faith by Respondent. Additionally, this is not the type of case where an employee reasonably should know that an erroneous overpayment has occurred. The change in Respondent's retirement classification did not result in any significant change to his pay nor did it otherwise alert him that a change in his retirement classification necessarily would result in an overpayment.

In view of the aforementioned facts, this case comes within the clear ruling of *Veronce*, which held that in certain circumstances where there is no otherwise indication of fault, an employee who neither knows nor has reason to know that he or she erroneously was compensated lacks fault. In *Veronce*, after the employee's sick leave was exhausted, she was placed in a leave without pay status while she was hospitalized. As a result, the tribunal determined that the employee was unable to check her leave and earnings statements or other documents to know that her paid leave was exhausted. The tribunal concluded that the employee's failure to recognize the overpayment was reasonable.

Although this case concerns markedly different circumstances, the facts compel the same result. The data codes created by OPM to represent different retirement classifications do not correspond to or otherwise serve as abbreviations of the categories they represent. Consequently, the classifications represented by these data codes are not readily apparent. Certainly, these data codes are not well-known, especially to employees not involved in personnel or human resources matters. Respondent's leave and earnings statements identified his retirement classification as code "2". This retirement classification was changed to code "K". It is not reasonable to expect an employee to know what these one-digit codes represent or to suspect that his or her retirement

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<sup>10</sup> See *id.*

<sup>11</sup> See *id.*

<sup>12</sup> See OPM's Guide to Personnel Data Standards (Update 55, January 26, 2007), available at <http://www.opm.gov/feddata/gp55.pdf>.

classification is incorrect on that basis alone.<sup>13</sup> Further, it is not reasonable to expect that an employee would know that a change in his one-digit retirement code, which is unlikely to be noticed at all, would be associated with a change in the dollar amount he or she must contribute.

### 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> Beyond this framework, there are no rigid rules governing the application of the equity and good conscience standard. The tribunal must balance equity and/or appraise good conscience in light of the particular facts of the case.<sup>15</sup> Factors weighed by the tribunal include the following: whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment; whether recovery of the claim would impose an undue financial burden on the debtor; and whether the cost collection the claim equals or exceeds the amount of the claim.<sup>16</sup> The tribunal also may consider whether recovery of the claim would be unconscionable under the circumstances. In assessing whether collection of the debt would be unconscionable, the tribunal examines whether collecting a debt is beyond what is customary or reasonable. Such unconscionable circumstances include an agency's failure to respond in a reasonable amount of time to a debtor's challenge of an overpayment and an agency's gross negligence in handling an overpayment case.<sup>17</sup>

The record reflects that upon receiving the BoC, Respondent promptly paid the portion of the overpayment attributable to his FEGLI coverage. The case of *In re Cheryl*, Dkt. No. 05-28-WA, U.S. Dep't of Educ. (February 17, 2006) (*Cheryl*) is instructive here. In addition to finding that collection of the debt would constitute a financial hardship, the Waiver Official in *Cheryl* noted that the employee attempted to resolve the disputed debt (i.e. pay the debt) immediately after it arose.<sup>18</sup> Correspondingly, Respondent's repayment of the debt attributable to an error that reasonably should have come to his attention weighs in his favor. Additionally, the tribunal notes that in a June 12, 2003 report, the Department's HRS office informally recommended that Respondent's waiver request be granted.<sup>19</sup> Based on the aforementioned factors, the tribunal finds that collection of this debt would go against equity and good conscience.

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<sup>13</sup> In another case involving an erroneous retirement classification, the tribunal similarly held that the employee lacked fault using the *Veronce* standard. See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (December 14, 2005) (The employee's erroneous retirement classification corresponded with the misinformation he received from the HRS office that he was ineligible for social security retirement benefits (i.e. FICA). Consequently, FICA deductions were not taken from his pay. Thus, the tribunal concluded that the employee neither knew nor had reason to know that an error in pay occurred.)

<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 Carolyn*, Dkt. No. 06-04-WA, U.S. Dep't of Educ. (June 28, 2006); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (September 14, 2005).

<sup>16</sup> See *In re Shelley*, Dkt. No. 06-25-WA, U.S. Dep't of Educ. (November 28, 2006).

<sup>17</sup> See *id.*; *In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006).

<sup>18</sup> See also, *In re Tanya*, *supra*. (The tribunal held that where there is otherwise no indication of fault, an employee who promptly offers to repay or actually repays a salary overpayment satisfies the initial factor, the fault standard, for determining whether waiver is appropriate.)

<sup>19</sup> Although not binding on the tribunal, some of the cases transferred to OHA's jurisdiction contain an informal recommendation regarding whether a waiver request should be granted or denied by the Waiver Official.

**ORDER**

Having found that Respondent has met the threshold factors warranting waiver of this debt, Respondent's entire \$143.52 debt is **HEREBY WAIVED**.

So ordered, this 5<sup>th</sup> day of April 2007.

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