

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	
Department of Health and	)	DATE: November 8, 1994
Human Services,	)	
	)	
- v. -	)	
	)	Docket No. C-94-353
Alfred H. Varga,	)	Decision No. CR342
	)	
Respondent.	)	
	)	

DECISION

This Debt Collection Act case has come before me pursuant to the hearing request filed by Administrative Law Judge Alfred H. Varga (Respondent). Respondent's hearing request is dated April 13, 1994. Respondent acknowledges in his hearing request that he received an overpayment of \$2184.57 from the Department of Health and Human Services (DHHS). He therefore seeks review of DHHS' determination that he must repay \$3547.96. In his hearing request, Respondent asks also for a waiver of the overpayment.<sup>1</sup>

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<sup>1</sup> In the hearing request, Respondent also objects to DHHS' making deductions of \$136.46 per payroll period to satisfy the asserted debt of \$3547.96. As I find below, DHHS had made four payroll deductions for the purpose of recouping the overpayment in issue. Finding 29. The deductions began because DHHS did not receive any response to the instructions on repayment intended for Respondent. See Finding 28. Moreover, DHHS ceased such deductions once Respondent forwarded a hearing request. Finding 45. The amount recouped by DHHS through such deductions is far less than the overpayment amount identified by Respondent in his hearing request. Finding 31. For these reasons, I conclude that DHHS' cessation of the deductions have rendered moot Respondent's objection that DHHS made deductions in an arbitrary manner.

As summarized in my Order and Schedule for Filing Briefs and Documentary Evidence, I held a prehearing conference with the parties on June 2, 1994, at which the parties identified the issues as the amount of the overpayment and whether the overpayment should be waived on the facts of this case. DHHS acknowledged that the overpayment was issued pursuant to administrative error and not due to any request or inducement by Respondent. The parties agreed that the case could be decided on a paper record, and they further agreed to waive the 60-day deadline for issuing a decision in this case. See 45 C.F.R. § 30.15(j)(7). Accordingly, I established a schedule by which the parties could present their written arguments and documentary evidence. I asked the parties also to address the additional question of whether DHHS had referred Respondent's request for waiver to me for decision pursuant to 45 C.F.R. § 30.15(p).

The parties filed their submissions in accordance with the schedule I established.<sup>2</sup> In its Supplemental Brief,

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<sup>2</sup> DHHS initially filed a document entitled DHHS' Motion and Brief for Summary Judgment (DHHS Brief). Respondent filed his Answer to DHHS' Motion and Brief for Summary Judgment (R. Brief). DHHS then filed its Reply to Respondent's Answer to DHHS' Motion and Brief for Summary Judgment (DHHS Reply). Thereafter, Respondent sent a letter containing additional arguments; however, he later requested to withdraw his letter. DHHS did not object to the request. Therefore, I granted Respondent's motion to withdraw his letter brief.

In light of the fact that DHHS had agreed at the prehearing conference that this case should be decided on a paper record, I sought clarification on whether DHHS had correctly styled its motion and brief. Counsel for DHHS confirmed that DHHS wished me to rule on whether it was entitled to judgment as a matter of law and, if not, as to what material facts remained in dispute. Therefore, on September 15, 1994, I issued a Ruling Denying DHHS' Motion for Summary Judgment. I gave the parties the opportunity to file additional submissions, which they did.

DHHS' briefs were accompanied by documents marked as exhibits and attachments. In the absence of any objections from Respondent, I have admitted into evidence all of DHHS' proposed exhibits (DHHS Ex. 1 to 4). In addition, I have redesignated DHHS Attachment 7 as DHHS Ex. 5, and I admit it into evidence as well.

(continued...)

DHHS acknowledges that Respondent's request for waiver had been referred to me. In his brief, Respondent argued the reasons in support of the waiver request. He also did not suggest that I lacked jurisdiction over the issue. Accordingly, I conclude that I have authority to review the merits of the waiver request filed by Respondent.

In the sections that follow, I will first identify the specific matters in controversy. I will then issue those findings of fact that pertain to my jurisdiction over the case and underlie my adjudication of the disputes presented by the parties. In the next section of the decision, I will discuss how I resolved those issues of material fact and reached the following conclusions of law:

- I. The net amount of the salary overpayment DHHS erroneously issued to Respondent is \$2184.57.
- II. The amount DHHS was initially entitled to collect from Respondent was \$3102.69.
- III. Of the \$3102.69, DHHS has already collected \$545.84 through payroll deductions.
- IV. Of the remaining \$2556.85, Respondent is entitled to have \$500 waived.
- V. Respondent may repay the amount of \$2056.85 to DHHS in one lump sum or in installments consistent with DHHS' rights to effectuate administrative offsets under 45 C.F.R. § 30.15.
- VI. If Respondent disagrees with my denial of his request to waive the portion of his debt that is in excess of the above-mentioned \$500 amount, he has a right of appeal to the Comptroller General of the United States.
- VII. In lieu of repaying DHHS the amount of \$2056.85, Respondent may, at his option, accept the terms of DHHS' settlement offer.

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<sup>2</sup>(...continued)

I have admitted into evidence also the documents submitted by Respondent (R. Ex. 1 to 10).

In addition to the foregoing conclusions, I direct that, as promptly as possible after receiving Respondent's repayment(s), DHHS shall provide Respondent with the necessary documents that will enable him to obtain an appropriate refund or adjustment of the federal (including Medicare) and State taxes that were paid as a result of the salary overpayment erroneously issued by DHHS to Respondent.

#### ISSUES

The issues before me concern the amount of the debt in existence and the disposition of Respondent's request for a waiver of his obligation to repay the debt.

More specifically, the parties disagree on the following matters:

- o the amount of the net salary payment erroneously issued to Respondent;
- o the amount of Respondent's indebtedness; and
- o whether Respondent should be relieved of his obligation to repay the debt in part or in whole.

#### FINDINGS OF FACT

1. At all times relevant to this action, Respondent has been employed as an administrative law judge at the Detroit, Michigan, Hearing Office of the Social Security Administration's Office of Hearings and Appeals (OHA). DHHS Brief at 1.

2. The Social Security Administration is an agency within DHHS.

3. On July 13, 1993, DHHS electronically transferred the amount of \$2184.57 to Respondent's credit union account. R. Ex. 1; DHHS Ex. 2 at 6.

4. On July 20, 1993, DHHS electronically transferred the amount of \$2059.57 to Respondent's credit union account. R. Ex. 1.

5. DHHS issued Respondent an "Earnings and Leave Statement" for the amount of \$2059.57, showing it to be the net salary payment Respondent was due for the payroll

period that ended on July 10, 1993. R. Ex. 10; DHHS Ex. 2 at 9.

6. Respondent's gross earnings from DHHS for the pay period that ended July 10, 1993 were \$3548. R. Ex. 10; DHHS Ex. 2 at 9.

7. The \$2059.57 amount paid to Respondent for the payroll period that ended July 10, 1993 resulted from those deductions DHHS made for Respondent's contributions to his health plan, his thrift savings account, his federal retirement plan (CSRS), and his purchase of bonds, together with the withholdings DHHS made for his Medicare, federal, and State taxes. R. Ex. 10; DHHS Ex. 2 at 9.

8. There is no evidence that an "Earnings and Leave Statement" was issued by DHHS to Respondent with respect to the \$2184.57 amount electronically transferred to Respondent's credit union account on July 13, 1993.

9. DHHS transferred the \$2184.57 amount to Respondent's credit union account as a net salary payment to Respondent. See DHHS Ex. 3 at 8.

10. DHHS used Respondent's gross earnings of \$3548 for the payroll period that ended on July 10, 1993 to derive the \$2,184.57 net amount. DHHS Ex. 3 at 8.

11. The deductions and withholdings DHHS made that resulted in the net payment of \$2184.57 to Respondent were the same as those listed in Finding 7, with the exception that no deduction was made for the purchase of bonds. DHHS Ex. 3 at 8.

12. The payment of two salary checks to Respondent for the same payroll period, via the electronic transfer of funds, resulted solely from administrative error on DHHS' part. DHHS Brief at 2.

13. On July 21, 1993, Respondent became aware that there appeared to be excess money in his account at the credit union. R. Brief at 1.

14. After obtaining from the credit union a printout of the transactions, Respondent saw that his account was credited with his regular pay from DHHS on July 8 and July 20, and that, in addition, he was credited with an additional amount on July 13, 1993. R. Ex. 1; R. Brief at 1.

15. The amounts credited to his account on July 13 and 20, 1992 were described in the printout as "DHHS TREAS . . . FED SALARY . . ." R. Ex. 1.
16. Respondent checked with the credit union for possible mistakes by that organization. R. Brief at 1.
17. At Respondent's request, the manager of the Detroit Hearing Office contacted OHA's Travel and Payroll Staff in Falls Church, Virginia, before and during early August 1993, and made inquiries concerning the salary payments. DHHS Brief at 2; DHHS Ex. 1; R. Exs. 3, 6.
18. The Detroit Hearing Office's actions on Respondent's behalf included forwarding to OHA's Travel and Payroll Section, during July of 1993, copies of Respondent's Earnings and Leave Statements for the pay periods ending June 12, June 26, and July 10, 1993. R. Ex. 3.
19. On September 1, 1993, an unidentified individual told someone named "Larna" in Respondent's Hearing Office to inform Respondent that "he needs to pay the money back." DHHS Ex. 1; R. Ex. 3 at 2.
20. Larna Grace is the secretary to the manager of the Detroit Hearing Office. R. Ex. 6.
21. The evidence does not establish that Respondent was given the message that he must pay the money back. See R. Ex. 6.
22. On November 23, 1993, an employee of OHA's Travel and Payroll Staff prepared a memorandum with supporting documents concerning her determination that Respondent had been overpaid on July 10, 1993 in the amount of \$2184.57, and asking that an "overpayment letter" be sent out to Respondent. DHHS Ex. 2 at 1.
23. On January 18, 1994, the Assistant Director for Personnel and Pay Systems Division, DHHS, prepared a Certification of Salary Overpayment, to advise Respondent that he had received a salary overpayment of \$3548, and that, unless he made direct payment in the full amount of indebtedness within 30 calendar days, salary deductions would begin to satisfy the debt. DHHS Ex. 3 at 1.
24. The Certification of Salary Overpayment was "to" Respondent, "thru: Personnel Officer Terminal ID 43." DHHS Ex. 3 at 1.

25. The form "Instructions for Indebtedness Payment" attached to the Certification of Salary Overpayment states in relevant part:

1. PAYMENT IN FULL - ALWAYS NET AMOUNT
2. PAYMENT BY BIWEEKLY DEDUCTION . . .  
- ALWAYS GROSS AMOUNT

\* \* \*

B. If your overpayment is greater than \$ 650.00 (gross), your minimum payments are automatically calculated. Within thirty days from the date this notice was mailed, if the debt is not paid or you have not entered into a satisfactory payment arrangement, twenty six equal payments will begin until the debt is satisfied.

DHHS Ex. 3 at 2.

26. The evidence does not establish that the Certification of Overpayment dated January 18, 1994 and its attachments were sent to Respondent or "Personnel Officer Terminal ID 43" on or about said date.

27. The evidence does not establish that, if the Certification of Overpayment was sent on or about January 18, 1994, Respondent received it.

28. Having received nothing in response to the Certification of Overpayment dated January 18, 1994, DHHS did not begin payroll withholdings to satisfy the debt within the 30 days specified in its "Instructions for Indebtedness Payment." See Finding 25.

29. Beginning with the payroll period that ended on March 19, 1994, DHHS made four payroll withholdings in the amount of \$136.46 per payroll period in partial satisfaction of the salary overpayment. DHHS Ex. 4.

30. If the payroll withholdings in the same amount had continued for a total of 26 pay periods as specified in the Instructions for Indebtedness Payment, DHHS would

have recouped \$3547.96 -- an amount equivalent to (within four pennies of) the gross salary payment issued to Respondent through administrative error. See Findings 25, 29.

31. To date, DHHS has recouped \$545.84 of the overpayment through the above-mentioned four payroll withholdings. Finding 29.

32. During the weeks prior to April 13, 1994, Respondent noticed the payroll withholdings and sought clarifications from several employees within OHA's payroll office in Falls Church, Virginia, concerning the withholdings and the overpayment. R. Exs. 4, 6; R. Brief at 2.

33. On April 12, 1994, the Certification of Salary Overpayment and attachments were sent by facsimile to the Detroit Hearing Office. R. Ex. 5.

34. The Detroit Hearing Office did not have a copy of the Certification of Salary Overpayment and attachments until April 12, 1994. See R. Ex. 5.

35. On April 13, 1994, Respondent sent a letter to the Payroll and Accounting Operations Group of DHHS to request a hearing on the amount of the overpayment and on whether the overpayment should be waived. In the letter, he asked also that the payroll withholdings be stopped. R. Ex. 6.

36. According to instructions attached to the Certification of Salary Overpayment sent to Respondent, requests for hearing, waiver of overpayments, and stay of collection should be sent to the individual's "current/former Servicing Personnel Office." DHHS Ex. 3 at 4.

37. The instructions indicate that, for debts exceeding \$500, an individual may request a stay in collection while his request for waiver is being considered. DHHS Ex. 3 at 4.

38. After Respondent sent his letter dated April 13, 1994 to the Payroll and Accounting Operations Group, DHHS continued to make payroll withholdings of \$136.46 for the pay periods that ended on April 16 and April 30, 1994. DHHS Ex. 4.

39. On May 4, 1994, OHA's Travel and Payroll Staff received a call from a U.S. Senator's office, making inquiries on Respondent's behalf concerning the



overpayment. Memorandum to David Marty from Don Swain dated May 17, 1994 (attached to Hearing Request) (May 17 Memo).

40. Upon being told by the Senator's staff that Respondent had sent a request for hearing and waiver of overpayment dated April 13, 1994, Mr. Swain, of OHA's Travel and Payroll Staff, contacted Bill LaPointe, of DHHS' Payroll Accounting Operations Group, on May 5, 1994 and asked for a copy of Respondent's request for hearing and waiver of overpayment, along with a copy of the payroll audit. May 17 Memo.

41. On May 10, 1994, DHHS' Payroll Accounting Operations Group forwarded a copy of the payroll audit for Respondent, but indicated that it did not receive Respondent's request for hearing and waiver of overpayment. May 17 Memo.

42. On May 13, 1994, Mr. Swain informed the Senator's staff member that neither the OHA "servicing personnel office" nor DHHS' payroll office had received Respondent's request for hearing and waiver of overpayment. May 17 Memo.

43. On May 13, 1994, the Senator's office faxed a copy of the request for hearing and waiver of overpayment, dated April 13, 1994, to Mr. Swain's attention. May 17 Memo.

44. Mr. Swain then forwarded the April 13, 1994 letter from Respondent to the OHA personnel office for processing. May 17 Memo.

45. For the pay period ending May 14, 1994, DHHS suspended the deduction of \$136.46 from Respondent's salary. DHHS Ex. 4 at 5.

46. On May 24, 1994, Chief of OHA's Personnel Staffing Services Branch, Bonnie Miller, acknowledged receipt of Respondent's request for hearing. R. Ex. 7.

47. Ms. Miller stated in her letter that Respondent's request for hearing was misdirected to DHHS' Payroll and Accounting Operations Group; however, the request for hearing was brought to her office's attention by OHA's Division of Budget and Financial Management, which received a fax of the request via the Senator's office. R. Ex. 7.

48. Ms. Miller referred Respondent's request for hearing, which included the request for waiver of the

overpayment, to the Departmental Appeals Board, and the case was docketed accordingly. R. Exs. 7, 8.

49. "Hearing" means either a review of the record or an oral hearing. 42 C.F.R. § 30.15(b)(2).

## ANALYSIS

### A. The amount of the debt

Under the Debt Collection Act, debts include salary overpayments to employees. 45 C.F.R. § 30.2. As I noted in my September 15, 1994 Order Denying DHHS' Motion for Summary Judgment, Respondent does not dispute that he received a salary overpayment for the pay period ending July 10, 1993. Thus, there is no dispute in this case that a debt exists. The parties disagree as to the amount of that debt, however. DHHS claims that it is entitled to collect from Respondent the gross amount of the salary check that DHHS erroneously issued to Respondent. E.g., DHHS Reply at 4. Respondent, by contrast, argues that the amount of the debt is the net amount of the overpayment reduced by \$125, the value of a U.S. Savings Bond for which DHHS made a deduction but allegedly never delivered to Respondent. R. Brief at 10 - 11.

For the reasons stated below, I conclude first that Respondent is not entitled to reduce the amount of his overpayment by offsetting the value of a savings bond he allegedly never received. Second, I conclude that DHHS is not entitled to recover from Respondent the gross amount of the salary overpayment. Third, I conclude that DHHS' representation that Respondent may satisfy his debt by repaying the net amount of his indebtedness in one lump sum is, in effect, a settlement offer, which Respondent may accept or reject as he chooses. I analyze the waiver question in a separate section.

#### 1. The net amount of the salary overpayment

I first consider the parties' dispute concerning the net amount of the salary check DHHS erroneously issued to Respondent for the payroll period that ended on July 10, 1993. The net amount Respondent received is the necessary starting point for calculating both the amount DHHS is entitled to recoup from Respondent and the amount Respondent would need to repay if he were to accept DHHS' offer to satisfy the debt by repaying the net amount in one lump sum. Respondent contends that the net amount is

\$2059.57. DHHS contends that the net amount erroneously overpaid to Respondent was \$2184.57. I conclude that the correct net amount is \$2184.57, as contended by DHHS.

The evidence shows that, shortly after the payroll period that ended on July 10, 1993, DHHS issued two salary payments to Respondent via electronic transfers to his credit union account: once on July 13, 1993, and again on July 20, 1993. E.g., DHHS Ex. 2 at 9; DHHS Ex. 3 at 8; R. Ex. 1. DHHS issued an "Earnings and Leave Statement" that corresponds to the \$2059.57 amount paid to Respondent for the pay period that ended on July 10, 1993. R. Ex. 10. By contrast, there is no "Earnings and Leave Statement" corresponding to the \$2184.57 amount. Other "Earnings and Leave Statements" for pay periods prior to July 1993, as well as the printout of Respondent's checking account entries, also show that Respondent routinely received \$2059.57 as his net salary from DHHS. DHHS Exs. 2 at 10, 11; R. Ex. 1.

Respondent's disagreement with the \$2184.57 amount appears to be tied to his claim that he never received certain U.S. Savings Bonds to which he is entitled. In his hearing request, Respondent did state, "The overpayment amount I received was \$2,184.57." By contrast, in his brief he notes that DHHS deducted \$125 for the purchase of U.S. Savings Bonds in issuing him a net salary check for only \$2059.57 during July 1993, but he received no Savings Bonds from DHHS for the \$125 deduction. R. Brief at 10.

While I appreciate Respondent's concerns for the bonds DHHS should have sent him, the issues before me are limited to those debts owed to the United States. 45 C.F.R. § 30.2. There is no hearing right in this forum concerning any debt that may be owed by the United States to its employees. Respondent must seek recourse elsewhere to recoup any debt allegedly owed to him by DHHS.

For all these reasons, I conclude that the \$2184.57 deposited by DHHS in Respondent's credit union account is the net amount of the salary overpayment made in error by DHHS. Therefore, it is on this basis that I proceed to compute the amount of the debt which DHHS is entitled to recoup from Respondent.

2. The amount DHHS is entitled to recover from Respondent

In this section, I calculate the amount of the debt owed by Respondent to DHHS. I consider separately below the effect of DHHS' apparent offer to compromise Respondent's debt for a lump sum payment of a different amount and the question of whether Respondent is entitled to waiver of the debt. In calculating the amount of the debt, I have relied on the General Accounting Office's (GAO's) opinion letter cited by DHHS. DHHS Ex. 5 at 2 - 5.

There is no doubt that the total amount of money erroneously disbursed by DHHS on or about July 13, 1993 as a salary payment to Respondent was \$3548. Finding 6. DHHS argues, therefore, that the total amount of the debt to be collected from Respondent is \$3548. However, based on the contents of the GAO opinion letter, I reject DHHS' contention that the entire amount of the money wrongly disbursed by DHHS must be collected from Respondent.

DHHS asserts that the amount of Respondent's debt is the gross amount of the overpayment because it is a prior year debt. DHHS claims that the GAO letter supports its policy "to collect overpayment debts in the gross amount for prior year debts, and in the net amount for current year debts." DHHS Ex. 5 at 1. I find this policy unreasonable and lacking in legal support as applied to the past year debt pending before me.

The GAO letter contains the following statement:

The amount to be collected is the gross amount of the overpayment; that is, the total of all improper payments made directly to the employee and payments made on the employee's behalf.

DHHS Ex. 5 at 2 - 3. However, the GAO letter does not state that the gross amount of the overpayment must be collected solely from an employee in Respondent's situation. DHHS overlooks the fact that GAO was addressing both the issue of what is the amount of an overpayment to be collected by the agency as well as the issue of what is the amount of the overpayment the agency should recoup from an employee in Respondent's position. These are distinct issues, as DHHS' right to collect debts is not limited to actions against its employees. Under DHHS' regulations, "debts" include, "but are not limited to . . . salary overpayments to employees," and a "debtor" means also an "organization, association, partnership, corporation . . . indebted to" DHHS. 45 C.F.R. § 30.2 (emphasis added). Therefore, while DHHS

must indeed recover the gross amount of overpayment it had erroneously made in July of 1993 (\$3548), that fact does not lead to the conclusion that DHHS has a right to collect the gross amount of overpayment from Respondent.

GAO stated and illustrated by very clear examples<sup>3</sup> that, in the case of a past year debt such as Respondent's, the employee would repay the agency (or have deducted from his salary check) only the following:

- o the net overpayment amount; and
- o the withholdings the agency made for Medicare, federal taxes, State taxes, and local taxes.

DHHS Ex. 5 at 4. The employee is required to repay the Medicare and tax withholdings because the agency's records have already been balanced with the tax authorities for the prior year, and the W-2 already issued to the employee showed the actual withholdings of the prior year. Id. However, after the employee has repaid the agency for these prior year withholdings, the agency would then issue the employee a letter explaining the changes for the employee's use in dealing with the tax authorities to recover the excess withholdings. Id.

In the example GAO used to illustrate how the agency collects the gross amount of the overpayment, the employee would not repay deductions the agency erroneously made for his retirement policy, life insurance policy, or savings plan. To "collect" the foregoing types of deductions erroneously made by the agency during a prior year, "[d]eductions reported on behalf of the employee would be reduced [by the agency] the next time they were transmitted . . .," just as is done when the overpayment is corrected in the same calendar year as it was made. Id. If the employee has changed benefit programs or is no longer on the rolls,

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<sup>3</sup> The examples used by GAO parallel Respondent's situation. In the examples, the agency made withholdings for federal retirement and life insurance, Medicare and federal income taxes, State taxes, and local taxes; and the agency deducted contributions to the employee's thrift savings plan. In Respondent's case, DHHS made withholdings for Respondent's retirement plan (CSRS), Medicare taxes, federal taxes, and State taxes. In addition, DHHS deducted contributions to Respondent's thrift savings plan. DHHS Ex. 3 at 8.

the agency is to make reductions in the benefit accounts in effect at the time of overpayment. DHHS Ex. 5 at 5.

The contents of the GAO letter are logical and reasonable. The line drawn in GAO's examples between the extent of the employee's financial obligations for the overpayment and the agency's obligation to make adjustments and corrections in the payroll systems under its control illustrates the fact that the total amount of overpayment to be collected from Respondent is not the gross amount of the overpayment, \$3548. Instead, the amount of overpayment to be recouped from Respondent is only the "total of all improper payments made directly to the employee and [those] payments made on the employee's behalf" which were mandated by law and not within DHHS' power to collect from elsewhere. DHHS Ex. 5 at 3. Medicare, federal, State, and local income taxes must be withheld by an employing agency pursuant to law, whether or not a salary check is issued in error. The evidence introduced by the parties does not suggest any practical means by which DHHS can, on its own, recoup the improper Medicare, federal, State and local tax withholdings from anyone except the employee after DHHS has balanced its accounts with the taxing authorities for a prior year and issued the employee a W-2 form containing the incorrect withholdings for his tax filings. Therefore, as explained in the GAO letter, the employee should repay the agency the amount of such withholdings (along with the net amount he actually received) for a prior year debt and use the document the agency provides to obtain the appropriate refunds from the taxing entities.

Even though it may be possible for DHHS to use other means to achieve the same end described by GAO, I find unreasonable DHHS' approach of placing upon Respondent the burden of repaying the entire overpayment amount of \$3548. First, it is inequitable for DHHS to require Respondent to repay any duplicative deductions DHHS made to his retirement, savings, or health plans. Respondent was not required by law to have deductions made for health insurance, and he need not have elected to contribute to a thrift savings plan. Respondent never authorized DHHS to make more than one deduction per payroll period for his contribution to each plan, and he never authorized these plans to receive two identical contributions for the same payroll period from DHHS.

Respondent has already been greatly inconvenienced by the mistakes made by DHHS. As the GAO letter pointed out, if DHHS wishes to recoup the money it erroneously paid out during a prior year to the employee's federal retirement plan, insurance policy, and thrift savings account, DHHS

is capable of making the necessary reductions or adjustments within its own systems to compensate for such money. In addition, DHHS has admitted its capability for reducing all improper deductions withheld and reported on behalf of Respondent. DHHS Brief at 10. The equities are in favor of DHHS' correcting its own errors with as little inconvenience to Respondent as possible.

In addition, if Respondent were to repay his gross salary of \$3548 as urged by DHHS, Respondent's money would have paid for one extra pay period's worth of contributions to his retirement plan, health plan, and thrift savings plan. There is no allegation that Respondent has derived any benefit from having had two payments (instead of one) made to his health plan or CSRS retirement plan for the pay period that ended on July 10, 1993. DHHS has made no commitment to refunding the duplicative contributions to Respondent should he repay the \$3548. DHHS also has set forth no means by which Respondent may be able to recoup these extra contributions made by DHHS in his name if he should pay DHHS his gross salary amount. While DHHS is capable of making the reductions and payroll system adjustments in the manner described by GAO, there is no evidence that Respondent will be able to stop his voluntary contributions to such plans for only one pay period in order to achieve the same result.

Accordingly, I conclude that, out of the \$3548 salary overpayment issued by DHHS for the pay period ending on July 10, 1993, Respondent owed \$3102.69 prior to DHHS' effectuating payroll deductions in March and April of 1994 to offset the debt. I have calculated the amount as follows:

\$2184.57	(net amount Respondent received) plus
\$ 51.45	(withheld for Medicare) plus
\$ 711.62	(withheld for federal taxes) plus
<u>\$ 155.05</u>	(withheld for state taxes) equals
\$3102.69	

See DHHS Ex. 3 at 8. That amount was further reduced by DHHS' collection of \$545.84 through payroll deductions during the months of March and April of 1994. Findings 29, 31. Therefore, before I reach the issue of whether the debt should be waived in whole or in part, the outstanding debt amount owed by Respondent to DHHS under the Debt Collection Act is \$2556.85.

Subject to my ruling on the waiver issue discussed below, Respondent may satisfy his indebtedness to DHHS by making a lump sum repayment to DHHS or by making installment payments consistent with DHHS' rights under 45 C.F.R. §

30.15. DHHS must promptly provide the necessary documents that will enable Respondent to seek refunds from the State and federal taxing authorities when Respondent has made the appropriate repayment(s) to DHHS.

3. DHHS' pending offer to accept a lump sum payment of \$1638.73 in satisfaction of Respondent's debt

In the alternative to its demand that Respondent repay the gross amount of the salary overpayment, DHHS has offered Respondent the opportunity to satisfy his debt by repaying in one lump sum the net amount of his debt. When reduced by the amounts already recouped by DHHS through payroll deductions, the net amount of Respondent's debt is \$1638.73.<sup>4</sup> DHHS defends this offer based on its asserted policy, discussed above, to collect past year debts in gross amounts and to collect present year debts in net amounts. I conclude that DHHS' position is not supported by the record. In addition to my conclusion, explained above, that this policy is contrary to the GAO opinion letter relied on by DHHS, I conclude also that such a policy is inconsistent with the contents of the standard "Instructions for Indebtedness Payment" sent by DHHS to Respondent.

The standard "Instructions" make no distinction between past year debts and present year debts. The document merely instructs all debtors that, if they choose to repay in full, they need only send the net amount; if they choose to make repayment in installments through biweekly payroll deductions, they need to repay the gross amount. DHHS Ex. 3 at 2. By the time the "Instructions for Indebtedness of Payment" were issued to Respondent in 1994 pursuant to the certification of overpayment by DHHS' Assistant Director for Personnel and Pay Systems Division, Respondent's debt already constituted a prior year debt. Finding 23.

DHHS is aware of these inconsistencies but claims that Respondent should not have been offered the opportunity to repay only the net amount. DHHS Brief at 10 n.4. However, while alleging that Respondent should have been required to repay the gross amount instead of the net

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<sup>4</sup> The \$1638.72 represents the erroneous net salary payment to Respondent of \$2184.57, less the payroll deductions totaling \$545.00 previously made by DHHS.



amount of a past year debt, DHHS also claims that Respondent's repayment of the net amount would still result in his "refund[ing] the gross amount of the overpayment; in this case \$3,548.00." DHHS Brief at 10. DHHS' position is that, if Respondent repays the net amount, DHHS will recoup the remainder of the gross amount from Respondent by making adjusted payroll deductions or reports on his accounts with other agencies. Id.

I find DHHS' explanations of these matters unpersuasive and incomplete. First, DHHS' explanations in this proceeding imply that, in addition to DHHS Exhibit 3, other form notices to debtors are in use. There is no support in the record for such an implication. More importantly, issues concerning potential tax consequences to Respondent, for example, were not addressed by DHHS' representation that, if Respondent were to repay the outstanding net amount of his salary overpayment in one lump sum (i.e., the \$2184.57 in net salary less the \$545.84 already recouped by DHHS), DHHS would then recover the remaining sums by "reducing the deductions withheld and reported on behalf of the employee to the various agencies in subsequent pay periods." DHHS Brief at 10.

For these reasons, no legal or factual support exists for DHHS' asserted policy to collect past year debts in their gross amounts and present year debts in their net amounts. Therefore, I construe DHHS' statements as, at best, a settlement offer. DHHS has stated for the record that it remains willing to accept a lump sum payment of the net amount still owed by Respondent (\$1638.73), subject to DHHS recouping the remaining gross salary overpayment amount by reducing those portions of Respondent's subsequent salaries that DHHS transfers or reports to various agencies on Respondent's behalf. DHHS Brief at 10. Since Respondent has never rejected this offer, Respondent may, if he chooses, make a lump sum payment of \$1638.73 under the terms specified by DHHS. If Respondent chooses to accept DHHS' terms, his actions would render moot the debt amount and waiver issues presently before me.

I make clear to the parties that, here, I am merely finding that Respondent has a right to accept the terms of the offer made by DHHS. The parties are at liberty to negotiate their own settlement terms even though, as discussed herein, I find no legal support of record for DHHS' asserted policy of collecting the gross amount of the overpayments from its employees when the debt accrued during a previous year. It is also apparent that, in

setting forth its offer in this record, DHHS has not stated whether or how it will assist Respondent in correcting the records of Respondent's income with the Internal Revenue Service or in seeking any tax refunds due Respondent. Therefore, Respondent is cautioned to decide the merits of DHHS' offer for himself.

#### B. Respondent's waiver request

In cases where the United States has a claim against an individual due to an erroneous disbursement of pay, the overpayment may be waived either in whole or in part if its collection would be against equity and good conscience and not in the best interests of the United States. 5 U.S.C. § 5584(a). However, collection of the debt may not be waived if there exists "an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim . . . ." 5 U.S.C. § 5584(b)(1). There is no presumption that collection will be waived merely because an overpayment resulted from administrative error. Federal Personnel Manual - HHS § 550-8-30.B.1. (DHHS Attachment 6 at 3). Instead, all waiver requests must be decided on a case by case basis. Id.

The authority to grant or deny waiver requests under the statute rests with the Comptroller General of the United States, except that the head of an agency (or, as in this case, the official to whom the Secretary of DHHS has referred the waiver request) may waive the collection of an amount not in excess of \$1500. 4 C.F.R. § 91.4(c)(1). With respect to requests for waiver of an amount in excess of \$1500, the head of an agency or her designate may make an appropriate recommendation to the Comptroller General, or the head of an agency or her designate may deny the waiver request as it pertains to any amount in excess of \$1500. 4 C.F.R. §§ 91.4(c)(1), (2); 92.2(c). If waiver is denied, the individual is entitled to have the denial reviewed by the Comptroller General. Id.

In the present case, DHHS referred the entire contents of Respondent's hearing request for adjudication by me. Finding 48. Respondent sought a hearing on the issue of the amount of his debt and whether the debt should be waived. Finding 35. "Hearing," as defined by the relevant regulation, includes a review of the documentary evidence of the record. Finding 49. Therefore, I conclude that I have been delegated the responsibility for disposing of the waiver issue to the same extent that the Secretary of DHHS has authority to do so under the laws and regulations described above.

Respondent contends that he is entitled to have the collection of his debt waived pursuant to 5 U.S.C. § 5584. R. Brief at 13. Respondent points out that he was in no way responsible for the erroneous issuance of an overpayment to him. Moreover, he has expended considerable efforts in investigating whether and how an overpayment occurred, and he elicited the assistance of a Senator's staff in order to obtain clarifications and information from DHHS. R. Brief at 1 - 3, 13 - 22; Findings 16 - 18, 39, 43. He therefore believes that there is no indication of fraud, misrepresentation, fault, or lack of good faith that would preclude the granting of his waiver request. R. Brief at 13 - 22. Respondent believes also that granting his waiver request will promote accountability in government and "punish the people involved in this matter," who, in Respondent's view, did not do their jobs or did not do their jobs correctly. R. Brief at 14. Respondent does not specify to what extent the collection of his debt should be waived. Respondent's letter dated September 19, 1994.

DHHS acknowledges that the debt was created by an administrative error, and it was not caused by any fraud or misrepresentation. DHHS Brief at 2. DHHS argues, however, that Respondent is at fault, and therefore not entitled to a waiver of his debt, because he knew or should have known that the overpayment was erroneous or that he was not entitled to retain it. DHHS Brief at 6 (citations omitted). DHHS also uses the handwritten note of an unidentified person to support its assertion that an employee of OHA's Travel and Payroll Staff in Falls Church, Virginia, did tell someone to tell Respondent to pay the money back. DHHS Brief at 2 (citing DHHS Ex. 1).<sup>5</sup> DHHS contends that, "[a] reasonable person, particularly an administrative law judge, may not rely upon lack of response to a telephone inquiry to justify retention of an overpayment to which he knows he is not entitled." DHHS Brief at 6 - 7.

The problem in DHHS' position is that it could place at fault any individual who came to the realization that the agency made an error, in good faith brought the error to the agency's attention, sought and awaited instructions from the agency on how to correct the agency's error, and declined to make repayments in advance of exercising his

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<sup>5</sup> On the basis of the record before me, I conclude that DHHS has not proven that the message from the Travel and Payroll Staff was received by Respondent. See Findings 19 - 21.

right to contest the amount of the debt claimed against him.

The facts in this case establish that Respondent realized he had been overpaid by the agency shortly after his bank account was credited with surplus money. All the steps he took before and after coming to that realization were reasonable and prompted by the exigencies of the circumstances. Findings 13 - 18, 21, 26, 27, 32 - 35. All that he did was in accord with DHHS' expectations of a responsible employee. DHHS Attachment 6 at 3.<sup>6</sup> Even though the record reveals that no biweekly Earnings and Leave Statement was issued for the overpayment, Respondent made inquiries with his credit union and then had the Hearing Office Manager's staff contact the agency's central payroll office concerning the overpayment. His actions do not indicate that, after he became aware that he was overpaid, he resorted to misrepresentations to DHHS or attempted to defraud DHHS out of the overpayment.

Respondent did not voluntarily repay the amount owed to DHHS because he received no instructions on repayment from DHHS at first; after he received such instructions, he had legitimate reasons to dispute the amount sought by DHHS. Findings 26, 27, 32 - 35. As I have noted above, even some of DHHS' written instructions to him were at odds with the policies and procedures claimed by DHHS in these proceedings. To date, Respondent has availed himself of those rights and remedies that are available to him as a citizen and as an agency employee.

I find no basis for placing Respondent at fault under the waiver provisions of the law merely because he became aware he had received an overpayment, made inquiries in good faith, sought instructions from DHHS on how the error should be corrected, and declined to repay the incorrect amount demanded by DHHS. Under the Comptroller

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<sup>6</sup> According to DHHS' personnel manual instructions,

Currently, each employee receives from the Pay Systems Division a biweekly Earnings and Leave Statement. Employees are responsible for reviewing their statement and notifying their supervisors and their personnel officers of any unexplained changes in their pay.

General's regulations, there is no automatic preclusion of a waiver request under facts similar to those of this case:

Generally, waiver is precluded when an employee . . . receives a significant unexplained increase in pay or allowances, or otherwise knows, or reasonably should know, that an erroneous payment has occurred, and fails to make inquiries or bring the matter to the attention of the appropriate officials.

4 C.F.R. § 91.5(b)(1993). Under the regulation, it is unreasonable ignorance or inactivity that may impute fault to an overpaid employee; it is not the prompt awareness of an administrative error or the good faith inquiries of responsible officials that places an overpaid employee at fault.

DHHS has misplaced reliance upon two 1971 opinions from the Comptroller General's office for the proposition that, whenever an employee knows or has reason to know he received an overpayment, then he is at fault even though he had reported the error to the agency. See DHHS Brief at 6. First of all, Respondent received one salary overpayment from the agency, not the repeated and consecutive salary overpayments involved in the cases cited by DHHS. In one of the 1971 cases cited by DHHS, the Comptroller General cited certain regulatory guidelines published in 1968 and sustained the denial of the waiver request where the debtor had accepted the same amount of overpayments six consecutive pay periods after having notified his supervisor of the error. Theodore F. Nathan, B-171944 (March 23, 1971) (DHHS Attachment 4). In the second 1971 case relied upon by DHHS, the debtor accepted the same amount of overpayment during all pay periods from November 4, 1965 to March 5, 1966. Robert L. Raybon, B-171487 (January 26, 1971) (DHHS Attachment 5). In addition, contrary to what is argued by DHHS, the Comptroller General reversed the decision below and granted the debtor's waiver request after finding that the debtor did make immediate inquiries upon becoming aware of the problem and that the errors were not corrected by the agency until some months later. Id.

The additional case cited by DHHS<sup>7</sup> re-emphasizes the fact that, at bottom, equity, good conscience, and the best interests of the United States are controlling on the issue of whether a waiver should be granted. 5 U.S.C. § 5584(a). As explained by regulation, "[g]enerally these criteria will be met" by the finding that the overpayment resulted from an administrative error and there is "no indication of" fraud, misrepresentation, fault, or lack of good faith. 4 C.F.R. § 91.5(b) (emphasis added). Contrary to DHHS' arguments, there is no bright-line test on whether a waiver request should be granted.

In Respondent's case, waiving the entire amount of Respondent's debt would not be in accord with equity, good conscience, and the best interests of the United States even though the debt was created by agency error and DHHS' attributions of fault to Respondent are unpersuasive. Despite the inconvenience to Respondent and his natural anger over his ordeal (e.g., R. Brief at 14), equity and good conscience do not entitle him to retain the entire amount of the overpayment. The tenor of his September 19, 1994 letter indicates merely that he is seeking to be treated fairly. Moreover, there is no evidence that waiving the entire amount of Respondent's debt will serve the purposes earlier advanced by Respondent: i.e., to promote accountability in government and to punish those who did not do their jobs properly.

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<sup>7</sup> DHHS attached to its Supplemental Brief the Comptroller General's reconsideration decision in Erik Brett Sager, B-218981 (October 7, 1986) (DHHS Attachment 8). In this case, the facts were in dispute as to whether Mr. Sager had reported his erroneous overpayment to the appropriate authorities, and the adjudicator in the initial decision had found against Mr. Sager on this issue in denying his waiver request. On reconsideration, the Comptroller General affirmed the denial of waiver by noting, inter alia:

The waiver statute authorizes the waiver of overpayments resulting from administrative error only in limited circumstances, when the employee is without fault in causing and reporting the error, and collection action would otherwise be "against equity and good conscience and not in the best interests of the United States."

DHHS Attachment 8 at 2.

See R. Brief at 13 - 14. Unfortunately, the money at issue was never the personal property of those who created or perpetuated the problems concerning the overpayment to Respondent. Therefore, waiving the collection of Respondent's debt in full will unjustly punish the American people, whose tax dollars were used to make the overpayment to Respondent.

Respondent's arguments show that he is not seeking to unjustly enrich himself. As the cases relied upon by DHHS show (and as I think Respondent recognizes), an employee cannot create any right or enforceable expectation to retain an overpayment even where he has promptly and properly reported his receipt of an erroneous overpayment. Instead, the granting or denying of a waiver request is a discretionary matter, decided on the particular circumstances of each case as measured against the statutory criteria of equity, good conscience, and the best interests of the United States.

In his filing dated September 19, 1994, Respondent states that he is requesting a waiver because he is "an innocent party" who should not be "punish[ed]" for an error he did not cause. The facts in this case persuade me that waiving \$500 of the debt owed by Respondent would be in accord with the standards specified in 5 U.S.C. § 5584(a). Respondent has expended his time and efforts to remedy DHHS' errors, and even after he has repaid the debt to DHHS, he will need to file various tax refund requests if he wishes to negate the effects of DHHS' erroneous withholdings. According to Respondent's payroll records, his time is worth between \$45 to \$50 per hour to DHHS. DHHS Ex. 4 (\$49.40 in 1994); R. Ex. 10 (\$44.35 in 1993).<sup>8</sup> I believe that Respondent's uncompensated efforts, past and future, in this overpayment matter will total approximately 10 hours. Even though the actual amount of time Respondent has spent on the matter to date may differ from my estimate, I note that some of his efforts properly took place at the Hearing Office and with the assistance of Hearing

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<sup>8</sup> I use these records to place a value on Respondent's time because no other possible valuation method is before me. In my Order Denying DHHS' Motion for Summary Judgment and Limiting the Hearing to a Paper Record Review, I notified the parties of the pending issue concerning "[w]hether the facts of this justify a waiver of the overpayment" and, "[i]f so, the amount that should be waived." Neither party has submitted any argument specifically addressing the amount that should be waived.

Office employees during work hours. E.g., R. Exs. 2, 4, 6. I have not included such time in my calculation of the 10 hours that Respondent has or will put into the matter during his off-duty hours. Therefore, permitting Respondent to retain \$500 of the overpayment would be in accord with the equities of the circumstances before me.

Not permitting Respondent to retain \$500 would be against good conscience and would amount to treating Respondent the same as an employee who had induced an overpayment through fraud or misrepresentation and, therefore, should rightfully spend his or her own time to sort out the resultant problems. Forcing an employee in Respondent's situation to spend his own time to undo the agency's errors serves no legitimate interest of the United States, in whose behalf the debt is to be collected. I therefore find that waiving collection of \$500 from Respondent's debt to DHHS would also be in accord with good conscience, and the best interests of the United States.

Accordingly, Respondent's debt of \$2556.85 to DHHS is further reduced by the amount of \$500. If Respondent disagrees with my decision to deny him the waiver of that amount of his debt in excess of \$500, he may request review by the Comptroller General.

/s/

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**Mimi Hwang Leahy**  
**Administrative Law Judge**



## APPENDIX

### RECITATION OF THE RECORD THAT WAS REVIEWED

I admitted the following exhibits in this case:

#### DEPARTMENT OF HEALTH AND HUMAN SERVICES'S EXHIBITS

- DHHS Ex. 1                      August 4, 1993 handwritten note of telephone call with Johnnie Gorham; an August 13, 1993 handwritten note of telephone call with Johnnie Gorham; and a September 1, 1993 handwritten note of telephone call with Larna Grace.
- DHHS Ex. 2                      November 23, 1993 routing and transmittal slip regarding indebtedness of Alfred H. Varga from Theresa Lucas, Travel and Payroll; a November 24, 1993 messenger receipt card; an undated quarterly listing of pay data of Alfred H. Varga (page number 208,180); an undated quarterly listing of pay data of Alfred H. Varga (page number 208,181); an undated quarterly listing of pay data of Alfred H. Varga (page number 73,767); a July 21, 1993 bank statement of Alfred H. Varga (548270VA-001); a July 21, 1993 bank statement of Alfred H. Varga (548270VA-002); a June 26, 1993 bi-weekly listing of pay data of Alfred H. Varga; an undated earnings and leave statement of Alfred H. Varga (pay period ending July 10, 1993); an undated earnings and leave statement of Alfred H. Varga (pay period ending June 12, 1993); and an undated earnings and leave statement of Alfred H. Varga (pay period ending June 26, 1993).
- DHHS Ex. 3                      January 18, 1994 certification of salary overpayment to Alfred H. Varga from Joseph V. Colantuoni, Assistant Director for Personnel and Pay Systems Division, with attachments.

- DHHS Ex. 4                      Undated earnings and leave statements of Alfred H. Varga (pay periods ending March 19, 1994, April 2, 1994, April 16, 1994, April 30, 1994, and May 14, 1994).
- DHHS Ex. 5                      June 24, 1994 Memorandum to Donald Rising, Assistant Special Counsel, Office of Hearings and Appeals, from Joseph V. Colantuoni, with attachment.

RESPONDENT'S EXHIBITS

- R. Ex. 1                      July 21, 1993 bank statement of Alfred H. Varga (548270VA-001). This bank statement is the same as the one mentioned in DHHS Ex. 2.
- R. Ex. 2                      September 1, 1993 handwritten note of telephone call with Theresa Lucas and an attached November 23, 1993 routing and transmittal slip regarding indebtedness of Alfred H. Varga from Theresa Lucas. This transmittal slip is the same as the one mentioned in DHHS Ex. 2.
- R. Ex. 3                      July 22, 1993 routing and transmittal slip to Theresa Lucas from Larna Grace; an August 3, 1993 handwritten note of a telephone call with Theresa Lucas; and a September 1, 1993 handwritten note of a telephone call with Theresa Lucas. This September handwritten note is the same as the one mentioned in R. Ex. 2.
- R. Ex. 4                      Undated sheet of various names and telephone numbers.
- R. Ex. 5                      January 18, 1994 certification of salary overpayment to Alfred H. Varga from Joseph V. Colantuoni, with attachments. This certification is the same as the one mentioned in DHHS Ex. 3. A facsimile transmittal sheet addressed to Larna Grace from Theresa Lucas is attached to the front of this document.

- R. Ex. 6 April 13, 1994 letter to the Payroll and Accounting Operations Group, Personnel and Pay Systems Division, from Alfred H. Varga.
- R. Ex. 7 May 24, 1994 letter to Alfred H. Varga from Bonnie L. Miller, Chief, Personnel Staffing Services Branch.
- R. Ex. 8 May 24, 1994 letter to Alfred H. Varga and Donald A. Rising from Gerald P. Choppin, Chief, Civil Remedies Division; and a May 24, 1994 Departmental Appeals Board, Civil Remedies Division, order and notice of prehearing conference.
- R. Ex. 9 January 18, 1994 certification of salary overpayment to Alfred H. Varga from Joseph V. Colantuoni, without attachments. This certification is the same one mentioned in DHHS Ex. 3 and R. Ex. 5.
- R. Ex. 10 Undated earnings and leave statement of Alfred H. Varga (pay period ending July 10, 1993). This earnings and leave statement is the same one mentioned in DHHS Ex. 2.