



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

**THOMAS,**

Respondent.

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**Docket No. 06-80-WA**

Waiver Proceeding

**DECISION GRANTING WAIVER**

Respondent, a U.S. Department of Education (Department) employee, requested waiver of a \$10,450.35 salary overpayment debt arising from the Department's failure to place him in the correct pay grade and step upon his promotion. 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 salary overpayment 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 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, Respondent's supplemental statements and attached documentation, and documents compiled by the Department's human resources office. This decision constitutes a final agency decision.

### **Procedural History**

According to the October 25, 2006 Notice of Debt Letter and attached Bill of Collection (BoC), the \$10,450.35 overpayment arises from the Department's placement of Respondent in an incorrect step upon his promotion. Respondent was promoted from a GS-14, step 10 position to a GS-15 position. The Department erroneously determined that Respondent should be paid at the GS-15, step 10 level instead of the GS-15, step 6 level. Respondent's pay remained at this higher incorrect pay level for 24 pay periods (Pay Period 22 of 2005 through Pay Period 19 of 2006).

By letter dated November 7, 2006, Respondent filed a request for waiver. In a November 15, 2006 Order Governing Proceedings, Respondent's request for a waiver was deemed timely. Respondent was granted two extensions of time to file his response. On January 31, 2007, Respondent filed a statement in support of his waiver request. On April 18, 2007, at the tribunal's request, Respondent filed a supplemental statement clarifying his previous statement.

### **Discussion**

A salary overpayment is created by an administrative error in the pay of an employee in regard to the employee's salary.<sup>4</sup> The fact that an administrative error created an overpayment does not relieve the overpaid employee from liability.<sup>5</sup> Instead, an employee who does not contest the validity of the debt may request that the debt be waived or forgiven.

Waiver 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

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<sup>4</sup> See 34 C.F.R. Part 32 (2006).

<sup>5</sup> 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).

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

According to Respondent, he was promoted a new position in October 2005 following his office's reorganization. As a result, Respondent was promoted to the GS-15 grade. Upon receiving his first paycheck in his new GS-15 position, Respondent states that he was unsure about whether his salary payment was correct and whether he was placed in the correct step level for his new grade. Respondent says that he questioned his salary payment because he previously served in a political appointment at the GS-15, step 4 level before accepting a career appointment at the GS-14, step 10 level in December 2001. Respondent also indicates that he considered his October 2005 promotion as a reinstatement to the GS-15 level.

Given his uncertainty regarding his salary payment, Respondent maintains that he contacted the Department's human resources office to inquire about the accuracy of his salary. He asserts that he was told that his salary adjustment was correct.<sup>12</sup> Respondent declares that he accepted this information as factual and correct. He also states that when he received the Department's notice regarding this debt almost eleven months later, he was surprised to learn that he had been overpaid. Respondent argues that he performed his due diligence by inquiring about the accuracy of his pay. He further argues that he relied upon the human resources office's expertise in these matters and that he should not be held responsible for an error originating from the human resources office. Finally, he notes that the human resources office also made the same error for two other employees in his office that were promoted.

The paradigm for resolving a waiver request arising from a debt involving the miscalculation of an employee's step upon a promotion is laid out in a case the tribunal recently issued, *In re Pedro (Pedro)*.<sup>13</sup> In *Pedro*, the employee was promoted to the next higher grade but his step level was miscalculated. The hearing official held that because an employee typically is not expected to be aware of the complicated rules that determine the employee's step level upon a promotion, and he was not otherwise aware that an error occurred, the employee was without fault. Ostensibly, Respondent's arguments are based on the same premise identified in *Pedro*; accordingly, the resolution of this case is directly guided by the holding of *Pedro*.

In *Pedro*, the employee was promoted to a newly created position following his office's reorganization. The hearing official found that the employee lacked fault because he was not expected to be aware of the complexities of the setting of pay upon a promotion and because he specifically inquired about the rate of pay (i.e. step level) set upon his promotion. The Department's human resources office advised him that his step level was correct and he relied upon their expertise. The tribunal also noted that there was no evidence that the employee

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

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

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

<sup>12</sup> Respondent filed a statement affirming the truth of his inquiry to the Department's human resources office. The tribunal accepts the veracity of Respondent's statement.

<sup>13</sup> See *In re Pedro*, Dkt. No. 06-78-WA, U.S. Dep't of Educ. (April 13, 2007).

otherwise was aware of the error or that personnel documentation effecting his promotion revealed the error.

Applying *Pedro* to the facts of the case at bar, the tribunal finds that Respondent is without fault. Respondent similarly was promoted to a new position in his office. In fact, Respondent was one of the other employees identified in *Pedro* as having been subject to the same administrative error regarding the miscalculation of his step level upon a promotion. Thus, 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.

Two complex methods – standard and alternate – exist to calculate an employee’s step level upon a promotion. More commonly used, the standard method with its four step process is the method appropriate in this case.<sup>14</sup> It is not reasonable to expect that Respondent, an employee without personnel expertise, would be cognizant of the complicated rules setting the rate of pay upon a promotion. As in *Pedro*, Respondent inquired about the accuracy of his pay and the Department’s human resources office assured him his step level was correct. Understandably, given the complex nature of the rules regarding step level upon a promotion, Respondent did not question what the Department’s personnel experts told him. Respondent’s reasonable but mistaken belief that his October 2005 career promotion constituted a reinstatement to his previous GS-15 position, rather than a promotion in an entirely different job appointment, unfortunately may have added weight to the reassurance he received from the Department’s personnel experts. Not unlike the employee in *Pedro*, Respondent also had no other reason to doubt the human resources office’s response. There is no evidence in the record that Respondent otherwise knew or was in possession of documentation indicating that an error existed.<sup>15</sup> In light of the above, the tribunal finds that Respondent’s failure to recognize that he was placed in an incorrect step after he was promoted was reasonable.

### 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>16</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>17</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>18</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

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<sup>14</sup> The tribunal’s decision in *Pedro* contains a full explanation of this method.

<sup>15</sup> For example, there is no personnel action form (SF-50) in the record that conflicts with the step level indicated in Respondent’s pay.

<sup>16</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>17</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>18</sup> See *In re Shelley*, Dkt. No. 06-25-WA, U.S. Dep’t of Educ. (November 28, 2006).

reasonable amount of time to a debtor's challenge of an overpayment and an agency's gross negligence in handling an overpayment case.<sup>19</sup>

Respondent argues that repayment of this debt would create an undue financial hardship. He explains that he is a quadriplegic with a severe disability. Respondent states that he has been hospitalized several times in the past few months due to a severe kidney infection and has incurred extremely high out-of-pocket medical expenses. Additionally, Respondent asserts that he has had to embark on major physical modifications in his home to accommodate his disability.

The record in this case reflects that Respondent acted in good faith, without any indication of misrepresentation or malfeasance. In fact, Respondent conscientiously contacted the Department's human resources office to inquire about his pay level once he received his promotion and, to his detriment, relied on their personnel expertise. The tribunal also is persuaded that collection of this debt would create an undue financial hardship for Respondent. Therefore, the tribunal finds that collection of this debt would go against equity and good conscience.

**ORDER**

Having found that Respondent has met the threshold factors warranting waiver of this debt, Respondent's entire \$10,748.17 debt is **HEREBY WAIVED**.

So ordered, this 19<sup>th</sup> day of April 2007.



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Greer Hoffman  
Waiver Official

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<sup>19</sup> See *id*; *In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006).