



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of

Docket No. 18-27-WA

D,

Waiver Proceedings

Respondent.

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

Respondent, a former U.S. Department of Education (Department) employee, sent the Office of Hearings and Appeals (OHA) a May 20, 2018 request for a waiver of a debt in the above-captioned proceedings. On June 6, 2018, 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 **\$6,927.80**. This overpayment resulted from Respondent leaving the Department with a negative sick leave balance of 210.15 hours.

On June 6, 2018, I sent an Order Governing Proceedings via electronic mail and U.S. mail in response to Respondent's waiver request. On July 9, 2018, after Respondent failed to timely file a response to the OGP, I issued an Order to Show Cause, to which Respondent timely responded. Additional documentation was needed from the Department, and on August 13, 2018, the Department's Office of Human Resources (OHR) submitted the requested information.

Having reviewed the submitted information, I conclude that Respondent has, in general, failed to meet his burden of showing he is without "fault," as the term is used in these proceedings, for the advanced leave he took but did not repay. For the 90 hours of leave that he reasonably believed was covered by donated leave, however, Respondent has met his burden of showing both that he is not at fault and that requiring repayment would be inequitable. Accordingly, Respondent's request for a waiver is granted in part and denied in part.

In a waiver proceeding, the Respondent does not challenge¹ the validity or amount of the debt, but rather argues that he should not be required to repay the debt because of equitable

¹ Respondent may challenge the validity or amount of the remaining debt or argue that an involuntary repayment schedule imposed by the Department will cause "extreme financial hardship" in a separate pre-offset hearing. To do so, he should request such a hearing within 10 days of receipt of this decision. 34 C.F.R. § 32.6(b). As noted in the decision, however, this

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.² When requesting a waiver, the Respondent 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 OHA,³ which, thereby, exercises waiver authority and jurisdiction on behalf of the Secretary of Education to waive⁴ claims of the United States against a former or current employee of the Department.⁵ The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁶ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. § 5584.

constitutes a final agency decision and Respondent may not challenge the partial denial of the waiver request. 34 C.F.R. § 32.5 (a)(1).

² 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. No. 13-40-WA, U.S. Dep't of Educ. (Dec. 5, 2013) at 2 n.5.

³ 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).

⁴ *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).

⁵ *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) 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, Apr. 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>.

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

PROCEDURAL HISTORY

Respondent suffers from multiple serious illnesses significantly limiting his functioning abilities. In early 2018, Respondent retired from the Department with a sick leave balance that was at negative 210.15 hours. Shortly after leaving the Department, Respondent emailed a human resources specialist inquiring about why 90 hours of sick leave that he believed was donated to him the week before he retired was not applied to offset his negative leave balance. Respondent has indicated that he never received a response to his inquiry, but when he spoke with the people who donated the leave, they informed him that the donated leave was deducted from their leave balances.

In early May 2018, Respondent received notice from the Department that he owed a debt of \$6,927.80 for his negative sick leave balance when he retired. This notice is dated March 20, 2018, but his mail was not delivered for two months, which he believes was a result of the mail being temporarily lost. In a May 20, 2018 letter, Respondent submitted a waiver request. Additionally, in response to the Order Governing Proceedings and Order to Show Cause, Respondent submitted a statement with attached documentary evidence. In both Respondent's initial request and in his subsequent statement, Respondent asserts that the amount owed should be offset by the donated leave and that repayment would cause an undue financial burden on himself and his family.

DISCUSSION

Leaving the Department with a negative leave balance creates a debt owed to the federal government.⁷ In this case, Respondent does not appear to contest that when he left he had a negative sick leave balance. His only arguments appear to be that he believes that the negative leave balance should be offset by the hours donated to him and that payment of the financial debt arising from the negative leave balance will cause an undue financial burden. It is well established that “no employee has a right to pay that he or she obtains as a result of overpayments.”⁸ 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).⁹ As part of this fault standard, a respondent must prove that when the overpayment was incurred he reasonably did not know that he was being overpaid.¹⁰ Once an employee knows or should know of a salary overpayment, the employee is required to set aside

⁷ See *In re Samantha*, Dkt. No. 11-74-WA, U.S. Dep't of Educ. (June 1, 2012) at 5; *In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (Oct. 19, 2005) at 3.

⁸ *In re Danaea*, 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.

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

¹⁰ See *In re Robert*, Dkt. No. 09-10-WA, U.S. Dep't of Educ. (Nov. 19, 2009) at 3; see also *In re Cruz*, Dkt. No. 08-12-WA, U.S. Dep't of Educ. (Aug. 5, 2009) at 2; *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at 4-5.

money to repay the overpayment of salary.¹¹ In making this determination, we consider the employee's job position, grade level, education and training, newness to Federal government, and "whether an employee has records at his or her disposal, which, if reviewed, would indicate a salary overpayment."¹²

In this matter, there is no indication that the overpayments 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 the Respondent knew or should have known that when he retired, he had a negative leave balance that he would be required to repay. In this matter, Respondent has not indicated that he was unaware that he would be required to repay the negative leave balance. In fact, the only arguments that he has raised are that he cannot afford the repayment and that leave that was donated to him was not applied to offset the negative leave balance. Therefore, in general, Respondent must repay debt incurred as a result of a negative leave balance.

As noted, however, Respondent raises the fact that in the days before he retired, colleagues donated 90 hours of leave to him which he believes should have been used to offset the negative balance. Respondent even contacted donors and confirmed with those employees that the donated leave was subtracted from their leave balances. When Respondent emailed a series of human resource specialists to ask about the offset, his inquiries were not answered. Under these circumstances it is reasonable that Respondent believed that he would not be required to repay those 90 hours he understood to have been offset by donated leave. In short, Respondent has satisfied the fault standard for the debt incurred for 90 of the 210.15 hours of negative leave balance, but not for the other 120.15 hours.

For a waiver to be granted, however, it is not enough to meet the fault standard. In addition, this Tribunal must also "balance the equities" by considering a number of factors, to determine whether repayment would be inequitable.¹³ In this matter, I have determined that requiring repayment of a debt for which Respondent is not at "fault" would be inequitable. Specifically, Respondent provided extensive evidence about the significant financial hardships he is already facing resulting from his illnesses, and in doing so showed that repayment of the additional debt would constitute an undue hardship. Therefore, Respondent has met his burden of showing requiring repayment of the debt arising from the 90 hours of leave which he reasonably believed were offset from his leave balance is inequitable and should be waived.

Respondent has failed to prove that he is not without "fault" for his negative leave balance, but has shown that he reasonably believed that 90 hours of the leave were repaid through donations and requiring repayment of that amount is inequitable. Therefore, his request for a waiver as it applies to the portion of the debt not offset by those 90 hours is denied, while

¹¹ *In re J.*, Dkt. No. 15-50-WA, U.S. Dep't of Educ. (Nov. 9, 2015) at 6, n.14; *In re Cruz*, Dkt. No. 08-12-WA, U.S. Dep't of Educ. (Aug. 5, 2009) at 3; *In re Sean*, Dkt. No. 08-01-WA, U.S. Dep't of Educ. (July 31, 2009) at 3.

¹² *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; *In re Spencer*, Dkt. No. 11-01-WA, U.S. Dep't of Educ. (June 7, 2011) at 2.

¹³ *See In re A*, Dkt. No. 15-43-WA, U.S. Dep't of Educ. (Sept. 4, 2015) at 5.

any debt incurred as a result of those 90 hours of negative leave balance is waived. This decision constitutes 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**. Specifically, the waiver is granted related to the debt attributed to 90 hours of leave and denied related to the remaining leave balance.

So ordered this 20th day of August 2018.

Daniel J. McGinn-Shapiro
Waiver Official