



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

ROBERT,

Respondent

Docket No. 06-77-WA
Waiver Proceeding

DECISION DENYING 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 **\$263.14**. 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 not warranted. Accordingly, Respondent's request for waiver is denied.

I.

The facts are undisputed, and 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 the temporary promotion at issue, Respondent's signed and sworn written statement dated October 14, 2006, a copy of a notice of debt letter dated September 11, 2006, and a copy of a Bill of Collection (BoC) dated August 24, 2006.

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* 120-days for employees who are not in a bargaining unit position. In effect, the Department's merit promotion plan as set forth in the PMI imposes a 120-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 not included in the bargaining unit. To temporarily promote an employee to a position not in the bargaining unit for a term that exceeds 120-days, the Department must follow competitive procedures for selection and appointment.

On January 8, 2006, Respondent began a temporary promotion to the position of “Equal Employment Specialist,” which is a position that is not in the bargaining unit. Respondent’s pay schedule was advanced from a GS-14 level to a GS-15 level. Respondent was issued a Notice of Personnel Action (also known as a Standard Form 50 or SF 50) with an approval date of January 19, 2006. The SF-50 also indicated that the effective date of Respondent’s promotion was January 8, 2006, and that Respondent’s temporary promotion could not exceed May 23, 2006. As noted *supra* and in light of the Department’s promotion plan, Respondent’s SF-50 erroneously indicated or authorized Respondent’s appointment not to exceed May 23, 2006 because that date exceeded 120-days.¹

On May 22, 2006, the Department changed Respondent’s pay status to GS-14 effective May 7, 2006. A corrective SF-50 was issued on June 1, 2006, indicating Respondent’s temporary promotion as effective from January 8, 2006 through May 7, 2006. The effect of this corrective measure was to invalidate the pay rate of 120 hours of Respondent’s pay.

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.² 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.³ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. 5584.⁴

Respondent argues that a waiver of the entire debt is warranted. In Respondent’s view, he is not at fault for the erroneous salary payment because he neither caused, nor could have recognized the error as having occurred. In addition, Respondent asserts that he believed that his temporary appointment was for 120-days as indicated by his SF-50 and as directed in an oral communication from the Administrator for Management Services, Fred Green. On this basis, Respondent argues that he was unaware that he had been erroneously overpaid and, therefore,

¹Competitive 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).

²General 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/

³*See*, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

⁴Under 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).

could not have alerted the Department to the erroneous payments.

As the tribunal recognized in a case issued today, *In re Elizabeth (Elizabeth)*,⁵ the paradigm for resolving a waiver request arising from a debt involving a temporary promotion is set forth in *In re Richard (Richard)*.⁶ 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.⁷ In *Richard*, the employee, who had been temporarily promoted, simply remained in the job beyond the authorized term and, therefore, had no basis to expect that the time period in his temporary assignment that exceeded his authorized term of appointment was permissible other than the fact that he remained in the job. Ostensibly, Respondent's arguments are based on the same premise identified in *Richard*; accordingly, the resolution of this case is directly guided by the holding of *Richard*.

In *Richard*, 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.⁸

Applying *Richard* to the case at bar, the tribunal follows the well established principle that no employee has a reasonable expectation of an entitlement to pay for performing the job functions of a temporary appointment after the term of the appointment has expired; this principle follows from the unremarkable conclusion that employees cannot be paid at a rate that exceeds their lawful rate of pay.⁹ As such, in the event that an employee receives an erroneous salary payment, the employee has an independent duty to hold onto the overpayment for future repayment to the government.¹⁰ Accordingly, Respondent's request for waiver cannot be granted.

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

⁵ *In re Elizabeth*, Dkt. No. 06-46-WA, U.S. Dep't of Educ. (November 7, 2006).

⁶ *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

⁷ *Id.*

⁸ *Id.*

⁹ *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

¹⁰ See, e.g., DOHA Case No. 01092001 (Department of Defense, Office of Hearings & Appeals [DOHA]) (October 29, 2001); DOHA Claims Case No. 99111916 (December 8, 1999).

for determining whether waiver is appropriate requires a consideration of two factors; namely, (1) whether there is no indication of fraud, misrepresentation, fault,¹¹ 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.¹² Measured against these factors, and guided by the facts and reasoning in *Richard*, I find that Respondent is at fault, thus precluding the application of waiver. 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.¹³

An important factor in *Richard* is present in this case; namely, that the employee was a supervisory employee who had been temporarily promoted to an acting director position paid at the GS-15 level. In *Richard*, 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.¹⁴ In this respect, Respondent had been temporarily promoted to an acting director position of the Equal Employment Opportunity Service paid at the GS-15 level. At that level of management, Respondent should have known that payment of a salary of temporary appointment beyond the appointment period is improper. It is entirely reasonable to expect a supervisory employee, by monitoring bank accounts or pay statements, to note the occurrence of an appropriate and expected change in pay connected to the expiration of a temporary promotion. Where a reasonable person in the employee's position should have been aware that he or she was receiving payment more than he or she was entitled, the employee is barred from obtaining a waiver of the overpayment.

In this regard, Respondent should have observed that the SF-50 indicating that the 120-day appointment would properly end on May 23, 2006 was erroneous because that date would erroneously extend a 120-day appointment to 134-days. More directly, Respondent knew the effective commencement date of his temporary promotion and the 120-day not-to-exceed date could have been derived with little effort. A simple calculation would suffice. In doing so, an inquiry with Human Resources as to the accuracy of the not-to-exceed date on the SF-50 would have alerted the Department to the fact that a date on the SF-50 may be erroneous, and Respondent's duty under the fault standard could have been fulfilled.

It is worth noting that this case is unlike the case decided today in *In re Elizabeth (Elizabeth)*¹⁵ because a careful review of the employee's SF-50 for accuracy would have

¹¹ In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

¹² See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

¹³ 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").

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

¹⁵ *In re Elizabeth*, Dkt. No. 06-46-WA, U.S. Dep't of Educ. (November 7, 2006).

disclosed the error. In *Elizabeth*, the employee would have to have been familiar with an arcane Department policy applicable to bargaining unit positions only. This case is also unlike *Elizabeth* because the employee in *Elizabeth* was neither a supervisor, nor employed in a field concerning employment or labor matters. Rather, Respondent routinely confronted matters involving personnel actions; as such, Respondent, in his capacity as an Equal Employment Specialist and acting office director, is presumed to be familiar with scrutinizing SF-50s for information concerning the term of an appointment. Consequently, the tribunal's decision in *Elizabeth* is inapplicable.

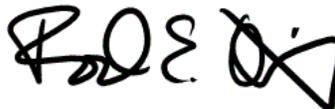
CONCLUSION

The tribunal finds that Respondent should have known that an error in salary payment existed; as such, waiver cannot be granted in this case. 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 **\$263.14** is **HEREBY DENIED**.

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