



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS  
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In the Matter of

**Docket No. 19-53-WA**

**M L,**

Waiver Proceeding

Respondent.

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**DECISION GRANTING WAIVER**

At issue in this case is whether an employee of the U.S. Department of Education (Department) should be granted a waiver of \$1,885.63 (Debt ID 91691553734) for a salary overpayment. This overpayment occurred because the Department processed a Within Grade Increase (WGI) personnel action while the employee was on a temporary promotion detail. For the reasons that follow, this tribunal concludes that waiver of the debt does meet the waiver standards. Accordingly, Respondent's request for waiver is GRANTED.

**Jurisdiction**

Under 5 U.S.C. § 5584 (the Waiver Statute), the Department has the authority to waive claims of the United States against debtors as a result of an erroneous payment to a federal employee.<sup>1</sup> The Department promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 *seq.*) and its *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (January 2012),<sup>2</sup> which specifically delegates the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).

The undersigned is the authorized waiver official who has been assigned this matter by OHA. 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 request for waiver. This tribunal has reviewed all the submissions that are in the record. This decision constitutes a **FINAL** agency decision.

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<sup>1</sup> See 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) (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: <http://oha.ed.gov>.

<sup>2</sup> The *Handbook*, ACS-OM-04, was revised and reissued by the Department on Jan. 19, 2012.

## **Discussion**

On June 28, 2019, OHA received a waiver request from the Respondent for an overpayment identified as Debt ID 91691553734. On July 2, 2019, an Order Governing Proceedings (OGP) was issued. The OGP provided the Respondent an additional opportunity to supplement the record with materials that would support the Respondent's waiver request. On August 6, 2019, the Respondent filed additional material to support the Respondent's waiver request.

This tribunal has reviewed the submitted evidence and has determined that the record contains sufficient evidence to determine whether to grant Respondent's waiver request. The record is now closed, and the matter is ready for decision.

Currently before this tribunal in this matter are the following documents:

- (1) Respondent's correspondence requesting a waiver dated June 25, 2019.
- (2) Debt Collection letter dated June 17, 2019.
- (3) A collection of emails between the Respondent and the Department.
- (4) Respondent's financial hardship narrative dated July 29, 2019.
- (5) A collection of monthly bill statements.
- (6) Earnings and Leave Statements (ELS) from Pay Period (PP) 201813 to 201912.
- (7) SF-50 Notification of Personnel Action with EFFECTIVE DATE of June 10, 2018, and an APPROVAL DATE of June 20, 2018, and the NATURE OF ACTION identified as PROMOTION-NTE 06-09-19.
- (8) SF-50 Notification of Personnel Action with EFFECTIVE DATE of September 6, 2018, and an APPROVAL DATE of October 6, 2018, and the NATURE OF ACTION identified as CHG IN TENURE GROUP.

## **Fault Standard**

In a waiver proceeding, the validity of the debt is not within the determination of the Waiver Official. The waiver of a salary overpayment is an equitable remedy, in which the debtor argues that he or she should not have to repay the debt. The standard for determining whether a 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,<sup>3</sup> and (2) whether Respondent can demonstrate that collection of the debt would be against equity and not in the best interests of the United States.

To determine whether these requirements are met, the debtor, upon requesting a waiver hearing, is required 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.

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<sup>3</sup> See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005).

At issue in this proceeding is whether Respondent's arguments and submissions support a request that the entire overpayment be waived in accordance with standards prescribed by statute and consistent with the case law and regulations promulgated by the Department. Therefore, the Respondent's waiver can only be granted if there is a lack of fault by the Respondent and it would be against equity to collect the debt.

*Fault* in a waiver case is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. Fault in a waiver case is determined by assessing whether a reasonable person should have known or suspected that he or she was receiving more than his or her entitled compensation.<sup>4</sup> In 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>5</sup> Thus, every waiver case must be examined in light of its particular facts and circumstances.<sup>6</sup> A waiver cannot be granted if a debtor is unable to satisfy the fault standard.

When a personnel action is authorized for an employee, the employee is issued a form entitled SF-50 Notification of Personnel Action. This form provides notice to the employee of the authorized personnel action. The employee has a duty to review any SF-50 issued for clearly identifiable errors.<sup>7</sup> A WGI is a periodic increase in an employee's basic rate of pay from one step of the grade to the next higher step of that grade.<sup>8</sup> Each grade is comprised of 10 Steps. For advancements between Steps 1-4, an employee must wait 52 weeks (1 year) of service from the date of the last Step increase. Advancements between Steps 5-7 require a waiting period of 104 weeks (2 years) of service from the date of the last Step increase. Advancements between Steps 8-10 require 156 weeks (3 years) of service from the date of the last Step increase.<sup>9</sup> It is well established that an employee is expected to know the required waiting periods between WGIs and to inquire about increases that do not conform to those waiting periods.<sup>10</sup>

There are rare exceptions that even if the employee has completed their requisite waiting period between steps, the employee is disqualified from a WGI. To determine if a disqualifying event applies to an employee's WGI, requires the understanding of and application of novel personnel terms. An employee can be disqualified for a WGI because of a combination of employment position type,<sup>11</sup> Equivalent Increase<sup>12</sup> and Credible Service.<sup>13</sup>

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<sup>4</sup> See *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (Nov. 9, 2005).

<sup>5</sup> See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

<sup>6</sup> *Id.* at 5.

<sup>7</sup> See *In re Robert*, Dkt. No. 06-77-WA, U.S. Dep't of Educ. (Nov. 7, 2006).

<sup>8</sup> See 5 C.F.R. § 531.405(a).

<sup>9</sup> See *id.*

<sup>10</sup> See *In re J*, Dkt. No. 15-50-WA, U.S. Dep't of Educ. (Nov. 9, 2015); *In re Nicole*, Dkt. No. 09-07-WA, U.S. Dep't of Educ. (July 30, 2009); *In re Pedro*, Dkt. No. 06-78- WA, U.S. Dep't of Educ. (April 13, 2007); *In re Jeanette*, Dkt. No. 06-11-WA, U.S. Dep't of Educ. (Sept. 20, 2006); *In re Jay*, Dkt. No. 06-01-WA, U.S. Dep't of Educ. (June 23, 2006).

<sup>11</sup> See 5 C.F.R. § 531.403

<sup>12</sup> See 5 C.F.R. § 531.407

<sup>13</sup> See 5 C.F.R. § 531.406

On June 10, 2018, the employee was temporarily promoted<sup>14</sup> from a GS-11 Step 2 to a GS-12 Step 1. On September 6, 2018, the employee received a WGI to a GS-12 Step 2.<sup>15</sup> This WGI was presumably in response to the employee's acceptable performance during the preceding 52 week period. However, the employee was disqualified from receiving the September 6, 2018, WGI.<sup>16</sup> The June 10, 2018, temporary promotion was considered an Equivalent Increase,<sup>17</sup> thus disqualifying the September 6, 2018, WGI. The employee would be eligible for the WGI after the employee's temporary promotion was ended and the employee was returned to the lower grade<sup>18</sup>. The employee received the erroneous pay from PP 201819 to 201912.

The employee states that she is new to federal service and that she had never been on a temporary promotion assignment. When the employee received the September 6, 2018, WGI, the employee believed she was entitled to the WGI. The employee knew she had just completed her 52-week waiting period from the previous step increase. However, she did not know that she was disqualified from receiving a WGI, until the temporary promotion was terminated.

This case is the exception to the expectation that an employee should know when they are entitled to receive a WGI. The disqualification for a WGI in this case is more than a waiting period timetable. In this case, understanding disqualification of the WGI would require the Respondent to possess specialized knowledge of personnel terms combined with multiple federal pay regulations. Due to the Respondent's newness to federal service, the Respondent lacked familiarity with the federal pay system and WGI increases. At the time of the overpayment, the Respondent had only three years of federal service experience, and just two WGI increases, with none while the employee was on a temporary promotion. There is nothing in the record to indicate that the employee had or should have specialized knowledge of personnel terms and more complex federal pay regulations.

Therefore, based upon those mitigating factors, it is reasonable that the Respondent believed she was entitled to the WGI. There is nothing in the record that contradicts the Respondent's well-placed belief that the WGI was appropriate. There is nothing in the record to indicate the overpayments is the result of the Respondent's fraud, actions, statements, or failures to disclose information. Thus, this tribunal concludes that the Respondent could not have known the WGI was otherwise erroneous, and the Respondent is without fault as defined under waiver standards.

### **Equity and Good Conscience**

If the Respondent is without fault for the overpayment, the Respondent may successfully obtain waiver of a debt after the Respondent shows that it is against equity and good conscience to recover the overpayment.

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<sup>14</sup> Ex. SF-50 Notification of Personnel Action with Effective Date of June 10, 2018.

<sup>15</sup> Ex. SF-50 Notification of Personnel Action with Effective Date of September 6, 2018.

<sup>16</sup> See 5 C.F.R. § 531.404(c)

<sup>17</sup> See 5 C.F.R. §§ 531.403 and 407

<sup>18</sup> *Id.*

There are no rigid rules governing the application of the equity and good conscience standard. The tribunal must balance equity and/or appraise good conscience in light of the particular facts of the case.<sup>19</sup> Factors weighed by the tribunal include whether recovery of the claim would be unconscionable under the circumstances and whether collection of the debt would impose an undue financial burden.<sup>20</sup>

The Respondent argues that it would be against equity and good conscience to require repayment of the amount owed because it would be hardship. To support this argument, the Respondent submitted a financial hardship narrativity and substantial documentation including a monthly income and expenses statement with corresponding bills. After careful review of the Respondent's submitted hardship documentation, the tribunal finds that collection of the debt would cause the Respondent to be unable to pay for food and shelter, causing a financial hardship for the Respondent. Therefore, the collection of the debt is against equity and good conscience.

### 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 \$1,885.63 is **HEREBY GRANTED**. This decision constitutes a **FINAL AGENCY** decision.

So ordered this 9<sup>th</sup> day of April 2020.

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George H. Abbott, III  
Waiver Official

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<sup>19</sup> See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (Sept. 14, 2005).

<sup>20</sup> See *id.*

