



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of

Docket No. 18-09-WA

K,

Waiver Proceedings
Debt ID M1803300001

Respondent.

DECISION DENYING WAIVER REQUEST

Respondent, U.S. Department of Education (Department) employee, sent the Office of Hearings and Appeals (OHA) a February 11, 2018 request for a waiver of a debt in the above-captioned proceedings. On February 14, 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 **\$2,119.80**. This overpayment resulted from a failure by the Department to deduct Respondent's share of premiums for her health insurance from Respondent's pay check for 20 pay periods in 2017.

On February 14, 2018, I sent an Order Governing Proceedings via electronic mail in response to Respondent's waiver request. Respondent timely filed her sworn statement with supporting documentation on March 6, 2018. At my request, the agency that handles payroll matters for Department of Education employees, the Department of the Interior (DOI), provided additional necessary information.

On March 19, 2018, an order was issued providing Respondent with an additional opportunity to supplement her filings with any other documentation she wished to submit. On March 26, 2018, Respondent sent an email indicating that she had "been as forthright as possible and presented all the information [she] ha[d]."

Having reviewed the submitted information, I conclude that Respondent failed to meet her burden of showing she is without "fault" as the term is used in these proceedings. Accordingly, Respondent's request for a waiver is denied.

In a waiver proceeding, the debtor does not challenge¹ the validity 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

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

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 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.

PROCEDURAL HISTORY

In February 2017, Respondent transferred from the United States Senate and began her current tenure at the Department. At the start of her time at the Department, Respondent completed and submitted all of her required paperwork for benefits and, four days later, received

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), 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).

an email from the Department's Office of Human Resources (OHR) that her benefits had been processed. On or about March 8, 2017, Respondent contacted OHR concerned that she had not received her health insurance card from Blue Cross Blue Shield (BCBS), the health insurance company she had elected to provide coverage for her. After a series of emails, on March 15, a representative from OHR sent an email to Respondent confirming that Respondent's "coverage has been processed with BCBS." Sometime after, Respondent received her insurance card in the mail and "did not think about it again." In December 2017, however, Respondent received a letter from BCBS saying that Respondent's health care benefits were terminated by the Department. Immediately responding, on December 4, 2017, Respondent emailed three Department employees, one of whom put her into contact with the Benefits Office in OHR. A line of emails followed, which culminated with a December 14, 2017 email from OHR assuring Respondent that her "health insurance has been rectified and her coverage remains active from her effective date of coverage 02/19/2017." Respondent notes that she was never informed of any issue of her not paying premiums or anything to do with payroll, but rather the only matter raised was an administrative issue. Respondent only learned of an issue with a failure to deduct premiums leading to a salary overpayment when DOI contacted her and Respondent contacted the Department's Office of Management, which confirmed on February 7, 2018 that Respondent had been paid an overpayment in salary. Specifically, Respondent was informed that when her health care benefit was processed, OHR made an error by sending her information to BCBS without first processing Respondent's health care paperwork in the payroll system.

Respondent notes that OHR has taken responsibility for the error which caused the overpayment. Respondent asserts that she was unaware of the error, and if she had known about it, she would have followed up diligently. Respondent argues that, since her first week on the job, she has done "all of the due diligence possible . . . to follow up and ask questions regarding the processing of [her] benefits," and had no reason to suspect any error or any information from OHR that processing was "anything but complete." Respondent notes that she takes her responsibilities very seriously and concludes that "it is unclear what other steps may have or should have been taken [by her]." Respondent asks that the repayment of the bill be waived.

DISCUSSION

Under the Federal Employees Health Benefits Act of 1959 (FEHBA), Congress established a comprehensive employer-sponsored group health insurance program (known as the Federal Employees Health Benefits or FEHB) for Federal employees. Under the law, the responsibility to pay premiums is shared by the employee and the government, with each paying their share each pay period.⁷ An employee's contribution to his or her health care coverage is disclosed as a deduction on his or her leave and earnings statements.⁸ In this matter, the overpayment in salary arose from a failure to deduct Respondent's contributions from pay periods 6 through 25 in fiscal year 2017.

⁷ 5 U.S.C. § 8906(c).

⁸ *In re Eric*, Dkt. No. 10-06-WA, U.S. Dep't of Educ. (Mar. 31, 2011) at 2.

Determining whether waiver is appropriate requires consideration of two factors: (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.⁹

It is well established that “no employee has a right to pay that he or she obtains as a result of overpayments.”¹⁰ 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).¹¹ As we have stated in the past, a “salary overpayments often, if not always, involve some type of error by the agency,” but “the administrative error by the government cannot, itself, entitle an employee to waiver.”¹² Rather, the fault standard imposes a duty on Department employees to seek correction of the erroneous payment regardless of the government’s mistake.”¹³ As part of this fault standard, a respondent must also show that he or she did not “accept[] the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.”¹⁴ 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.¹⁵

In re Spencer, contains an examined the fault standard in detail. The standard 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.”¹⁶ This duty aligns with “the employee’s particular capacity to know of the antecedents that may give rise to changes in pay,” and “the reality that the employee is often in the best position to recognize a mistake in pay; that is, not only is the employee aware of the personnel action that affects pay before the pay change is implemented (e.g., promotions, pay increases, monetary awards, or bonuses), but it is the employee who often initiates a change in status that results in a pay change (e.g., a change in insurance coverage, a change in health benefit coverage, or a change in a retirement benefit).”¹⁷ We begin the fault

⁹ See e.g., *In re David*, Dkt. No. 05-22-WA, U.S. Dep’t of Educ. (Dec. 14, 2005).

¹⁰ *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.

¹¹ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep’t of Educ. (Dec. 12, 2005).

¹² *In re Faith*, Dkt. No. 10-04-WA, U.S. Dep’t of Educ. (Nov. 19, 2010) at 3; see also *In re Richard*, Dkt. No. 12-19-WA, U.S. Dep’t of Educ. (Apr. 4, 2012) at 3; *In re Paul*, Dkt. No. 11-90-WA, U.S. Dep’t of Educ. (Mar. 8, 2012) at 2; *In re Jason*, Dkt. No. 10-01-WA, U.S. Dep’t of Educ. (Aug. 24, 2010) at 4.

¹³ *In re Faith*, Dkt. No. 10-04-WA, U.S. Dep’t of Educ. (Nov. 19, 2010) at 3.

¹⁴ 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.

¹⁵ *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.

¹⁶ *In re Spencer*, Dkt. No. 11-01-WA, U.S. Dep’t of Educ. (June 7, 2011) at 2.

¹⁷ *Id.*

standard analysis by determining “whether, under the particular circumstances involved, a reasonable person would have been aware that he or she was receiving more than entitled, or, stated differently, whether the debtor had no reasonable expectation of payment in the amount received.”¹⁸ In short, “where a reasonable person would have made inquiry about the accuracy of a salary payment, but the debtor did not, then the debtor is not free from fault.”¹⁹

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.”²⁰ Specifically, employees have a duty to review and react to errors that are clear on the face of a leave and earnings statement.²¹

In this matter, there is no indication that the overpayments at issue in this matter resulted from Respondent’s fraud, actions, statements, or failures to disclose information. In fact, OHR has stated that it was a mistake by OHR, and not any act or failure to act by the Respondent, which caused the overpayment of salary at issue. Therefore, the only matter left to be considered in the “fault” analysis is whether, during the time Respondent received overpayments of salary, Respondent knew or should have known that the Department was failing to deduct her share of health insurance premiums.

Respondent has indicated that it was not until she received a letter from DOI that she learned of any issues related to whether she had paid premiums or any matter related to her pay. Additionally, Respondent has detailed that until she received notice from BCBS that her health care benefits were being terminated and inquired about the matter, she was under the belief that her health insurance election had been processed correctly and there was no issue with her health care. There is no evidence that contradicts that Respondent had no actual knowledge of the salary overpayments or the underlying errors that caused the overpayments. In fact, there is evidence that once she became aware of the errors in processing her insurance paperwork and of the overpayments in salary, Respondent diligently addressed the matter. Thus, the remaining issue in the fault standard analysis is whether Respondent **should** have recognized the overpayments of salary during the time she received the overpayments.

As noted above, the salary overpayment at issue arose from a failure to deduct health insurance premiums from Respondent’s pay between pay periods 6 and 25 in fiscal year 2017. Respondent’s leave and earnings statements from pay period 6 has deductions for taxes, retirement, and other matters, but no stated deduction for any insurance premiums. On

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ 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.

²¹ See *In re M*, Dkt. No. 17-26-WA, U.S. Dep’t of Educ. (July 6, 2017) at 5; *In re E*, Dkt. No. 15-61-WA, U.S. Dep’t of Educ. (Feb. 5, 2016) at 5; *In re J*, Dkt. No. 15-50-WA, U.S. Dep’t of Educ. (Nov. 9, 2015) at 5-6 n.14; *In re S*, Dkt. No. 13-59-WA, U.S. Dep’t of Educ. (Nov. 25, 2013) at 5; *In re B*, Dkt. No. 12-62-WA, U.S. Dep’t of Educ. (Dec. 28, 2012) at 4; *In re Spencer*, Dkt. No. 11-01-WA, U.S. Dep’t of Educ. (June 7, 2011) at 2.

Respondent's leave an earnings statement for pay period 7, an additional deduction is added for "Dental/Vision Com" which then appears on every other leave and earnings statement through pay period 25. And then, beginning in pay period 13 and continuing through pay period 25, an additional deduction was added for "Assoc. Dues." None of Respondent's leave and earnings statements from pay period 6 through 25, however, indicate any deduction for any general health insurance. A waiver of a salary overpayment debt arising out of uncollected health care deductions may be "appropriate where there would be no readily apparent overpayment[s] on employee's leave and earnings statement."²² Here, however, the failure to make a deduction for health care coverage was clear on Respondent's leave and earning statements. And Respondent has provided no evidence that it was reasonable to believe that this deduction was properly missing.²³ Rather, this matter is similar to *In re M*, where Respondent was denied a waiver of a salary overpayment arising out of uncollected health insurance deductions because she failed to meet the fault standard when her leave and earnings statements showed deductions for dental and vision insurance but nothing that "would be understood to be general health insurance."²⁴

Respondent argues that she "did all the due diligence possible from the first weeks on the job to follow up and ask questions regarding the processing of [her] benefits," and that she had "no reason to suspect an error" or any indication that "processing was anything but complete." Respondent has shown that she was diligent about addressing concerns about the processing of her health insurance coverage caused by a delay in receiving a health insurance card in her first month after rejoining the Department. But addressing these concerns did not relieve Respondent of her duty to check her leave and earnings statements to confirm that a deduction was made for health insurance.²⁵ Knowing that she was enrolling in a health benefit program, and having concerns about that enrollment, should have put Respondent on heightened alert for other errors in the processing of her health insurance coverage. And if Respondent had examined her leave and earnings statements, she would have seen that there was not a proper deduction for health insurance.

Respondent has failed to show why she was unable to discover missing health insurance deductions on her leave and earnings statements. She has also not proven that she reasonably believed that there should not have been such deductions. Therefore, I am unable to conclude

²² *In re L*, Dkt. No. 16-40-WA, U.S. Dep't of Educ. (Aug. 31, 2016) at 5.

²³ *Contrast In re L*, Dkt. No. 16-40-WA, U.S. Dep't of Educ. (Aug. 31, 2016) (finding that where the employee showed that he had reason to believe that he was not provided health insurance during the relevant time, it was reasonable to suspect there would not be a payroll deduction for health insurance).

²⁴ *In re M*, Dkt. No. 16-52-WA, U.S. Dep't of Educ. (Feb. 15, 2017) at 5.

²⁵ Respondent also indicates that she was very busy at the time of the errors that caused the salary overpayments. Respondent's busy schedule, however, is not enough to physically prevent her from examining a one page leave and earnings statement. *Contrast In re R*, 14-15-WA, U.S. Dep't of Educ. (May 4, 2016) at 4 (noting that a sudden loss of vision prevented the employee from accessing and examining leave and earnings statements).

that she has met the fault standard burden and I cannot grant her waiver request.²⁶ 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 DENIED**.²⁷

So ordered this 9th day of April, 2018.

Daniel J. McGinn-Shapiro
Waiver Official

²⁶ As noted, a waiver cannot be granted if a respondent fails to satisfy the fault standard. *In re Richard*, Dkt. No. 12-19-WA, U.S. Dep't of Educ. (Apr. 4, 2012) at 3. Therefore, because a waiver cannot be granted in this matter, it is not necessary to analyze whether requiring repayment would have been inequitable if the fault standard had been met.

²⁷ When there is a denial of a waiver of a debt resulting from a salary overpayment, as in this matter, the employee has ten (10) days to request a pre-offset hearing before an Administrative Law Judge to challenge the existence or amount of the debt or an involuntary repayment schedule. 34 C.F.R. § 32.6 (b). As noted, however, this constitutes a final agency decision and Respondent may not challenge the denial of the waiver request. 34 C.F.R. § 32.5 (a)(1).