

OFFICE OF HEARINGS AND APPEALS  
400 MARYLAND AVENUE, S.W.  
WASHINGTON, D.C. 20202-4616

TELEPHONE (202) 245-8300

FACSIMILE (202) 245-6929

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In the Matter of

Docket No. 17-04-WA

J,

Waiver Proceeding

Respondent.

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**DECISION GRANTING WAIVER**

This proceeding comes before the Office of Hearings and Appeals (OHA) through the timely request of Respondent, an employee of the U.S. Department of Education (Department). Respondent's request arises under 5 U.S.C. § 5584 (Waiver Statute) authorizing the waiver of claims of the United States against debtor due to erroneous payments made to a Federal employee<sup>1</sup> and is based on notice of salary overpayment of \$2298.80. The overpayment debt was set forth in a Bill of Collection (BoC).<sup>2</sup> The debt collection letter reflects salary overpayments related to a failure to deduct payments for health benefits occurring over 14 pay periods. Respondent is a current employee and timely filed her waiver request. For the reasons that follow, I find that waiver of this debt is warranted. Accordingly, Respondent's request for waiver is granted.

The legal authorities pertinent to this waiver request are from the aforementioned statute, the Department's implementing regulations at 34 C.F.R. Part 32 (§ 32.1 et seq.), and the policy set forth in the Department of Education, Administrative Communications System, Handbook for processing Salary Overpayments (Handbook, ACS-OM-04) (revised January 2012). Taken together, these authorities prescribe procedures for processing debts, authorizing deductions from

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<sup>1</sup> General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (5 U.S.C. § 5584) (Waiver Statute). The law of debt collection is extensive. *See, e.g. In re Richard*, Dkt. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at footnote 1 (setting forth the statutory framework governing debt 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, April 26, 1996, 110 Stat. 1321). The Department's overpayment procedure may be found on the Office of Hearings & Appeals website at <http://oha.ed.gov/overpayments/index.html>.

<sup>2</sup> The overpayment is identified as the Debt ID: 63551594422 specified by the Payroll Operations Division of the Department of Interior (DOI) dated December 19, 2016 which identified an overpayment of \$2298.80.

wages to pay debts, and setting standards for waiving those debts when appropriate.<sup>3</sup> The Handbook, ACS-OM-04, specifically delegates waiver authority involving all former and current employees of the Department to the Office of Hearings and Appeals (OHA), which, thereby, exercises waiver authority on behalf of the Secretary. The undersigned is the authorized waiver official who has been assigned this matter by OHA.<sup>4</sup>

For purposes of a waiver proceeding, the debtor is presumed to have acknowledged the validity of the debt. In this waiver proceeding, Respondent argues she should not be required to repay the debt on the basis of the circumstances of the debt and argues there is no indication of fraud, misrepresentation, fault, or lack of good faith by her or anyone else having an interest in obtain a waiver of the claim.<sup>5</sup> In doing so, 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.

Resolution of this case is based on the matters accepted into the record as argument, evidence, and/or documentation when considered as a whole, including the Bill of Collection (BoC) sent by the Department's servicing agency the Department of Interior (DOI), Respondent's waiver request, and all subsequent submissions and documents she submitted under sworn testimony. For the reasons that follow, the tribunal concludes that waiver of the debt is warranted. This decision constitutes a final agency decision.

At issue in this case is whether the Department through its payroll servicer (DOI) is entitled to recover the salary overpayment for the health benefits payment which should have been deducted over 14 pay periods in 2016 as set forth in the BoC.

## DISCUSSION

Broadly stated, determining whether waiver is appropriate requires a consideration of two factors: namely, (1) whether there is no indication of fraud, misrepresentation, fault,<sup>6</sup> or lack of good faith on Respondent's part, and (2) whether Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment.<sup>7</sup> Respondent must satisfy both factors to obtain a waiver.

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<sup>3</sup> In addition to regulations promulgated by the Department, standards prescribed by the Department of Justice and the Department of Treasury govern administrative debt collection efforts; those standards are widely known as the Federal Claims Collection Standards (FCCS). See 31 U.S.C. § 3711 (2000) and 31 C.F.R. ch. IX, Parts 900–904 (2000)

<sup>4</sup> See, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

<sup>5</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, U.S. Government Accountability Office, *Scope of Waiver Authority*, B-307681 (May 2, 2006).

<sup>6</sup> In this respect, since fault can derive from an act or failure to act, fault does not require a deliberate intent to deceive.

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

In waivers, the fault standard has specialized meaning and is examined in the context of an employee's duty to prevent or discover mistakes and errors in salary payments when doing so is feasible. Fault is examined in light of the following: (a) 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;<sup>8</sup> (b) whether the erroneous payment resulted from the 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 (c) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.<sup>9</sup>

Respondent argues that the waiver of the entire debt is warranted because it was incurred through administrative error not caused by her. She further asserts that she was not aware that health benefits were based on payroll deductions, as she was unfamiliar with that system of benefits. She reports in that her past private non-profit work experience, over 10 year period, there were no deductions taken from her salary for health benefits. Her unfamiliarity with the federal system, being newly hired from the private sector, led her to reasonably think all was accounted for in receiving her health benefits and coverage. She did submit the proper form SF-2809, requesting the family health coverage, listing her dependents and spouse, dated May 13, 2016 to the Human Resources (HR) office. This completed form was placed into the record. She received her health care cards and says that she had coverage in effect during May and the following months. The first indication of any problem was in November 2016, when she was told by her doctor's office that she had no insurance coverage. She had to pay out of pocket (\$285 ) for her child's medical visit and immediately contacted the Department's human resources (HR) staff to remedy the problem. She dealt with an HR staffer who clarified that deductions were proper and helped her reinstate her benefits. Respondent provided the Blue Cross Blue Shield cancellation letter she received, dated November 6, 2016 and the reinstatement of benefits letter of December 8, 2016.

While we do not reach the validity of the debt question in a waiver proceeding, these particular facts establish Respondent's inexperience as a new hire with the health benefits deduction process. She contacted HR as soon as she discovered her insurance cancellation and HR took the corrected action by November 30<sup>th</sup>. Respondent did receive reimbursement for the out of pocket expense but continues to have reimbursement problems over medication costs from the insurance provider through the time of filing her March 2<sup>nd</sup> waiver materials with this office.

The first consideration in determining whether a waiver is appropriate in a salary overpayment case is whether the Respondent lacks fault. To assess fault, the tribunal takes into consideration all relevant evidence and information, and must evaluate the debtor's case against a "reasonable person" standard and decide whether the debtor knew, should have known, or should have suspected that she or he was receiving salary payments in excess of those

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<sup>8</sup> For discussion of the scope of the Respondent's duty under the fault standard, see *In re William*, Dkt. 05-11-WA, U.S. Dep't of Educ. (Oct. 19, 2005).

<sup>9</sup> See generally, *Guidelines for Determining Requests* U.S. Department of the Treasury Directive (2009), at <http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/td34-01.aspx>.

authorized.<sup>10</sup> Criteria for this consideration include the employee's position, grade, longevity of Federal government service and whether the employee had access to records which, if reviewed, would indicate a salary overpayment.<sup>11</sup> Applying these criteria to Respondent, she was a new hire, this being her first federal position, and was unfamiliar with salary payments deductions for health benefits. She relied on the insurance coverage being processed and promptly received health benefits cards in keeping with her SF-2809 form being fully processed. In addition, she is not an employee in the human resources area, who we would expect to have specialized knowledge of payroll matters and could be held to a higher standard on this.<sup>12</sup>

In applying the fault standard to this case, the tribunal concludes the Respondent lacks fault. As an initial matter, the tribunal recognizes that this overpayment was the result of an administrative error that does not reflect any fraud, misrepresentation, or lack of good faith by Respondent. More importantly, this is not the type of case where an employee reasonably should have known that an erroneous overpayment occurred. She was a new hire to federal service. For all of her non-profit work experience health coverage was a benefit, not based on salary deductions. She did not realize the same benefit had a cost to the employee in the federal system. As such, she was not expecting a deduction for this which would show on each leave and earnings statement (LES). Adding to this, the usual requirement that an employee monitor the accuracy of his or her leave and earnings statements is in her case dependent on her special circumstances and physical limitations (blindness). Respondent affirms in her waiver statement that she is blind and is unable to visually review hard copies of her statement. Basically, she relies on electronic debits being correctly and fully processed to avoid such payroll errors. With her special circumstances, this is not a case where Respondent would have been able to discover the erroneous payment or otherwise know of the inaccuracy of her pay by routine LES inspection.<sup>13</sup> Given Respondent's unique circumstances, her case can be distinguished from a line of prior cases where we found the employee at fault for not inspecting the accuracy of his or her LES when it comes to FEHB health benefits. Without the special circumstances of the present case, fault would lie with the employee who failed the LES care and scrutiny tests. *See, contra. In re D*, Dkt. 13-28-WA, U.S. Dep't of Educ.(Oct. 24, 2013); *In re Sue*, Dkt. 12-36-WA, U.S. Dep't of Educ (August 22, 2012), citing *In re Catherine*, Dkt. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005).

Therefore, this tribunal finds that Respondent satisfies the fault standard and is without fault regarding this debt. The present case is also related to the decision in *In re Francisco*, Dkt. No.07-154-WA, U.S. Dep't of Educ. (Feb. 15, 2008). In *Francisco*, the tribunal held that notwithstanding the default rule that an employee is responsible for recognizing that he or she received an erroneous salary payment, a waiver official may find there are sufficient factors in the case that satisfy the fault standard. In keeping with *Francisco*, the fault standard is satisfied when the circumstances of the debt show the employee could not have known that he or she was erroneously compensated. From all indications, and recognizing special circumstances here, this is not a case where Respondent would have been able to discover the erroneous payment or know of the inaccuracy of her pay.

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<sup>10</sup> See, *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (Nov. 9, 2005).

<sup>11</sup> See, *In re John*, Dkt. No. 07-03-WA, U.S. Dep't of Educ. (May 1, 2007)

<sup>12</sup> See, *In re L*, Dkt. No.14-70-WA, U.S. Dep't of Educ. (February 9, 2015).

<sup>13</sup> See, *In re Russell*, Dkt. No. 05-19-WA, U.S. Dep't of Educ. (June 23, 2005).

Having found no fault or lack of good faith on Respondent's part, the remaining question is whether Respondent has demonstrated that it is against equity and good conscience for the Federal government to recover the debt in this case. To secure a favorable ruling on the equity standard, Respondent must show that she acted fairly, without fraud or deceit, and in good faith with regard to all matters concerning the overpayment. In addition, although there are no rigid rules governing the application of equity, the tribunal must balance equity and evaluate good conscience in light of the particular facts of this case.<sup>14</sup> In doing so, I must balance the competing interests in the forgiveness of a debt owed to the United States against Respondent's asserted interests in the forgiveness of a debt owed to the United States. Factors weighed in this balancing of interests include the following: whether the debt is substantial; whether recovery of the claim would be unconscionable under the circumstances; whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment; and whether collection of the debt would impose an undue financial burden.

Respondent argues that it is against equity to collect the overpayments because the overpayments were caused by the Department's error and repayment will impose an undue financial burden. Here the debt is substantial, amounting to \$2298.80. She indicates if forced to repay it, this will jeopardize summer childcare plans she has already made for her children, ages 3 and 7 years old. Respondent has presented an income and debt list in which she covers the usual household budget items and expenses. The list covers routine expenses including a monthly debt consolidation payment. By this expense sheet, she shows that payment of this debt would be unduly burdensome and particularly impact her ability to obtain and pay for childcare coverage. Her expected summer childcare expense alone will be approximately \$2,733 for 8 weeks care. The ability to provide needed childcare is essential to the two parents work situation and for maintaining their 4-person household. Based on Respondent's showing of income and growing expenses, the tribunal agrees that requiring her to make up the non-deducted payments would cause Respondent's family financial hardship.

The tribunal concludes that Respondent's assertions establish the potential financial hardship that repaying this debt would impose upon her. The financial burden is a significant factor supporting Respondent's position that repayment would be inequitable. In light of the aforementioned and on the basis of the entire record, I find that in the interests of the United States, waiver of this debt should be granted.

### **CONCLUSION**

Because Respondent is without fault regarding her debt and because the circumstances of her case weigh in favor of equitable relief, this tribunal concludes that it would be against equity and good conscience to require Respondent to repay this debt. This decision constitutes a final agency decision.

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<sup>14</sup> See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Education. (December 14, 2005); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (September 14, 2005).

**ORDER**

Pursuant to the authority of 5 U.S.C. § 5584, Respondent's request for waiver of the entire debt to the United States Department of Education in the amount of \$2298.80 is **HEREBY GRANTED**.

So ordered this 23rd day of March, 2017.

  
Nancy S. Hurley  
Waiver Official