



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF HEARINGS AND APPEALS

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In the Matter of

**Docket No. 18-37-WA**

**M,**

Waiver Proceedings  
Q1841429523

Respondent.

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**DECISION DENYING WAIVER**

Respondent, a current U.S. Department of Education (Department) employee, sent the Office of Hearings and Appeals (OHA) a request for a waiver of a debt in the above-captioned proceedings. On July 18, 2018, the matter was assigned to me as waiver official. Respondent's waiver request arises from the Department of the Interior's (DOI) notice of a debt resulting from an overpayment of salary to Respondent in the total amount of **\$1,316.34**. This overpayment resulted from a conversion of annual leave and holiday time to leave without pay.

On July 18, 2018, I sent an Order Governing Proceedings via electronic mail and U.S. mail in response to Respondent's waiver request. The Order stayed proceedings until the Department concluded an audit of Respondent's military leave payment. After two extensions, the Department concluded its audit and submitted the audit on August 27, 2017, in which the Department maintained that Respondent owes \$1,316.34. I subsequently issued an Order Further Governing Proceedings to which Respondent responded.

In a waiver proceeding, the Respondent does not challenge<sup>1</sup> the validity or amount of the debt, but rather 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

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<sup>1</sup> 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 the separate pre-offset hearing that has been docketed, 18-36-OF. A waiver decision, however, constitutes a final agency decision and a respondent may not challenge the denial of the waiver request. 34 C.F.R. § 32.5 (a)(1).

<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.

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.

Having reviewed the submitted information, I conclude that Respondent is not at fault for the debt, but nevertheless it is not inequitable to require repayment and so the waiver request is denied. This decision constitutes a final agency decision.

## JURISDICTION

The waiver authority involving former and current employees of the Department was delegated to 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.

## PROCEDURAL HISTORY

Respondent works for the Department and periodically takes military leave to serve in the United States Air Force Reserve. In September 2017, Respondent contacted human resources at the Department about a discrepancy in her military leave balance. Over the next nine months, numerous emails were exchanged between Respondent, different human resource specialists, the employee in Respondent's office responsible for timekeeping, and a representative from DOI

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<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), 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>.

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

acting on the Department of Education's behalf. These emails indicated that the online system did not accurately reflect Respondent's military leave balance and provided conflicting information about whether or not Respondent had a positive leave balance. Specifically, the emails showed confusion among numerous people, including those in human resources and those processing payroll matters at DOI about whether military leave balances carry over from year to year, how many hours of leave carry over, and when a new year's military leave is effective. Respondent urged the Department to conduct an audit to determine whether the correct amount of military leave she had and followed up numerous times via email about this audit.

Based upon an understanding that she had sufficient military leave, the timekeeper in Respondent's office recorded Respondent in paid military leave status for all but 8 hours of pay period 13 of 2018, with the remaining hours being covered by the Memorial Day holiday. DOI, in what now is known to be an incorrect conclusion, determined that Respondent did not have military leave. Acting on its incorrect conclusion, DOI converted the military leave to a combination of annual leave and leave without pay. Respondent's office's timekeeper then converted the annual leave to leave without pay, and changed the 8 hours on Memorial Day to leave without pay after a Department human resources specialist indicated that Respondent was not eligible for holiday pay because she was in leave without pay status. Despite this amendment, DOI paid out salary for the annual leave and holiday for pay period 13. In a letter dated July 2, 2018, DOI asserted a debt for this salary which at the time the Department asserted should have been recorded as unpaid leave.

After the debt letter was issued, however, the Department concluded an audit that showed that Respondent had more than enough military leave for pay period 13, and so Respondent should have been paid based on what was originally submitted by the timekeeper, namely, 32 hours of military leave and eight hours of holiday time. When she received the results of the audit, the timekeeper asked a human resources representative if this would eliminate the debt and was told it would and so the timekeeper converted the time to military leave and holiday time. Soon after, DOI deposited \$1259 in Respondent's account. Respondent has indicated that she believes that this was for pay period 13. In other words, instead of eliminating the debt as indicated, DOI issued a separate check to cover Respondent's proper pay and maintained the debt created by an amendment to an erroneous situation. In her statement submitted in this matter, Respondent has indicated a willingness to repay debt she owed, but also indicated that she still did not know the correct amount of the debt.

## DISCUSSION

Overpayment of salary in this matter only happened as a result of actions by people other than Respondent, which Respondent did not cause and could not prevent.

It is well established that "no employee has a right to pay that he or she obtains as a result of overpayments."<sup>7</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

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<sup>7</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.

debtor (fault standard).<sup>8</sup> As part of this fault standard, a respondent must prove that when the overpayment was incurred s/he reasonably did not know that s/he was being overpaid.<sup>9</sup> Once an employee knows or should know of a salary overpayment, the employee is required to set aside money to repay the overpayment of salary.<sup>10</sup> 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."<sup>11</sup>

The overpayment here was created when (1) a timekeeper accurately reported Respondent's time as military leave and holiday time; (2) then a DOI official erroneously rejected that time, incorrectly determining that Respondent did not have a military leave balance, and converted it to annual leave, holiday time, and leave without pay; and then (3) a human resources specialist and the timekeeper incorrectly converted the annual leave and holiday time to leave without pay, rather than confirming whether Respondent had military leave. It was only after even the debt letter was issued that the Department determined that Respondent had a military leave balance and never should have been in leave without pay status. And even long after the debt letter was issued, Department representatives were expressing that they thought the debt would be eliminated once they learned that the initial timesheet was correct and there was sufficient military leave available. It is not clear how any employee under these circumstances would be able to know that he or she would have to repay salary, especially when the Department only definitively came to that conclusion long after the overpayment was made and the debt letter was issued. In this case, Respondent cannot be held at fault for this debt.

For a waiver to be granted, however, it is not enough to avoid fault. In addition, I must also "balance the equities" by considering a number of factors, to determine whether repayment would be inequitable.<sup>12</sup> In this matter, I have determined that, although Respondent is not at fault, it is not inequitable to require repayment of the debt. Respondent has indicated that an additional direct deposit was made for pay period 13. Requiring repayment of other money that was already paid out for the pay period would result in Respondent being paid once properly and is not inequitable. Because it is not inequitable to require repayment, Respondent's waiver request is denied. This decision constitutes a final agency decision.

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<sup>8</sup> See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005).

<sup>9</sup> 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.

<sup>10</sup> *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.

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

<sup>12</sup> See *In re A*, Dkt. 15-43-WA, U.S. Dep't of Educ. (Sept. 4, 2015) at 5.

ORDER

Pursuant to the authority of 5 U.S.C. § 5584 (2012), Respondent's request for waiver of debt Q1841429523 is **HEREBY DENIED**.

So ordered this 30th day of October, 2018.

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Daniel J. McGinn-Shapiro  
Waiver Official