



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of

M,

Docket No. 16-52-WA

Waiver Proceedings

Respondent.

DECISION DENYING WAIVER REQUEST

The Office of Hearings and Appeals (OHA) received a request for a waiver of a debt from Respondent, a U.S. Department of Education (Department) employee, in the above-captioned proceedings. Respondent's waiver request comes in response to notice of a debt, M1631300001, resulting from an overpayment of salary to Respondent in the total amount of **\$2,279.67**. Respondent asserts that this overpayment arose as a result of a failure by the Department to properly collect fees for her health insurance.

On November 28, 2016, an Order Governing Proceedings was issued. On December 13, 2016, Respondent filed her sworn statement with supporting documentation. Additionally, at my request, the Department's Office of Human Resources submitted a copy of Respondent's Leave and Earnings Statement from one pay period during the time period at issue. On December 28, 2016, an Order was issued providing Respondent an opportunity to supplement the file by January 18, 2017. The Order indicated that at that point, the file would be closed and the evidence presented would be considered to "determine if Respondent has shown that a waiver is warranted in this matter." Respondent did not send any additional information or submissions in response to the December 28, 2016 order. Therefore, the file is closed and the matter is ready for decision.

Currently before me in this matter are the following documents:

- (1) Respondent's request for a waiver;
- (2) Respondent's sworn statement;
- (3) A copy of the debt letter, dated November 8, 2016, from the Department of the Interior;
- (4) A copy of Respondent's Reissued Leave and Earnings Statement for Pay Period 21 of 2016;
- (5) A copy of Respondent's Reissued Leave and Earnings Statement for Pay Period 20 of 2016;

- (6) A copy of Respondent's Reissued Leave and Earnings Statement for Pay Period 20 of 2016 with notations; and
- (7) A copy of Respondent's original Leave and Earnings Statement for Pay Period 19 of 2016.

Having reviewed the submitted information, I conclude that Respondent has failed to meet her burden of showing both that she is without "fault" for these overpayments. Accordingly, Respondent's request for waiver is denied.

In a waiver proceeding, the debtor assumes¹ the validity of the debt, but 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.² When requesting a 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. This decision constitutes a final agency decision.

JURISDICTION

The waiver authority involving former and current employees of the Department was delegated to the Office of Hearings and Appeals (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

¹ Assuming the validity of the debt for the purposes of the waiver proceedings does not preclude Respondent from challenging the validity of the debt in a separate pre-offset hearing.

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. 13-40-WA (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), October 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

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.

PROCEDURAL HISTORY

In September 2015, Respondent began working as a Teaching Ambassador Fellow at the Department through an Intergovernmental Personnel Agreement. Immediately upon beginning her fellowship, Respondent meet with a representative from the Department’s human resources office (OHR), elected coverage for herself and her two children, submitted the required paperwork, and received health insurance cards from her insurer.

In a letter, dated November 8, 2016, the United States Department of the Interior, which handles salary payment matters for the Department of Education, informed Respondent that she had been overpaid a total of \$2,279.67 as a result of the Department failing to collect monthly fees for her health insurance coverage during pay periods prior to pay period 20 in fiscal year 2016.

Respondent has argued that she “did not realize that the associated monthly [health insurance] fees were not being deducted from [her] pay, and [she] would firmly assert that the burden to ensure all HR processes were being implemented appropriately should not be on [her] as the employee, but instead should rest with the office that oversees this work.” Respondent further notes that in the spring of 2016, when paying her taxes, Respondent became aware that the Department had failed to deduct social security taxes, and after Respondent contacted OHR and rectified the situation, Respondent was made to pay almost \$6,000. Respondent also asserts that repaying the debt at issue in this matter would present an undo financial burden on her family as she is at the end of her political appointment with the transition of administrations. Therefore, Respondent asserts that is requesting that the debt be waived and the Department “absorb the cost of this error.”

OHA received Respondent’s request for a waiver of this debt and an Order Governing Proceedings was issued. Respondent timely responded with a sworn statement and supporting documentation. After Respondent chose not to respond to an order providing Respondent an opportunity to supplement the file, and OHR, at my request submitted requested additional information, the file was closed on January 18, 2017.

Act of 1996, Pub. L. No. 104-134, April 26, 1996, 110 Stat. 1321). The Department’s overpayment procedures may be found on the Office of Hearings & Appeals website at: <http://oha.ed.gov/overpayments.html>.

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

DISCUSSION

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

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 It is not enough, however, for the debtor to meet the fault standard. The debtor must also demonstrate that collection of the debt would be against equity and good conscience, and not in the best interests of the United States.

In waiver cases, the fault standard has specialized and particular meaning. “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 circumstances should have known was incorrect; (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.”¹⁰ 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.¹¹

As a starting point, there is no indication that the overpayments at issue in this matter 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, during the time she was receiving overpayments of salary, Respondent knew or should have known that the Department had failed to take deductions from her pay for health coverage provided through the Federal Employees Health Benefits Program. Respondent has indicated that she did not know of the failure to take the deductions. There is, however, evidence that indicates that Respondent should have known of the Department’s failure to take deductions from her pay for her health insurance coverage, and should have notified the appropriate personnel to remedy that error.

As Respondent has indicated, she received health insurance cards from her insurer, indicating that she and her family were receiving health insurance coverage during the time at

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

⁸ *In re Danea*, 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.

¹¹ *In re J.*, Dkt. No. 15-50-WA, U.S. Dep’t of Educ. (Nov. 9, 2015) at 6 n.14.

issue.¹² As noted by this Tribunal that “even where an employee enjoys the benefit of FEHB [federal employee health insurance] coverage, waiver of a FEHB debt may be appropriate’ where there would be no ‘readily apparent overpayment’ on employee’s leave and earning statement.”¹³ In this case, however, it was readily apparent from Respondent’s leave and earning statement that the proper deductions were not taken. At my request, OHR sent a copy of one of Respondent’s leave and earning statement from a pay period during the time period at issue. Under the “Deductions” section of the statement, there are five different deductions for different taxes, and one deduction for “Dental/Vision.” There, however, is no deduction for any item that would be understood to be general health insurance.

Employees have an obligation to check their leave and earnings statements and Respondent will be held at “fault” in this matter for not reporting any overpayment that is apparent on the face of the statement.¹⁴ The submitted documentation indicates that Respondent knew that she and her family had health insurance coverage during the pay periods at issue, and should have known that the proper deductions from her pay for this coverage had not been taken, causing her to be overpaid. Therefore, Respondent has failed to satisfy the “fault” standard and her request to waive her debt must be denied.¹⁵ This decision constituted 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 in the amount of **\$2,279.67** is **HEREBY DENIED**.

So ordered this 15th day of February, 2017.

Daniel J. McGinn-Shapiro
Waiver Official

¹² *Contrast In re L*, Dkt. No. 16-40-WA, U.S. Dep’t of Educ. (Aug. 31, 2016) (employee had no reason to know that he was receiving health insurance coverage during the time at issue).

¹³ *Id.* at 5, quoting *In re Robin*, Dkt. No. 07-114-WA, U.S. Dep’t of Educ. (Aug. 4, 2008) at 3, further citations omitted.

¹⁴ *See In re E*, Dkt. No. 15-61-WA, U.S. Dep’t of Educ. (Feb. 5, 2016) at 5; *In re Jacqueline*, Dkt. No. 05-12-WA, U.S. Dep’t of Educ. (July 25, 2005) at 6. Moreover, Respondent has indicated that in the spring of 2016, she was made aware of the failure of the Department to take proper deductions for social security taxes, requiring her to repay almost \$6,000. At that time Respondent would reasonably have been on heightened notice to check to make sure there were no other missing deductions from her pay.

¹⁵ Because Respondent has failed to demonstrate that she is without “fault,” and her request must be denied, it is not necessary to address whether repayment would be inequitable if she had not been at “fault” for the salary overpayments. *See In re Jacqueline*, at 6-7.