



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

SAMANTHA,

Respondent

Docket No. 11-74-WA
Waiver Proceeding

DECISION PARTIALLY GRANTING WAIVER

At issue in this case is whether a former employee of the Department of Education (Department) should be granted waiver of a debt arising from an overpayment occurring as a result of a negative annual leave balance and an unpaid deduction for health care insurance at the time when the former employee resigned. The debt covers two distinct, but interrelated bills of collection (BoC) totaling \$1,150.57.¹ For reasons that follow, I find that waiver of the debt is warranted in part. Accordingly, Respondent's request for waiver is granted, in part.

The OFFICE OF HEARINGS & APPEALS (OHA)² maintains authority and jurisdiction to waive³ claims of the United States against a former or current employee of the Department.⁴

¹ Respondent received bill of collection 12771205468 for \$958.72 (net debt balance) and bill of collection 2491205468 for \$191.85 (net debt balance). This decision governs each.

² 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 January 2012).

³ *Waiver* is defined as "the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee as [provided] by 5 U.S.C. 5584...or any other law." 5 C.F.R. § 550.1103.

The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁵ In a waiver proceeding, the debtor acknowledges the validity of the debt, but argues that he or she should not be required to repay the debt on the basis of equitable circumstances connected to the debt 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 a waiver of the debt.⁶ In the submission requesting waiver, the debtor 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.

The record in this case comprises what I have accepted in evidence, including: copies of written statements by Respondent explaining the circumstances of the overpayment and asserting why a waiver should be granted, copies of email messages between Respondent and various officials in Respondent's former office, copies of leave requests during 2010 and 2011, copies of time and attendance forms, and copies of Respondent's compiled charts showing her computed or estimated unpaid hours worked during annual leave or in excess of her expected 40 hour work week covering 7 pay periods during 2011.

DISCUSSION

I.

Broadly stated, determining whether 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, and (2) whether Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment.⁷

Although *fault* is often used in a conventional sense to refer to blunder, mistake or responsibility, *fault*, as the term is used in the Waiver Statute and in case law, has specialized and particular meaning. Rather than its conventional use, fault is examined in light of the following considerations: (a) whether there is an indication of fraud; (b) whether the erroneous payment resulted from an employee's incorrect, but, not fraudulent, statement that the employee under the

⁴ See also, 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 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: oha.ed.gov/overpayments/.

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

⁶ 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, U.S. Government Accountability Office, *Scope of Waiver Authority*, B-307681 (May 2, 2006).

⁷ See, *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

circumstances should have known was incorrect;⁸ (c) whether the erroneous payment resulted from an employee's failure to disclose to a supervisor or official material facts in the employee's possession that the employee should have known to be material; or (d) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.⁹ Given the aforementioned considerations, the application of the fault standard is critical to the ultimate determination of whether to grant or deny waiver. More precisely, waiver cannot be granted, if a debtor fails in showing that he or she can satisfy the fault standard.¹⁰

The total debt Respondent owes is computed on the basis of two bills of collection. First, according to the Department's Debt Collection Coordinator and payroll specialist, Naomi Sanchez, Respondent resigned on August 19, 2011 "in the middle of [pay period] 18." Respondent ended her tour of duty with the Department's office of Federal Student Aid (FSA). As a result of the timing of Respondent's resignation, Respondent "did not receive a paycheck for that pay period," which also resulted in Respondent failing to pay - - through payroll deduction - - her share of the costs of her health insurance coverage from August 14, 2011 through August 27, 2011. This created a net overpayment of \$191.85.

In addition, for pay period 10 of 2011, Respondent requested - - and was granted approval of - - 20 hours of annual leave. At the time, Respondent had earned only 10 hours of annual leave; therefore, she was granted 10 hours of advance annual leave, which allowed Respondent to receive her full salary payment during the period of her absence. According to Sanchez, after returning from annual leave, Respondent "went intermittent [and therefore] did not accrue leave." Consequently, Respondent did not repay the 10 hours of advance annual leave with earned leave prior to her resignation. This created an overpayment for 10 hours of pay, which totals a net repayment obligation of \$958.72.

Respondent does not dispute the foregoing facts, but argues, ostensibly, that the overpayment should be equitably offset with hours she worked in excess of her scheduled work hours.¹¹ More directly, Respondent argues that waiver of the debt is warranted because she worked without compensation for several hours in excess of her 80-hour pay period and that she

⁸ Under the fault standard, the scope of Respondent's duty extends to include the obligations to: (1) verify bank statements and/or electronic fund transfers of salary payments, (2) question discrepancies or unanticipated balances from salary payments, and (3) set funds aside for repayment when appropriately recognizing a salary overpayment. *See, In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (October 19, 2005). As such, in a waiver proceeding, the debtor must either acknowledge the validity of the debt or urge the absence of any reason to recognize the salary payment at issue as an overpayment. *Id.*

⁹ *See generally, Guidelines for Determining Requests* U.S. Department of the Treasury Directive 34-01 (2000), available at <http://www.treasury.gov/regs/td34-01.htm>; Standards for Waiver, 4 C.F.R. § 91.5 (2000).

¹⁰ *See, e.g., In re Megan*, Dkt. No. 11-89-WA, U.S. Dep't of Educ. (April 24, 2012).

¹¹ In Respondent's last submission, she withdrew her argument that the debt should be offset by the annual leave she is owed as a result of the Department paying her only 4 hours of annual leave per pay period, instead of 6 hours per pay period.

“ended up working while on pre-approved annual leave.”¹² Respondent asserts that the excess hours were not recorded in the official timekeeping system because she was informed by her office timekeeping staff that “**only** regular hours be submitted on timesheets and that credit hours and overtime **not** be included on timesheets” (emphasis in original).¹³ In addition, Respondent asserts that waiver is warranted because the Chief Administrative Officer of her office, Irma Blanchett, indicated in a November 2, 2011 email sent to Respondent that FSA had “requested a waiver of [the] debt from the Office of Management (OM) and that [Blanchett] supports a waiver.”¹⁴

II.

As noted supra, there are two bills of collection involved in this case. To resolve the waiver request, this decision addresses each in turn. First, bill of collection #2491205468 totaling \$191.85 arises as a result of Respondent failing to pay - - through payroll deduction - - her share of the costs of her health insurance coverage from August 14, 2011 through August 27, 2011. Respondent resigned during the pay period for which she received no compensation, and, thus, no deductions were made for benefits in effect until August 27, 2011. After review of Respondent’s arguments and a review of the record in this case, I find that Respondent demonstrated that her circumstances satisfied the *fault* standard for this portion of her overpayment.

Under the Federal Employees Health Benefits Act of 1959 (FEHBA),¹⁵ Congress established a comprehensive employer-sponsored group health insurance program (known as the Federal Employees Health Benefits or FEHB) for Federal employees.¹⁶ Under the Act, the Federal government and the employee share responsibility for premiums payable to the

¹² Respondent notes instances in which she was away from her office on approved annual leave, but was “required” to attend several hour-length meetings. Respondent does not state who required her to attend these meetings or explain why she did not request an adjustment to her leave status to properly compensate her for the hours she indicates that she actually worked.

¹³ Respondent argues that this advice appears inconsistent with the Department’s Personnel Manual of Instruction 610-3 (PMI) because the PMI indicates that Respondent was eligible to earn credit hours. According to Respondent, she has “never been paid” for “62 overtime or credit hours” that she requested in 2010. Moreover, Respondent argues that it was “standard timekeeping practice” of the Department to submit in a “computerized timekeeping system” no more than “80 hours per pay period” regardless of whether the employee “worked more than 80 hours in a given period.” Undoubtedly, Respondent’s broad assertion that the Department and her office adopted a practice of failing to compensate employees entitled to compensation for required hours of work, if accurate, should warrant meaningful attention. This is not the proper forum, however, to address policy matters of this scope. And, even if Respondent’s argument raised an appropriate legal question in connection with Respondent’s debt that was also within my authority to address, I would not grant Respondent relief because Respondent provides no relevant and persuasive evidence in support of her assertions. Nor does Respondent show that she sought compensation for the purported 62 hours of work performed and was denied compensation.

¹⁴ Blanchett’s email message cannot be given the weight Respondent seeks. The email is addressed to Respondent, not this tribunal. More important, Blanchett’s email does not identify any factor upon which waiver may be based that supports granting waiver for Respondent.

¹⁵ Pub. L. No. 86-382, 73 Stat. 709 (codified, as amended, at 5 U.S.C. § 8901).

¹⁶ FEHBA also covers dependents and retirees.

employee's health plan.¹⁷ Premiums are paid each pay period and are disclosed as payments and deductions on employee pay statements.

Although it is clear that Respondent maintained health insurance coverage from August 14, 2011 through August 27, 2011, there is no evidence showing that Respondent failed to disclose to a supervisor or human resource official material facts in her possession that she should have known to be material to processing her payroll deduction for health insurance. Indeed, Respondent expressed surprise to discover that she was covered by her former employer-sponsored health insurance after the date of her resignation. Therefore, I find no basis from the evidence in the record to conclude that Respondent did not act fairly, without fraud or deceit, and in good faith with regard to all matters concerning the health insurance coverage. Accordingly, I find that it is against equity and fairness for the Federal government to recover the debt identified in bill of collection #2491205468. Respondent's request to waive the debt totaling \$191.85 is granted.

III.

The remaining question is whether waiver should be granted for the debt identified in bill of collection #12771205468 totaling \$958.72. This debt arises as a result of Respondent's request for advance annual leave and Respondent's subsequent resignation from the Department before she earned a sufficient amount of annual leave to recover the advanced leave. Respondent's resignation resulted in a negative annual leave balance, which constitutes a debt owed to the Federal government.

Respondent argues that waiver of the debt created by the negative annual leave balance should be granted because: (1) it was not clear to Respondent until she received the bill of collection that she had to repay advance annual leave upon leaving Federal service, (2) that she was "required" to work more than 40 hours per week without seeking compensation or credit, which should equitably offset or compensate for the hours of unpaid advance annual leave, and (3) that Irma Blanchett supports Respondent's waiver request.

Although Respondent raises what would be notable questions concerning the fairness of collecting a debt based on a negative leave balance when probative evidence demonstrates that an employee was *required* to provide uncompensated hours of work to the Department, Respondent's evidence falls short of establishing that such circumstances are applicable here. First, Respondent presents no evidence showing that an official required her to attend meetings in support of her contention that several times in 2010 and 2011, she was granted advance annual leave, but was subsequently required to attend hour-long meetings while on annual leave. In addition, Respondent fails to present evidence showing that she was denied requested compensation for the hours she worked during annual leave or beyond 40 hours a week. Indeed, on this issue, my review of the record reveals a single email message from Irma Blanchett sent to Respondent on November 2, 2011 - - when Respondent was no longer employed by the

¹⁷ 5 U.S.C. § 8906.

Department - - indicating that Blanchett was of the view that Respondent had “never stinted FSA on hours.” Blanchett also indicated that she supports the waiver request. This view, of course, is not probative of whether Respondent was *required* to provide uncompensated hours of work to the Department.¹⁸ Nor, as I indicated in note 14, *supra*, is Blanchett’s message indicative of *why* waiver should be granted. As such, I reject Respondent’s request that waiver be granted - - for the annual leave debt - - to equitably offset uncompensated work.

Further, the Department’s waiver cases have consistently recognized that a debtor does not lack fault for a debt, if the debtor either knew or should have known of the existence of the debt at the time the debt arose. This follows from the well-established principle that no employee has a reasonable expectation to pay that was erroneously received. To the contrary, when an employee becomes the recipient of an erroneous payment, the employee has a duty to hold onto the overpayment and inform the agency of the error in anticipation of future repayment to the government.¹⁹ In this regard, it is entirely reasonable to expect an employee - - by monitoring advance leave requests, bank accounts, and leave and earnings statements - - to track when and/or whether the employee has repaid the advanced leave with earned leave, including at the time an employee resigns. Where a reasonable person in the employee’s position would have been aware that he or she had not repaid the advanced leave, the employee is barred from obtaining a waiver of the debt.

Therefore, I find that Respondent should have been aware that she had not repaid all of her requested advance annual leave.²⁰ Respondent’s Flexible Schedule Certification Forms covering a range of pay periods in 2011 and 2010 unmistakably indicate that Respondent periodically requested advance annual leave and was granted each of those requests. By way of accurate monitoring of leave requests and by simple calculation, therefore, Respondent would have determined the amount she owed in advanced annual leave and could have made arrangements to reduce or eliminate the negative annual leave balance or otherwise made arrangements for repayment. Consequently, I find that Respondent knew or should have known that she had not fully repaid her advanced annual leave at the time of resignation. When an employee fails to review documentary records, including leave requests and leave and earning statements, which, if examined, would have shown or identified an unpaid annual leave balance at the time of an employee’s resignation, the employee is not free of fault. As noted *supra*, waiver should not be granted when a debtor fails in showing that he or she is free of fault. Accordingly, Respondent’s request for waiver of the debt identified in bill of collection #12771205468 totaling \$958.72 is denied. This decision constitutes a final agency decision.

¹⁸ Notably, I make no finding regarding Respondent’s assertions concerning whether she occasionally worked in excess of 40 hours per week. The record is devoid of sufficient evidence on that account. Moreover, the record is entirely lacking clear and probative evidence concerning whether Respondent performed an activity for the benefit of the Department and under the control or direction of the Department during the time periods she asserts. *See* 5 C.F.R. Part 551.

¹⁹ *See, e.g.*, DOHA Case No. 01092001 (Department of Defense, Office of Hearings & Appeals [DOHA]) (October 29, 2001); DOHA Claims Case No. 99111916 (December 8, 1999).

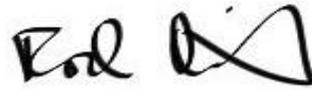
²⁰ This is not to say that Respondent was *actually* aware that she owed a debt to the Department when she resigned; she contends that she was not aware of the debt and I find no reason to doubt this contention. Even so, it is not a reasonable basis to obtain a waiver of a negative annual leave balance that should have been tracked and documented to ensure the balance was recovered or paid.

ORDER

IT IS ORDERED, pursuant to the authority of 5 U.S.C. § 5584, that Respondent's request for waiver of the debt to the United States Department of Education for bill of collection #2491205468 in the amount of \$191.85 (net debt balance) is **GRANTED**.

IT IS FURTHER ORDERED, pursuant to the authority of 5 U.S.C. § 5584, that Respondent's request for waiver of the debt to the United States Department of Education for bill of collection #12771205468 in the amount of \$958.72 (net debt balance) is **DENIED**.

So ordered this 1st day of June 2012.

A handwritten signature in black ink, appearing to read "Rod Dixon", written over a horizontal line.

Rod Dixon
Waiver Official