



**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

**JOHN,**

**Docket No. 07-03-WA**  
Waiver Proceeding

Respondent.

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**DECISION DENYING WAIVER**

This proceeding concerns whether Respondent, a U.S. Department of Education (Department) employee, should be granted a waiver of a \$1,196.07 salary overpayment debt. The overpayment arose from the Department's erroneous payment of a higher rate of salary to Respondent after the term of his temporary promotion expired. Based on my review, I find that waiver of this debt is not warranted. Accordingly, Respondent's request for a waiver is denied.

**Jurisdiction**

Under 5 U.S.C. § 5584 (the Waiver Statute), the Department has the authority to waive 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 request for waiver, his supplemental statement and attached documentation, and documents compiled by the Department's Human Resources office. This decision constitutes a final agency decision.

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<sup>1</sup> See General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828; see also *In re Tanya*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 18, 2006) at 1, note 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).

## Procedural History

According to the February 20, 2007 Notice of Debt Letter and attached Bill of Collection (BoC), the \$1,196.07 overpayment arises from the Department's payment of a higher rate of salary for 280 hours of work after his temporary promotion expired. Respondent's temporary promotion was scheduled to end on September 25, 2006, during Pay Period 21 of 2006. The BoC indicates that Respondent continued to receive the higher pay rate until November 27, 2006, the end of Pay Period 24 of 2006.

Respondent filed his request for waiver and attachments on February 26, 2007. In a March 8, 2007 Order Governing Proceedings, Respondent's request for a waiver was deemed timely and Respondent was afforded an opportunity to supplement the record. On March 19, 2007, Respondent filed a statement and two statements from his first and second supervisors.

## 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.

## Fault Standard

The fault standard is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. Fault 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>7</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>8</sup> Thus, every waiver case must be examined in light of its particular facts and circumstances.<sup>9</sup>

Respondent states that on May 28, 2006 he was temporarily promoted to serve as the Acting Group Director of his office for a period of 120 days and that his temporary promotion was set to expire on September 25, 2006. During his promotion, Respondent indicates that he was

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<sup>4</sup> See 34 C.F.R. Part 32 (2004).

<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 Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

<sup>8</sup> See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

<sup>9</sup> See *id.* at 5.

paid at the GS-15, step 5 level.<sup>10</sup> He states that he believed his promotion would terminate automatically. Respondent claims that the two-week delay between the end of the pay period and the issuance of the corresponding earnings statement interfered with his realization that the automatic termination has not occurred. He maintains that he then did not notice that his rate of pay was still at the GS-15 level until mid-November. Once he noticed the error, Respondent avers that he promptly notified his supervisory officials and the personnel liaison in his office.

Respondent asserts that he acted in good conscience by promptly notifying the appropriate officials once he noticed the error. To support his assertion, Respondent submits statements from his first and second supervisors, in which each supervisor confirms that he notified them of the error in mid-November 2006. Respondent also argues that because the error was caused by the human resources office his waiver request should be granted.

In applying the fault standard to this case, the tribunal concludes that Respondent is at fault. There is no evidence of fraud, misrepresentation or lack of good faith in this case. The tribunal accepts as true Respondent's assertion that he reported the error in mid-November 2006. He should have, however, recognized the error immediately. Respondent had a duty to inquire about the accuracy of his salary payment, especially upon the termination of a temporary promotion – a circumstance that warrants additional scrutiny of his earnings statements or other documentation. Although Respondent reported the error two months after his temporary promotion expired, he should have been alerted to it much earlier.

In resolving a waiver case involving the expiration of a temporary promotion, the tribunal's decision, *In re Richard*,<sup>11</sup> sits directly on point with the case at bar. In *Richard*, the employee was temporarily promoted to the GS-15 pay level. At the end of his 120-day appointment, he continued to be paid at this higher pay rate for two pay periods. The hearing official found that the employee failed to inquire about and dutifully track the termination of his temporary promotion. The tribunal concluded that a review of the payroll documentation the employee in *Richard* received would have enabled him to determine the date when his temporary promotion ended. As a result, the employee should have been able to determine that the payment of salary for his temporary promotion beyond the 120-day appointment was erroneous. The hearing official found the employee's failure to inquire and or track the expiration of his temporary appointment particularly glaring given that he had been promoted to an acting director position paid at the GS-15 level. As articulated in *Richard*, "[i]t is also entirely reasonable to expect a supervisory employee, by monitoring his pay statements, to note the occurrence of an appropriate and expected change in pay connected to the expiration of a temporary promotion."

Similarly to *Richard*, Respondent was a highly-graded employee who was promoted to a GS-15 acting director position. Moreover, as he admits, Respondent knew both the effective date and the expiration date of his temporary promotion. Under such circumstances, Respondent should have noticed the error in his pay that led to this overpayment. Respondent claims that the two-week delay in the issuance of his pay statement initially caused him to not realize that his temporary promotion was not terminated automatically. Nevertheless, this two-week delay does

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<sup>10</sup> At the time of his temporary promotion, Respondent was a GS-14, step 8 level employee.

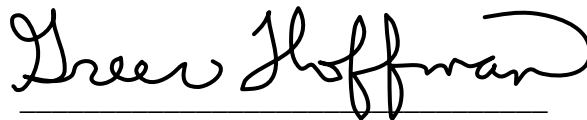
<sup>11</sup> Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

not overcome his duty to have noticed the error upon the receipt of the first earnings statement after his temporary promotion ended. Notably, Respondent's argument does not explain why his continued failure to notice the error for the following two months was reasonable. Even a cursory review of his earnings statement would have shown Respondent that his pay level remained at the GS-15 level.<sup>12</sup> Hence, the tribunal concludes that Respondent should have known that an error in his salary payment occurred. In view of Respondent's failure to meet the fault standard, his request for a waiver cannot be granted.

**ORDER**

Pursuant to my authority under the Waiver Statute, 5 U.S.C. § 5584, Respondent's request for waiver in the amount of \$1,196.07 is **DENIED**.

So ordered, this 1st day of May 2007.

A handwritten signature in black ink that reads "Greer Hoffman". The signature is written in a cursive style and is positioned above a horizontal line.

Greer Hoffman  
Waiver Official

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<sup>12</sup> As evidenced by Respondent's earnings statement for Pay Period 22 of 2006, Respondent's grade and step level was clearly identified as GS-15, step 5.