



**UNITED STATES DEPARTMENT OF EDUCATION**

OFFICE OF HEARINGS AND APPEALS

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In the Matter of

**SHEILA,**

Respondent

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**Docket No. 08-04-WA**  
Waiver Proceeding

**DECISION DENYING WAIVER**

This matter comes before the Office of Hearings and Appeals (“OHA”) through the timely request of Respondent, an employee of the U.S. Department of Education (“Department”). Respondent’s request arises under 5 U.S.C. § 5584 (“the Waiver Statute”) authorizing the waiver of claims of the United States against debtor due to erroneous payments made to a Federal employee.<sup>1</sup> The OHA maintains authority and jurisdiction<sup>2</sup> to waive<sup>3</sup> claims of the United States against a former or current employee of the Department. The undersigned is the authorized Waiver Official<sup>4</sup> who has been assigned this matter by OHA.

At issue in this case is whether an employee of the Department should be granted waiver of repayment of a debt arising from the Department’s erroneous salary payments during the pay period from February 17, 2008 through March 1, 2008 when Respondent continued to be paid at a higher salary rate after the term of her temporary promotion had expired on February 25, 2008.

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<sup>1</sup> See also, General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (codified at 5 U.S.C. 5584) (“the Waiver Statute”). The law of debt collection is extensive. See, e.g., *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 salary overpayment debt collection); see also 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). The Department’s overpayment procedures may be found on the Office of Hearings & Appeals website at: [www.ed-oha.org/overpayments/](http://www.ed-oha.org/overpayments/).

<sup>2</sup> The Department’s policy is set forth in the U.S. Department of Education, Administrative Communications System Departmental Handbook, HANDBOOK FOR PROCESSING SALARY OVERPAYMENTS (ACS-OM-04, June 2005 (revised Dec. 2006)).

<sup>3</sup> Waiver is defined as “the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee as [provided] by 5 U.S.C. 5584...or any other law.” 5 C.F.R. § 550.1103.

<sup>4</sup> See, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

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 waiver request, subsequent submissions and documents compiled by the Department's Human Resources office. This decision constitutes a final agency decision.

Based on a review of the record, I find that a waiver of this debt is not warranted. Accordingly, Respondent's request for a waiver is denied.

### **Procedural History**

Respondent was notified of the debt at issue through a Notice of Debt Letter ("NDL") and Bill of Collection ("BoC"), dated May 14, 2008, which stated that Respondent had received a Federal Salary payment that was \$58.24 in excess of the amount to which she was entitled. Respondent had received a temporary promotion from GS-13-10 to GS-14-06, for a period not to exceed 120 days, expiring on February 25, 2008. According to the BoC, Respondent was paid at the higher salary rate for 40 hours during the pay period from February 17 – March 1, 2008. Therefore, this overpayment is the result of an erroneous payment of salary after her temporary promotion had expired.

Respondent submitted her request for waiver by email on June 16, 2008. It was received by the Office of Hearings and Appeals and assigned to a waiver official, who accepted Respondent's request as timely and issued an Order Governing Proceedings on June 18, 2008. Subsequently on June 26, 2008, Respondent submitted a short, signed statement describing the circumstances surrounding the overpayment and indicating why Respondent believed a waiver was warranted; a copy of the SF-50 which implemented Respondent's temporary promotion; and the BoC for the debt. On September 24, 2009, this case was reassigned to the undersigned Waiver Official. On October 26, 2009, Respondent provided additional information by email and confirmed that the record was complete.

### **Discussion**

The record in this case constitutes the documents that have been accepted as argument and evidence, as stated above -- a copy of a signed, sworn, written statement by Respondent, submitted on June 26, 2008; a copy of a Bill of Collection dated May 14, 2008; a copy of the SF-50 which implemented Respondent's temporary promotion; and a printed copy of Respondent's October 26, 2009 email message.

In a waiver proceeding, waiver is available as an equitable remedy to a respondent who satisfies the relevant fault standard by demonstrating that his or her case does not involve fraud, misrepresentation, fault or lack of good faith on his or her part.<sup>5</sup> Additionally, for a waiver to be granted, the debtor must demonstrate that the totality of the circumstances weigh against the collection of the debt because collection would not be equitable, in good conscience or in the

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

best interests of the United States.<sup>6</sup> Not factored into this consideration is the validity of the debt.<sup>7</sup> Indeed, for a debt to be considered for a full or partial waiver, the debtor first must acknowledge the validity of that debt. The fact that the Department erred by making the overpayment to an employee does not relieve that employee of liability for the debt<sup>8</sup> or automatically provide grounds for a waiver.<sup>9</sup>

The first consideration in determining whether a waiver is appropriate in a salary overpayment case is whether Respondent lacks fault. To assess fault, the tribunal, taking into consideration all relevant evidence and information, must evaluate the debtor's case against a "reasonable person" standard and decide whether the debtor knew, should have known<sup>10</sup> or should have suspected that she or he was receiving salary payments in excess of those authorized.<sup>11</sup> Central to this consideration is the employee's position, grade level, longevity of service with the Federal government and whether the employee had access to records which, if reviewed, would indicate a salary overpayment.<sup>12</sup> A waiver may be granted where a respondent demonstrates a lack of fault in regard to the debt. In doing so, the debtor is expected to: (1) explain the circumstances of the overpayment, (2) state why a waiver should be granted, (3) indicate what steps, if any, the debtor took to bring the matter to the attention of the appropriate official or supervisor and the agency's response, and (4) identify all the facts and documents that support the debtor's position that a waiver should be granted. Correspondingly, if a respondent knew, should have known or should have suspected that she or he was being overpaid, then that respondent is not without fault, and a waiver is not warranted.

In the present case, the debt arose when Respondent was paid at a higher salary rate after the expiration of a temporary promotion. In her signed statement of June 24, 2008, Respondent indicates that she was detailed to the position of Acting Division Director, at a higher grade (GS-14-6) for a period of 120 days, from October 28, 2007 through February 2, 2008.<sup>13</sup> She further states that after the temporary promotion expired, she was asked to continue serving in the same functional capacity while being paid at her regular grade level (GS-13-10) until the position could be filled. She agreed to do so and served as Acting Division Director from February 2008 until August of the same year, earning the pay rate of a GS-13-10 starting on March 2, 2008.<sup>14</sup>

In her submissions, Respondent does not state whether she knew about the overpayment at the time it occurred, but she asserts that she was first notified of the matter when she received the NDL and BoC on May 16, 2008. Respondent urges that collection of this debt would be

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<sup>6</sup> See, *In re Arthur*, Dkt. No. 07-02-WA, U.S. Dep't of Educ. (May 10, 2007).

<sup>7</sup> See, *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

<sup>8</sup> *Id* at n. 7.

<sup>9</sup> *Id* at 4.

<sup>10</sup> Under this standard, Respondent is obligated to question discrepancies or unanticipated balances from salary payments. See, e.g., *In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (October 19, 2005).

<sup>11</sup> See, *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

<sup>12</sup> See, *In re John*, Dkt. No. 07-03-WA, U.S. Dep't of Educ. (May 1, 2007).

<sup>13</sup> Although Respondent lists the relevant dates as October 28, 2007 through February 2, 2008, the SF-50 indicates that the temporary promotion was effective October 28, 2007 for 120 days, not to exceed February 25, 2008.

<sup>14</sup> This date was derived from the BoC, which states that Respondent was overpaid through pay period 0805, ending March 1, 2008. Presumably, Respondent's pay rate was adjusted to her previous level for the subsequent pay period beginning on March 2, 2008.

against equity and good conscience because of her long and successful Federal career of more than 38 years, with consistently high performance ratings from the Department. Further, although Respondent does not argue this directly, she seems to imply that her service as an Acting Division Director for six months (at the lower grade level) after the temporary promotion had expired supports her position that a waiver is warranted.

In applying the fault standard to this case, this tribunal concludes that Respondent has not demonstrated that she lacks fault. The record shows that Respondent was first notified of the debt when she received the Notice of Debt Letter and Bill of Collection on May 16, 2008. While Respondent does not indicate whether she was aware of the overpayment prior to the notice, the SF-50 that she submitted with the waiver request clearly states in box 45: "Incumbent signed memo that she understands that promotion is temporary NTE 120 days (02-25-08)". Although the memo referenced in the SF-50 was not submitted for the record, Respondent clearly had possession of the SF-50 which provides the dates of her temporary promotion. Accordingly, Respondent had been provided actual notice of the date that the term of her temporary promotion ended and that her grade would revert to its previous level. When Respondent was paid at the GS-14-6 level for the entire pay period after her temporary promotion had expired, she either knew, should have known or should have suspected that she was being overpaid for that period. Further, Respondent's level of responsibility as Acting Division Director and the familiarity with government regulations that she would have acquired over her 38 years of service suggest that she knew, should have known or should have suspected that she was being overpaid when she continued to receive the higher salary after the term of the temporary promotion expired. For these reasons, this tribunal concludes that Respondent should have known that an error in salary payment existed.

As to Respondent's argument that she continued to perform the duties of the Acting Division Director beyond the expiration of her temporary promotion, some may recognize as valid Respondent's concerns, but the fault standard does not. As stated in *Richard*, "No employee has a reasonable expectation of an entitlement to pay for performing the job functions of a temporary appointment after the time period of the temporary appointment has expired."<sup>15</sup> Although the overpayment was of a short duration, it is nevertheless true that "[a]n employee who knows or who should know that he or she is receiving erroneous overpayments cannot acquire title to the erroneous amounts under any condition."<sup>16</sup> As with *Richard*, so too, Respondent is not entitled to these monies through a waiver of this debt.

Because Respondent has failed to demonstrate that she did not know, could not have known or could not have suspected that she was receiving a salary overpayment, she cannot succeed in satisfying the fault standard. Therefore, it is not necessary to determine whether equity, good conscience and the best interests of the United States weigh in favor of a waiver. Accordingly, Respondent's request for a waiver cannot be granted.

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<sup>15</sup> See, *Richard*, *supra*.

<sup>16</sup> *Id.*

**Order**

Pursuant to the authority granted by 5 U.S.C. § 5584, Respondent's request to waive the entire debt to the United States Department of Education in the amount of **\$58.24** is **DENIED**.

So ordered this 14<sup>th</sup> day of January 2010.



Kristine Minami  
Waiver Official