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In the Matter of

**Docket No. 14-62-WA**

**B,**

Respondent

Waiver Proceeding

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### **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 salary overpayment of \$3241.68 based on a Bill of Collection (BoC).<sup>2</sup> The debt collection letter reflects salary overpayments related to FERS Retirement deductions and results from a correction to a personnel action processed by the employing agency. For the reasons that follow, I find that waiver of this debt is warranted. Accordingly, Respondent's request for waiver is granted.

The legal authorities pertinent to this waiver request 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

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<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) (Waiver Statute). The law of debt collection is extensive. *See, e.g. In re Richard*, Dkt. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at footnote 1 (setting forth the statutory framework governing debt 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 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: M1431100018 specified by the Payroll Operations Division of the Department of Interior (DOI) dated Nov. 7, 2014 which identified \$1507.62 owed for 2013 and \$1734.06 for 2014 for Retirement Code Correction for the period PP201309 to PP201420. This reflects back to Respondent's hire date of April 8, 2013.

wages to pay debts, and setting standards for waiving those debts when 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 the Department through its payroll servicer (DOI) is entitled to recover the salary overpayment for Code Changes from “K” (FERS) to “KR” (FERS-RAE) for not properly coding Respondent as “KR” at a higher retirement deduction rate (3.1%) from the inception of her hire. The Code Changes are reflected on her SF-50s, and her initial notification of any Code change came on October 2, 2014 when she received EOPF notification about correction for her SF-50. When Respondent logged into her EOPF to review the changes she learned from the remarks: “corrects item number 030 from K to KR.” Respondent asserts this was the first time she learned of this difference and that any new hire to the government in 2013 is correctly identified as “KR” (FERS-RAE) and subject to a 3.1 % FERS Retirement deduction. Even upon learning there was a code correction, Respondent had to research what that meant and to find that a much lower Retirement deduction applies to the FERS category, that being .8% than the FERS-RAE one. Thus, it is the difference between the .8% and the 3.1% rate which the Department now seeks to recover. The FERS-RAE new rate was supposed to apply to any new federal employee without any prior creditable service as of January 1, 2013.<sup>5</sup>

This retroactive adjustment of FERS-RAE deductions from Pay period 21 in FY 2014 to Respondent’s April 8, 2013 hire date, created the salary overpayment of wages with accompanying changes in deductions for those pay periods, resulting in the \$3241.68 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<sup>6</sup>, the DOI Debt Notice (Nov. 7, 2014) document, a cancelled DOI Debt Notice, Respondent’s submission of multiple SF-50s, Respondent’s LES documents, her miscellaneous bank statements for verification of prior employment with a private sector firm.

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.

## **DISCUSSION**

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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 900–904 (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> An explanation of the Retirement Coverage Categories (FERS), (FERS-RAE), (FERS-FRAE) and their dates of applicability can be found on the OPM website (Benefits Administration Letter, No. 12-104 (Oct. 3, 2012) and collateral sites, such as [www.fedsmith.com/2014](http://www.fedsmith.com/2014) (see article, *FERS, FERS-RAE, FERS-FRAE... What Does All this Mean?*) (April 7, 2014).

<sup>6</sup> Respondent complied with OGP requirement to affirm her supporting statement as returned on December 15, 2014, with supporting documents.

Broadly stated, determining whether waiver is appropriate requires a consideration of two factors: namely, (1) whether there is no indication of fraud, misrepresentation, fault<sup>7</sup>, or lack of good faith on Respondent's part, and (2) whether Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment.<sup>8</sup> Respondent must satisfy both factors to obtain a waiver.

In waivers, the fault standard has specialized meaning and is examined in the context of an employee's duty to prevent or discover mistakes and errors in salary payments when doing so is feasible. Fault is examined in light of the following: (a) whether the erroneous payment resulted from an employee's incorrect but not fraudulent statement that the employee under the circumstances should have known was incorrect;<sup>9</sup> (b) whether the erroneous payment resulted from the employee's failure to disclose to a supervisor or official material facts in the employee's possession that the employee should have known to be material; or (c) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.<sup>10</sup>

Respondent argues that the waiver of the entire debt is warranted because it was incurred through administrative error not caused by her. She further asserts that she was not aware of the differences in retirement classifications and thought she could rely on the accuracy of the SF-50s provided to her. Additionally, Respondent notes that she was a new employee to federal service and there was no explanation during her onboarding process that distinguished the code classifications (FERS, FERS-RAE). She claims she examined her SF-50 when onboarding and her Leave and Earnings Statement (LES) when available, and found the information on both to be matching, so to the best of her knowledge she determined both documents to be correct. She reviewed her LES documents which carried the FERS deduction at .8% for FY 2013 pay period 9 through FY 2014 pay period 21, when suddenly the 3.1% deduction appeared with the new notation of FERS-RAE, with subsequent LES for PP 22 and PP23 carrying the new designation. She first received notification on October 2, 2014 of an SF-50 corrective action (via EOPF notice) and says she did not understand the correction: "Corrects item number 030 from K to KR." She researched it at that point to understand the classification. She further reports that in the course of her due diligence, she had to notify DOI Payroll Operations Division personnel that their first debt calculation received on November 6, 2014 was in error and DOI agreed and cancelled it, reducing the proposed debt by \$1127.38 and reissuing the current notice of debt. She asserts that at the time of hiring, new to the federal service, she received no information from Human Resources ("HR"/"HCCS") asking new hires to ensure the correct retirement code was identified on their SF-50s.

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<sup>7</sup> In this respect, since fault can derive from an act or failure to act, fault does not require a deliberate intent to deceive.

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

<sup>9</sup> For discussion of the scope of the Respondent's duty under the fault standard, see *In re William*, Dkt. 05-11-WA, U.S. Dep't of Educ. (Oct. 19, 2005).

<sup>10</sup> See generally, *Guidelines for Determining Requests* U.S. Department of the Treasury Directive (2009), at <http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/td34-01.aspx>.

Respondent asserts upon being hired and completing the necessary forms, no one in HR/Payroll provided any acronym list or ever explained any difference that might cause variations in deductions for payroll processing. Summarizing her position she submits that if no one in HR/Payroll performed due diligence to make the new hire aware of differences, and HR incorrectly input the code as “K” (FERS) instead of “KR” (FERS-RAE) in SF-50 Box 30, there was no way for her as the new hire to recognize such error. She further notes that from her April 2013 hire date and the October 2014 (EOPF correction notice) she did receive seven SF-50s with the incorrect code. She identifies that during that year and a half, the Department’s HR had at least seven opportunities to review her forms, identify the error and correct it, but this was never done. Since early detection and correction did not occur, she submits she is now being penalized for the HR’s untimeliness and lack of control over the process, causing an excessive debt to accrue to her detriment. Respondent shows that as soon as the debt was brought to her attention, she contacted appropriate people both at DOI and the Department’s HR/Payroll staff and proceeded to work with them to even recalculate the amount owed for the difference between the applicable retirement codes. Once alerted to any problem, Respondent pursued a very active role in both researching the debt for her own understanding and working with DOI to bring accuracy to the rate calculations.

In applying the fault standard to this case, the tribunal concludes the Respondent lacks fault. As an initial matter, the tribunal recognizes that this overpayment was the result of an administrative error that does not reflect any fraud, misrepresentation, or lack of good faith by Respondent. More importantly, this is not the type of case where an employee reasonably should know that an erroneous overpayment has occurred. The change in Respondent’s retirement rate did not result in significant change to her pay.

In view of the preceding facts, this case is akin to *In re Joseph*, Dkt. No. 08-06-WA, U.S. Dep’t of Educ. (Aug. 4, 2009), and *In re T*, Dkt. 13-40-WA, U.S. Dep’t of Educ. (Dec. 5, 2013). In both, the employee was overpaid because of a change in his retirement classification and not charged with knowledge of a retirement misclassification, and thus satisfied the fault standard.<sup>11</sup> The present case is also related to the decision in *In re Francisco*, Dkt. No. 07-154-WA, U.S. Dep’t of Educ. (Feb. 15, 2008). In keeping with *Francisco*, the fault standard is satisfied when the circumstances of the debt show the employee could not have known that he or she was erroneously compensated. From all indications, and particularly because Respondent was new to federal service, this is not a case where Respondent would have been able to discover the erroneous payment or otherwise know of the inaccuracy of her pay.<sup>12</sup>

Having found no fault or lack of good faith on Respondent’s part, the remaining question is whether Respondent has demonstrated that it is against equity and good conscience for the Federal government to recover the debt in this case. To secure a favorable ruling on the equity standard, Respondent must show that she acted fairly, without fraud or deceit, and in good faith with regard to all matters concerning the overpayment. In addition, although there are no rigid rules governing the application of equity, I must balance equity and evaluate good conscience in

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<sup>11</sup> This case, *In re Joseph*, and *In re T*, are distinct from *In re Lucas*, Dkt. No. 14-70-WA, U.S. Dep’t of Educ. (February 9, 2015), where the employee was a human resources specialist.

<sup>12</sup> See, *In re Russell*, Dkt. No. 05-19-WA, U.S. Dep’t of Educ. (June 23, 2005).

light of the particular facts of this case.<sup>13</sup> In doing so, I must balance the competing interests in the forgiveness of a debt 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 overpayments because the overpayments were caused by the Department's error and repayment will impose an undue financial burden. Respondent states that her current position pays less than her former position with a private sector firm. Respondent supplied information about the prior employer and showed bank information about salary paid from that employer. Respondent verifies she took a pay cut when she moved from the prior firm into federal service. She submits that repayment in light of her tight personal budget would impose a serious burden. In this light, the tribunal concludes that Respondent's assertions highlight the potential financial hardship that the repayment of this debt may impose. The financial burden is a significant factor supporting Respondent's position that repayment would be inequitable. In light of the aforementioned and on the basis of the entire record, I find that in the interests of the United States waiver of this debt 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 to the United States Department of Education in the amount of \$3241.68 is **HEREBY GRANTED**.

So ordered this 20<sup>th</sup> day of February 2015.

  
Nancy S. Hurley  
Waiver Official

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<sup>13</sup> See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Education. (December 14, 2005); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (September 14, 2005).