



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS  
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In the Matter of

**GD,**

Respondent.

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**Docket No. 19-11-WA**

Waiver Proceeding

**DECISION GRANTING WAIVER**

This decision concerns a Notice of Overpayment of Salary issued to Respondent in the gross amount of \$58,574.96 and identified by Debt ID M1834700004.<sup>1</sup> The overpayment arose from nearly three years of salary payments made at an SES rate of pay while Respondent was in a GS-15 position.<sup>2</sup> Based on the following analysis, I grant the waiver request.<sup>3</sup>

JURISDICTION

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

DISCUSSION

Waiver of an erroneous salary payment is an equitable remedy. Determining whether waiver is appropriate requires consideration of two factors: (1) whether there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of Respondent, and (2) whether

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<sup>1</sup> Respondent submitted his waiver request more than 15 days after receipt of the debt letter. However, the debt letter did not satisfy the regulatory notice requirement because, among other things, it did not clearly describe the separate waiver and pre-offset procedures or indicate there was a deadline to file a waiver request. 34 C.F.R. §§ 32.3, 32.4(b). Because the debt letter did not commence the 15-day timeline, I accept Respondent's waiver request as timely.

<sup>2</sup> Waiver Request, Attachment F (Letter to Respondent from Chief Human Capital Officer dated Jul. 5, 2018).

<sup>3</sup> Respondent also chose to exercise his right to a pre-offset hearing to challenge the validity of the debt. However, because I waive the entire amount of the debt, I find no controversy to be decided by a pre-offset hearing, and conclude that a pre-offset hearing would be moot.

Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment.<sup>4</sup> In this case, Respondent satisfies both factors.

First, Respondent demonstrates that he is not at fault with regard to the overpayment. Respondent accepted a transfer from an SES position to a GS-15 position with written assurance that he would retain his SES salary.<sup>5</sup> Respondent relied on the representations of senior departmental staff that he would “retain his current salary” and that “[t]his action is consistent with 5 CFR 536.301.”<sup>6</sup> The change in Respondent’s position was apparently approved by the Executive Resources Board (ERB) and the Secretary.<sup>7</sup> Respondent reasonably relied on senior departmental leaders’ determination that his salary retention was proper.

Second, Respondent has shown that repayment would be inequitable. Respondent accepted a “voluntary reassignment” with the understanding that he would retain not only his salary, but his eligibility for reinstatement to SES service in the future.<sup>8</sup> Therefore, Respondent faces not only the prospect of repaying an extraordinary sum, but also an unexpected change in employment circumstances based on his detrimental reliance on representations from senior departmental staff.<sup>9</sup>

Also, the total sum of Respondent’s debt – \$58,574.96 – is substantial and presents an obvious burden.<sup>10</sup> Even the net amount to be paid by Respondent, \$48,228.67, constitutes well over 50% of Respondent’s annual take home pay. It would be unconscionable to so significantly burden Respondent when the circumstances from which this situation arose were largely beyond his control.

Finally, the extraordinary sum at issue represents almost three years of payments that the Department failed to recognize as erroneous. Without any mitigating justification, waiver officials have found such significant delays to “go[] to a finding of agency negligence in handling an overpayment case.”<sup>11</sup>

Based on the above analysis, I find that Respondent has shown that he satisfies both the fault and equity standards to justify a waiver. Respondent also asserts his belief that his previous

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<sup>4</sup> 5 U.S.C. § 5584(a) (2012); *In re David*, Dkt. No. 05-22-WA, U.S. Dep’t of Educ. (Dec. 14, 2005) at 3, 5.

<sup>5</sup> Waiver Request, p. 1.

<sup>6</sup> *Id.*, Attachment B (Memorandum to Executive Resources Board from Director, Office of Human Resources dated July 10, 2015).

<sup>7</sup> *Id.*, Attachment D (Memorandum to the Secretary from Director, Office of Human Resources dated Aug. 25, 2015, commemorating the ERB’s “recommended approval” of the “retention of [Respondent’s] SES salary . . . upon reassignment”).

<sup>8</sup> *Id.*, p. 3.

<sup>9</sup> *See In re M*, Dkt. No. 16-30-WA, U.S. Dep’t of Educ. (Oct. 14, 2016) at 6 (finding it “unconscionable” to require repayment of a \$15,000 recruitment bonus when the employee detrimentally relied on the bonus to move from a lower cost living area to change jobs).

<sup>10</sup> *In re J*, Dkt. No. 17-04-WA, U.S. Dep’t of Educ. (Mar. 23, 2017) at 5 (finding a debt of \$2,298.80 to be “substantial”); *In re J*, Dkt. No. 16-57-WA, U.S. Dep’t of Educ. (May 18, 2017) at 5 (finding repayment of \$7,294.93, representing “more than two month’s take home salary and 17% of Respondent’s annual pay” to be inequitable); *In re M*, Dkt. No. 16-30-WA, U.S. Dep’t of Educ. (Oct. 14, 2016) at 6 (finding a \$15,000 debt to be “substantial”).

<sup>11</sup> *In re M*, Dkt. No. 16-30-WA at 6.

agreement with the Department is null and void, which “would mean that I would still be a member of the Senior Executive Service, with full retention of pay status, and there would be no rationale for a salary adjustment or a debt collection.”<sup>12</sup> Respondent also requests that he “be returned to the previously agreed upon salary as indicated in supporting documentation.”<sup>13</sup> In my role as Waiver Official, my authority is limited to the question of whether to grant a waiver of the debt asserted by the Department. I have no authority to consider these additional issues or grant or deny the specific relief Respondent requests.

### ORDER

Pursuant to the authority at 5 U.S.C. § 5584 (2012), Respondent’s request for waiver of the debt to the United States Department of Education captioned Debt ID M1834700004 is **HEREBY GRANTED** in the entire gross amount. Any sums already collected to satisfy these debts are **ORDERED** refunded to Respondent immediately.<sup>14</sup>

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/s/  
Charles S. Yordy III  
Waiver Official

Dated: March 22, 2019

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<sup>12</sup> Waiver Request, p. 3.

<sup>13</sup> *Id.*, p. 4.

<sup>14</sup> 5 U.S.C. § 5584 (c).