



**UNITED STATES DEPARTMENT OF EDUCATION**

OFFICE OF HEARINGS AND APPEALS  
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In the Matter of

**Docket No. 12-62-WA**

**B**

Respondent

Waiver Proceeding

**DECISION GRANTING WAIVER**

This proceeding 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 (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> and is based on notice of a salary overpayment of \$ 5088.85 based on a Bill of Collection (BoC).<sup>2</sup>

The legal authorities pertinent to this waiver request draw from the aforementioned statute, the Department’s implementing regulations at 34 C.F.R. Part 32 (§ 32.1 et seq.), and the policy set forth in the Department of Education, Administrative Communications System, Handbook for Processing Salary Overpayments (Handbook, ACS-OM-04) (revised January 2012). Taken together, these authorities prescribe procedures for processing debts, authorizing deductions from wages to pay debts, and setting standards for waiving those debts when

<sup>1</sup> General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (5 U.S.C. § 5584); *see also In re Richard*, Dkt. No. 04-04-WA, U.S. Dep’t of Educ. (June 14, 2005) at footnote 1 (setting forth the statutory framework governing debt collection by salary and administrative offset); *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 procedure may be found on the Office of Hearings & Appeals website at <http://oha.ed.gov/overpayments/index.html>.

<sup>2</sup> The overpayment is identified as the Debt ID M1231200001 specified by the Debt Management Branch, DOI, in the invoice of November 6, 2012, with its listing of the 6 pay periods in 2011 and 1 in 2012, of amounts to offset, the 512 hours found to exceed the limitation.

appropriate.<sup>3</sup> The 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.<sup>4</sup>

At issue in this case is whether an employee of the Department should be granted waiver of repayment of a debt arising from Respondent being hired without her knowledge of an hours' limitation authority being applicable instead of the full employment annuity authority she understood was applicable. Upon discovery of an hours' limitation requirement, a retroactive correction to the personnel action resulted when Respondent exceeded the hours under her annuitant status, effective September 25, 2011 (pay period 2011 (21)). This created an overpayment of wages for seven pay periods, with accompanying changes in deductions for those pay periods, as identified in the \$5088.85 overpayment here.

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 signed and sworn statements, the Department's Bill of Collection (BoC) document, the letter of background on Respondent's hiring basis as an annuitant submitted by Human Capital and Client Services (HCCS) Supervisor, Michael Blaylock with confirmation that Respondent was never made aware during recruitment discussions or in her offer of employment letter of an hours' limitation<sup>5</sup>, the actual Offer of Employment Letter dated March 18, 2011, Respondent's SF-50 hiring action, and email correspondence from the personnel office, seeking to resolve this matter in Respondent's favor.

Based on a review of the record, I find that a waiver of this debt is warranted. Therefore, Respondent's request for a waiver is granted. This decision constitutes a final agency decision.

#### Procedural History

Respondent was notified of the debt through a BoC dated November 6, 2012, which stated Respondent had received a salary overpayment due to a correction caused by an hours' limitation. Prior to accepting employment at the Department, Respondent worked as a federal employee at the Environmental Protection Agency (EPA), and retired from that post in October 2005. As explained by HCCS Supervisor Blaylock in his November 20<sup>th</sup> statement, Respondent was hired under the National Defense Authorization Act (NDAA) of 2010, which allows agencies to re-employ annuitants without a reduction to his or her salary or annuity. However, as later discovered, the annuitant may not work more than 1040 hours a year. He reviews that Respondent was never made aware of the hours' limitation during the recruitment and it was not

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<sup>3</sup> In addition to regulations promulgated by the Department, standards prescribed by the Department of Justice and the Department of Treasury govern administrative debt collection efforts; those standards are widely known as the Federal Claims Collection Standards (FCCS). *See* 31 U.S.C. § 3711 (2000) and 31 C.F.R. ch. IX, Parts 900-9 04(2000)

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

<sup>5</sup> A conference call was held by the Waiver official and Mr. Blaylock on Dec. 18, 2012. Mr. Blaylock clarified his position as Supervisor for the Headquarters HCCS team, and his familiarity with Respondent's problem with the salary overpayment and how it generated. He verified the contents of the letter he submitted in Respondent's behalf, dated Nov. 20, 2012, and the circumstances of her being hired as a reemployed annuitant and the authenticity of the hiring documents he forwarded into the record.

included in the offer of employment letter to her. She accepted the position of Management and Program Analyst, GS-0-14 level with an hourly rate of \$65.53 based on a full-time work schedule. He maintains the overpayment occurred due to an administrative error in his office related to her employment offer. She began the position in March 2011 but it was 9 months later when his office, through an internal review in December 2011, found Respondent had exceeded the limitation by 512 hours, generating the overpayment at issue. With this discovery, his office notified Respondent and placed her under another reemployment authority effective December 23, 2011. He explains the current authority results in a new hourly rate and reflects a full time schedule with a reduced hourly rate. Mr. Blaylock states he supports Ms. Daly's request for a waiver and his office had been working over several months to identify the proper organization to request a remedy. Inasmuch as the NDAA authority is delegated directly to the Agency, the Agency is responsible for addressing the overpayment, and it is brought for resolution as a waiver matter to this tribunal.

Respondent's request for a waiver was received on November 19, 2012, and in response to the Order Governing Proceedings (OGP), Respondent submitted her additional sworn statement of December 14, 2012. In these statements, she avers that she was totally unaware of any hours' limitation when she accepted the position in March 2011. She claims that her acceptance of the position, without an hours' limitation, was confirmed by the written offer of employment she received, latter dated March 18, 2011 with no provision about an hours' limitation. Further, she unequivocally states, "after reporting to duty, I received a Standard Form (SF) 50, dated March 28, 2011, further documenting my acceptance of the position, which also did not include any remarks or references to an hours' limitation in the comment field or elsewhere. If an hours' limitation had been communicated in either the verbal job offer or written job offer letter, I would have immediately declined the offer." Respondent also asserts that if she had found a limitation documented on her SF-50, as a remark or otherwise noted, she would have brought this matter to the attention of her supervisor and HCCS staff. However, there was none and she had no knowledge of it for over nine months until HCCS made the discovery through an audit and informed her the limitation did apply.

Respondent contends she was definitely seeking a full time position when coming back into federal service as a rehired annuitant, thus a position with an hours' limitation would not have met her criteria and expectations. She is steadfast in her claim there were three opportunities for the Department to clearly communicate to her the position she had accepted had any hours' limitation but failed to do so. In summary, it was not communicated when the job offer was initially extended (verbally) by HCCS; it was not documented in the written job offer letter dated March 18, 2011, and it was not documented in the "comment" or elsewhere on the SF-50, dated March 28, 2011.

The standard for determining whether a waiver of a debt is appropriate requires a consideration of two factors; namely, (1) whether there is no indication of fraud, misrepresentation, fault<sup>6</sup>, or lack of good faith on the part of Respondent, and (2) whether Respondent can show that it is against equity and good conscience, and not in the best interests

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<sup>6</sup> In this respect, since fault can derive from an act of a failure to act, fault does not require a deliberate intent to deceive.

of the Federal government to recover the overpayment.<sup>7</sup> Respondent must satisfy both factors to obtain a waiver.

### Fault Standard

By Respondent's assertions and the HCCS representations, there was no mention of an hours' limitation in the Offer of Employment letter or the SF-50 which brought Respondent into the position as a re-hired annuitant so there was no initial lack of diligence on Respondent's part. Moreover, while she had a duty to examine her leave and earnings statements (LES), there is no way she would have seen an hours' limitation or seen any error in payment leading to this overpayment. There were no discrepancies for her to discover in her LES that she should then have reported to HCCS. As a threshold matter, it is an employee's duty to prevent or discover mistakes and errors in salary payment when doing so is feasible. However, the present case is distinguishable from the line of cases holding an employee at fault for failing to examine or notice discrepancies in his or her LES, and being held to know and correct errors in pay.<sup>8</sup> Here, Respondent asserts that there was no feasible way to discover something that was not included in the employment offer letter or in her SF-50. Respondent's Employment Letter and SF-50 now in the record bears this out. She had no knowledge and it is clear the hours' limitation caught both her and the hiring office totally by surprise when discovered by an internal review. Respondent initiated HCCS help once she became aware she had exceeded the allowable hours and HCCS set to rectify the problem by placing her under another reemployment authority in December 2011. HCCS' immediate response and corrective action support Respondent's claims of lack of fault and lack of notice that being a Full time Reemployed Annuitant would generate a salary overpayment for which she would be responsible.

Arguably an employee has a unique ability to know of things that may give rise to changes in pay or is in the best position to recognize a mistake in his or her pay, yet this is not true if there was no notice, no way for Respondent to have known of the limitation. An employee accepts a position based on contractual terms and the employee should be able to rely on the employment offer made, without hidden qualifiers. In this case, the Respondent had no ability to know what was beyond the terms of the actual Employment Offer issued by the Department's Human Resource Specialist. As such, Respondent makes a clear case for lack of fault.<sup>9</sup> Furthermore a simple review of her SF-50 shows that for work schedule (#32) it was for full time; for Annuitant Indicator (#28) it was Rempl FERS ANNT-no redu (sic) reduction; and for the Remarks (#45) nothing about an hours' limitation appears. Since other remarks do appear at #45, and relate to the hiring action as a temporary (NTE) appointment, this gives added support for the conclusion that all limitations had been fully set forth. Without the initial paperwork advising Respondent of any hours' limitation, there would be no likelihood or expectation of her being able to discover any overpayment by examination of her leave and earnings statements (LES) since that is not an LES indicator. Respondent appears to have been diligent in her review of relevant documentary evidence here and by doing so she satisfies that criterion.<sup>10</sup>

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<sup>7</sup> See, *In re Richard*, Dkt. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

<sup>8</sup> See, *In re Carolyn*, Dkt. No.06-04-WA, U.S. Dep't of Educ. (June 28, 2006).

<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 *In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (Oct. 19, 2005).

### Equity and Good Conscience

To secure equity and good conscience, an individual must have acted fairly and without fraud or deceit, and in good faith.<sup>11</sup> In addition, although there are no rigid rules governing the application of equity, I must balance equity and evaluate good conscience in light of the particular facts of this case.<sup>12</sup> Prior cases are instructive and guide me in this balancing exercise.<sup>13</sup> In doing so, I must balance the competing interests in the recovery of all debts owed to the United States against Respondent's asserted interests in the forgiveness of a debt owed to the United States. Factors weighed in this balancing of interests include the following: whether the debt is substantial; whether recovery of the claim would be unconscionable under the circumstances; whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment; and whether collection of the debt would impose an undue financial burden.

Respondent argues that it is against equity to collect the overpayment because the overpayments were caused by the Department's error and repayment will impose an undue financial burden. To underscore the financial burden, Respondent indicates that repayment of this debt would create a financial hardship. She states that she is the sole financial provider for her household and repayment of this sizeable debt, one that is over \$5000, would be a substantial hardship for her and her family. Respondent provides background information that she retired in October 2005 with the intent to build up her husband's business, however, he became very ill and hospitalized in November 2005, and has not been able to return to work since then. Her monthly annuity's salary of \$1600, with TSP benefits, was not enough for household support so she had to return to work on a full-time basis to maintain the financial resources needed to support herself and family. Based on these representations, I am convinced that there are significant factors supporting Respondent's request for waiver, including Respondent's asserted financial burden that would be attendant to repayment of this debt and her ongoing efforts to resolve it beginning in December 2011 when first advised she might have an overpayment issue. It was not certain then but nevertheless, she immediately notified her supervisor about it and took the matter up with HCCS. This shows her concern at the first sign of a problem, then only a potential problem to inquire about it and verify its basis. In turn, HCCS could take preventative action by putting her on another reemployment authority and eliminate the basis for the salary overpayment. It is commendable that Respondent initiated these efforts to address and thereby aid HCCS to mitigate further problems, as soon as she learned of it.

Moreover, the record in this case reflects that Respondent acted in good faith, without indication of misrepresentation or malfeasance. I find no basis from the evidence in the record to conclude that Respondent was aware that working on a full time basis in keeping with her accepted position would cause an overpayment. She reasonably relied on the verbal and written job offers and the SF-50 paperwork, none of which reflected an hours' limitation. In this context, she had no reason to suspect an hours' limitation would apply to her in this new position when she had no notice of it, and no ability to discern it, until the personnel office applied it and caused the retroactive payroll correction. Accordingly, I find that in the interest of the United

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<sup>11</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>12</sup> See *In re David*, Dkt. No. 05-22-WA, U.S. dep't of Educ. (December 14, 2005); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (September 14, 2005).

<sup>13</sup> *Id.*

States, Respondent's request for waiver should be granted. This decision constitutes a final agency decision.

ORDER

Pursuant to the authority of 5 U.S.C. § 5584, Respondent's request for waiver of the entire debt in the amount of \$5088.85 is **HEREBY GRANTED**.

So ordered this 28th day of December 2012.

  
Nancy S. Hurley  
Waiver Official