



**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

**FRANCINE,**

**Docket No. 07-83-WA**

Waiver Proceeding

Respondent.

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**DECISION GRANTING WAIVER**

Respondent, a former U.S. Department of Education (Department) employee, requested waiver of a salary overpayment debt in the amount of \$196.65, arising from an error in the amount of a cash award Respondent received. 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 5 U.S.C. § 5584, authorizing 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 request for waiver 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 [Redacted]*, 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 May 12, 1999 Notice of Debt Letter and attached Bill of Collection (BoC), the \$196.65 overpayment arises from the receipt of a \$750.00 instead of a \$450.00 cash award. On June 4, 1999, Respondent filed a request for waiver of the aforementioned debt.<sup>4</sup>

## Discussion

Waiver of an erroneous salary payment is an equitable remedy available only when there is no indication of fraud, misrepresentation, fault, or lack of good faith by the debtor.<sup>5</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 is whether Respondent's arguments and submission support a request that a portion or the entire erroneous salary overpayment be waived. There is no dispute that this case involves an erroneous payment of pay.<sup>6</sup> The Department's error stems from its aforementioned failure to properly account for the balance of leave in Respondent's leave share account.

## Fault Standard

The fault standard is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. 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>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 argues that the overpayment occurred through administrative error and not through any fraud, misrepresentation, fault or lack of good faith on her part. Respondent argues that she had no way of knowing that she received an overpayment because she did not know how much of a cash award she was to receive.

The archetype for analyzing the fault standard under circumstances similar to this case is set forth in a previous decision of the tribunal.<sup>10</sup> In this decision, the debtor, a participant in the Department's leave share program, erroneously received leave in excess of the amount actually

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<sup>4</sup> For reasons unknown, the agency took no dispositive action on Respondent's request until May 21, 2007, when Respondent's case was docketed by the Office of Hearings & Appeals.

<sup>5</sup> See *In re [Redacted]*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

<sup>6</sup> An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to his or her salary. See 34 C.F.R. Part 32 (2005).

<sup>7</sup> See *In re [Redacted]*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

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

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

<sup>10</sup> See *In re [Redacted]*, Dkt. No. 06-82-WA, U.S. Dep't of Educ. (December 15, 2006).

donated. The Hearing Official found that the debtor's failure to recognize that she received an overpayment was reasonable because she had no way of knowing that her leave share account was exhausted. The Hearing Official also noted that the Department's leave and earnings statements did not contain any information that would have alerted the debtor to the overpayment. Finally, the tribunal noted that the debtor was absent due to the requisite medical emergency that necessitated her participation in the leave share program. Consequently, Respondent's ability to otherwise inquire as to her balance of donated leave was compromised.

In the case-at-bar, Respondent correspondingly had no way of knowing how much of a cash award she was to receive. According to the Department's Human Resources Services office, Respondent was not informed in advance of the amount of the award by her supervisor. According to HRS, Respondent would not have been made aware of the error until much later when she received the form (SF-50) that processed her award. In its July 22, 1999 investigation report, HRS filed a statement recommending that Respondent's waiver request be granted. The tribunal concurs. Respondent was not aware nor should she have known that her supervisor intended to give her a smaller cash award than she received. Therefore, the tribunal finds that Respondent is without fault as her failure to recognize that an overpayment occurred 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>11</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>12</sup> To this end, the tribunal may consider whether recovery of the claim would be unconscionable including whether collecting the debt goes beyond what is customary and reasonable. An agency's failure to respond to a debtor's waiver request and/or its gross negligence in handling an overpayment case may go beyond what is customary and reasonable.<sup>13</sup> Other 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; whether the time elapsed between the erroneous payment and the agency's discovery of the error and subsequent employee notification is excessive; and whether the cost of collection equals or exceeds the amount of the claim.<sup>14</sup>

Respondent's waiver request has languished for a number of years. The tribunal further notes that this overpayment occurred through no fault of Respondent. Additionally, it would be unfair to attempt to collect a debt that is 10 years old. In fact, the tribunal notes that the Department's right to collect the debt by administrative offset likely has expired. This

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<sup>11</sup> See 5 U.S.C. § 5584 and *In re [Redacted]*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005) at 5.

<sup>12</sup> See *In re [Redacted]*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (December 14, 2005).

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

fundamental issue arises because the Debt Collection Improvement Act of 1996<sup>15</sup> bars Federal agencies from carrying out an administrative offset<sup>16</sup> against a debt that exceeds the statute's 10-year statute of limitations.<sup>17</sup> Specifically, pursuant to 31 U.S.C. § 3716(e) (1), an agency's authority to collect a claim by administrative offset dissolves when the claim: "has been outstanding for more than 10 years."

Moreover, the tribunal is convinced that even if the Department could assert a basis for the extensive delay in resolving Respondent's waiver request, it is doubtful that a delay exceeding 10-years could be deemed reasonable or fair. Indeed, many of the traditional factors of equity identified in waiver cases espouse the same notion of fairness for which statutes of limitations are predicated on, including the sense of fairness arising from concerns that over time memories fade, evidence is lost, and the likely burden imposed on an individual's capacity to pursue their claim or cause. Accordingly, the tribunal concludes that in equity and good conscience and in the interests of the United States waiver should 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 \$196.65 is **GRANTED**.

So ordered, this 11th day of May 2009.

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Greer Hoffman  
Waiver Official

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<sup>15</sup> Pub.L. No. 104-134, April 26, 1996, 110 Stat. 1321). *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 legal framework governing salary overpayment debt collection, including the Department of Education's (Department) procedures.

<sup>16</sup> An *administrative offset* is a means of debt collection whereby funds payable by the United States are withheld or deducted from a current pay account to satisfy a debt owed by the payee. *See*, 5 C.F.R. § 550.1103 and 31 C.F.R. § 285.7.

<sup>17</sup> It is worth noting that the statute of limitations in section 3716(e) is pertinent only to debt collection by way of an administrative offset pursuant to the statute; the Act also explicitly provides that it is no bar to an agency's lawful authority to collect a debt through other means.