



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF HEARINGS AND APPEALS

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In the Matter of

**Docket No. 17-72-WA**

**E,**

Waiver Proceedings  
Debt ID 73391612216

Respondent.

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**DECISION GRANTING WAIVER REQUEST IN PART AND DENYING WAIVER  
REQUEST IN PART**

The Office of Hearings and Appeals (OHA) received a request for a waiver of a debt from Respondent, a U.S. Department of Education (Department) employee, in the above-captioned proceedings that was dated December 15, 2017. On December 18, 2017, the matter was assigned to me as waiver official. Respondent's waiver request comes in response to the notice of a debt resulting from an overpayment of salary to Respondent in the total amount of **\$683.64**. This overpayment resulted from a temporary within-grade step salary increase that was erroneously processed, which resulted in Respondent receiving a GS-9, Step 4 salary, rather than her intended salary for a GS-9, Step 3 position for pay periods in 2017. Specifically, the Bill of Collection indicates that debts were incurred for overpayments made during pay periods 14 through 24.

On December 18, 2017, an Order Governing Proceedings was sent via electronic mail to Respondent. In response, Respondent timely filed her sworn statement with supporting documentation on January 12, 2018. On January 23, 2017, an order was issued providing Respondent with an additional opportunity to supplement her filings with any other documentation she wished to submit. That order instructed that any additional supporting documentation needed to be submitted by February 13, 2018 because "[a]t that point, I will close the file and weigh the evidence presented to determine if Respondent has shown that a waiver is warranted in this matter." After February 13, 2018 passed and Respondent had not submitted any additional information, the file was closed to additional submissions. To clarify a final point, however, I requested, and was provided, copies of Respondent's Leave and Earning Statements from Pay Periods 12 through 24 of 2017.

Having reviewed the submitted information, I conclude that Respondent has meet failed to meet her burden of showing she is without "fault" as the term is used in these proceedings for the overpayments at issue in this matter related to overpayments incurred during pay periods 17 through 24. For pay periods 14, 15, and 16, however, Respondent has met her burden. Accordingly, Respondent's request for a waiver is granted in part and denied in part.

In a waiver proceeding, the debtor assumes<sup>1</sup> the validity of the debt, but argues that she should not be required to repay the debt because of equitable considerations as well as because there is no indication of fraud, misrepresentation, fault, or lack of good faith by Respondent or anyone else having an interest in obtaining the waiver.<sup>2</sup> When requesting a waiver, 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. This decision constitutes a final agency decision.

## JURISDICTION

The waiver authority involving former and current employees of the Department was delegated to the Office of Hearings and Appeals (OHA),<sup>3</sup> which, thereby, exercises waiver authority and jurisdiction on behalf of the Secretary of Education to waive<sup>4</sup> claims of the United States against a former or current employee of the Department.<sup>5</sup> The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.<sup>6</sup> Jurisdiction is proper under the Waiver Statute at 5 U.S.C. § 5584.

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<sup>1</sup> Assuming the validity of the debt for the purposes of a waiver proceeding does not preclude Respondent from challenging the validity of the debt in a separate pre-offset hearing.

<sup>2</sup> Under waiver decisions issued by the Comptroller General interpreting 5 U.S.C. § 5584, "pay" has been held to include "nonpay" or nonsalary compensation, which covers recruitment bonuses, accrual of annual leave, health and life insurance premiums, retention allowances, and all forms of remuneration in addition to salary. *See In re T*, Dkt. 13-40-WA (Dec. 5, 2013) at 2 n.5.

<sup>3</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, revised Jan. 2012).

<sup>4</sup> *Waiver* is defined as "the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee to an agency as [provided] by 5 U.S.C. 5584 . . . or any other law." 5 C.F.R. § 550.1103 (2014).

<sup>5</sup> *See* General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 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 (2012) and 31 U.S.C. § 3716 (2012) (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: <http://oha.ed.gov/overpayments.html>.

<sup>6</sup> *See* 5 U.S.C. § 5584(b) (2012) (noting the authority held by the authorized official in waiver cases).

## PROCEDURAL HISTORY

In the first half of 2017, Respondent was selected for a promotion from a GS-7 level Security Specialist to a GS-9 Personnel Security Specialist. On June 11, 2017, the promotion went into effect and Respondent's pay was properly set at a GS-9, Step 3 level as indicated by an SF-50 approved of on June 8, 2017. On August 1, 2017, however, a new SF-50 was issued that made numerous changes to Respondent's prior SF-50. Among those changes was an erroneous amendment to "number 19," which indicated a change from Step 3 to Step 4 within the GS-9 pay grade for Respondent's salary. On November 2, 2017, another SF-50 was issued, indicating numerous corrections, including changing Respondent's pay back to a GS-9 Step 3 salary. That same day, a representative from the Department's Office of Human Resources (OHR) contacted Respondent by phone to explain the changes made in the new SF-50 and their effect. The OHR representative followed up the call with an email reiterating the content of the phone conversation, including informing Respondent that she would be receiving a bill from the Department of the Interior's Business Center (DOI) for the debt incurred as a result of the overpayment. In a Bill for Collection, dated December 4, 2017, DOI informed Respondent of her debt. In December 15, 2017 letter, Respondent requested a waiver from this debt.

Respondent has indicated that during the time of the overpayment, because of the small increase in her paycheck of \$43.42, she did not notice the overpayment until she was notified by OHR. Respondent additionally contends that once the error was brought to her attention it was immediately corrected and she did not accept any additional overpayments. Respondent further asserts that she does not "have the education, skill and/or knowledge to understand how human resources dictate and assign step increases when the grade is increased as well." Respondent finally argues that she "was not aware of the increase" and does not feel that she should be "held responsible" for OHR's error.

## DISCUSSION

Determining whether waiver is appropriate requires consideration of two factors; namely, (1) whether there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of Respondent, and (2) whether Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment.<sup>7</sup>

It is well established that "no employee has a right to pay that he or she obtains as a result of overpayments."<sup>8</sup> 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 (fault standard).<sup>9</sup> As part of this fault standard, a respondent must also show that he or she did not "accept[] the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous."<sup>10</sup> Once an employee knows or should know of

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<sup>7</sup> See e.g., *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

<sup>8</sup> *In re Danae*, Dkt. No. 13-28-WA, U.S. Dep't of Educ. (Oct. 24, 2013) at 4; *In re Carolyn*, Dkt. No. 11-02-WA, U.S. Dep't of Educ. (Aug. 11, 2011) at 4.

<sup>9</sup> See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005).

<sup>10</sup> See *In re Robert*, Dkt. No. 09-10-WA, U.S. Dep't of Educ. (Nov. 19, 2009) at 3.

a salary overpayment, the employee is required to set aside money to repay the overpayment of salary.<sup>11</sup> As we have stated, when “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>12</sup> Specifically, employees have a duty to review and react to errors that are clear on the face of a leave and earnings statement or SF-50 “Notification of Personnel Action” form.<sup>13</sup>

In this matter, there is no indication that the overpayments at issue in this matter resulted from Respondent’s fraud, actions, statements, or failures to disclose information. Therefore, the only matter left to be considered in the “fault” analysis is whether, during the time Respondent received overpayments of salary, Respondent knew or should have known that the Department had committed an error by changing Respondent’s pay from a GS-9, step 3 level to a GS-9 step 4 level approximately one and half months after she had been promoted to the GS-9 level.

Respondent has indicated that the overpayment went “undetected” until she received notice from OHR. Nothing in the record contradicts this sworn statement or indicates that at any time during the period of overpayment she had actual knowledge that she was being paid at the wrong step. Thus, the remaining issue in the fault standard analysis is whether and when Respondent **should** have recognized the overpayment.

In many ways, this case is similar to *In re J.*<sup>14</sup> In that matter, the respondent incurred an overpayment when less five months after being promoted into a position at a higher salary grade level, he was given an unexplained and erroneous step increase. In that matter, it was noted that:

The regulation governing within-grade increases clearly indicates that an employee is not eligible for a within-grade increase from a Step 1 to a Step 2 for at least 52 weeks. Our Tribunal has consistently held that “an employee generally should be aware of the waiting periods between step increases and should make an inquiry about any increase not in accord with those waiting periods.”<sup>15</sup>

Noting that there are at times mitigating circumstances that would indicate that an employee would be reasonable in failing to recognize that an early grade increase was erroneous, the facts of the case, including that the employee had been in federal service for approximately 10 years, indicated that the Respondent should have recognized an overpayment arising out of an unexpected within grade salary increase less than five months after a grade increase. In this matter, Respondent’s service computation is in August 2009, meaning she has similarly served in

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<sup>11</sup> *In re J.*, Dkt. No. 15-50-WA, U.S. Dep’t of Educ. (Nov. 9, 2015) at 6 n.14; *In re Sean*, Dkt. No. 08-01-WA, U.S. Dep’t of Educ. (July 31, 2009), at 3.

<sup>12</sup> See *In re Jeanette*, Dkt. Nos. 06-11-WA, 06-12-WA, & 06-13-WA, U.S. Dep’t of Educ. (Sept. 20, 2006) at 2

<sup>13</sup> See *In re E*, Dkt. No. 15-61-WA, U.S. Dep’t of Educ. (Feb. 5, 2016) at 5; *In re J*, Dkt. No 15-50-WA, U.S. Dep’t of Educ. (Nov. 9, 2015) at 5-6 n.14.

<sup>14</sup> *In re J*, Dkt. No 15-50-WA, U.S. Dep’t of Educ. (Nov. 9, 2015).

<sup>15</sup> *In re J*, Dkt. No 15-50-WA, U.S. Dep’t of Educ. (Nov. 9, 2015) at 5 (further citations omitted).

the federal government for close to a decade and should know that she was unlikely to be eligible for a step increase from a step3 to a step 4 less than two months after a grade increase.

Respondent, however, argues that she did not notice the small increase in her biweekly paychecks. As noted, an employee has an obligation to read SF-50s notification of personnel actions issued to them and their biweekly leave and earning statements (LES statements). Respondent's LES statements from pay periods 14 (June 11 – 24, 2017), 15 (June 25 – July 8, 2017), and 16 (July 9 – July 22, 2017) all explicitly state that Respondent is being paid at the GS 9, Step 3 level. Respondent's LES statements from pay periods 17 through 24, spanning from July 23 – November 11, 2017, however, all state that she was paid at the GS 9, step 4 level during those periods. Respondent had an obligation to read her LES statements and should have noticed the change in step indicated on those LES statements, starting when pay period 17 ended on August 5, 2017. Similarly, when Respondent received the SF-50 approved of on August 1, 2017, she had an obligation to examine the document, and should have noticed that among the changes the document indicates have been made is that the document “corrects item number 19 from 03” and that item 19, which indicates that it is her salary “Step or Rate,” after the change reads “04.” Therefore, once Respondent had the LES statement for pay period 17 or the SF-50 approved of on August 1, she was on notice of the overpayment of salary and had an obligation set aside money for repayment of the overpayment.

As noted, the Bill for Collection from DOI appears to seek collection of a debt incurred during pay periods 14 through 16 as well as 17 through 24. Pay periods 14 through 16 occurred before the issuance of the August 1, 2017 SF-50 stating a change had been made to Respondent's salary “step or rate.” And before the issuance of the SF-50 and the LES for pay period 17, Respondent did not have a reason to reasonably know of any overpayment in salary. Rather, Respondent was reasonable in relying upon that the LES statements issued for pay periods 14 through 16, all of which indicate that she was paid at a GS-9, Step 3 rate, the salary rate indicated in the SF-50 approved of on June 8, 2017, which implemented Respondent's promotion from a GS-7 level to a GS-9 level. Therefore, for pay periods 14 through 16, Respondent has met the burden of showing that she is without “fault” for the overpayments.

For a waiver to be granted, it is not enough to meet the fault standard, however. In addition, this Tribunal must also “balance the equities” by considering a number of factors, to determine whether repayment would be inequitable.<sup>16</sup> In this matter, I have determined that requiring repayment would be inequitable. Respondent has submitted a detailed budget showing how small the margin is between her take-home salary and her required expenses and displaying that repayment of the debt would constitute an undue hardship. Therefore, Respondent has met her burden of showing requiring repayment of the relevant debt incurred before pay period 17 is in equitable and should be waived.

Because Respondent has failed to show that during pay periods 17 through 24 of fiscal year 2017, she did not accept an overpayment in salary when she should have recognized the overpayment her request for a waiver as it applies to that portion of the debt is denied. However, because Respondent has met the burden of proving that she is both without “fault” for the

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<sup>16</sup> See *In re A*, Dkt. 15-43-WA, U.S. Dep't of Educ. (Sept. 4, 2015) at 5.

overpayment of salary during pay periods 14, 15, and 16 and requiring repayment would be inequitable, Respondent's request for a waiver of that portion of the debt is granted. This decision constituted a final agency decision.

#### ORDER

Pursuant to the authority of 5 U.S.C. § 5584 (2012), Respondent's request for waiver of the entire debt to the United States Department of Education is **HEREBY GRANTED IN PART AND DENIED IN PART**.<sup>17</sup> Specifically, the waiver is granted related to the debt incurred during pay periods 14, 15, 16 and denied related to the debt incurred during pay periods 17, 18, 19, 20, 21, 22, 23, and 24.

So ordered this 8th day of March, 2018.

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Daniel J. McGinn-Shapiro  
Waiver Official

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<sup>17</sup> When there is a denial of a waiver of a debt resulting from a salary overpayment, as in this matter, the employee has the right to request a pre-offset hearing before an Administrative Law Judge to challenge the existence or amount of the debt or an involuntary repayment schedule. 34 C.F.R. § 32.6 (b). As noted, however, this constitutes a final agency decision and Respondent may not challenge the denial of the waiver request. 34 C.F.R. § 32.5 (a)(1).