



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of
K,

Docket No. 18-53-WA

Waiver Proceedings

Respondent.

Debt IDs 82261112818, 182121112818,
182261112818, and 182541112818

**DECISION GRANTING WAIVER REQUEST IN PART AND DENYING WAIVER
REQUEST IN PART**

The Office of Hearings and Appeals (OHA) received a request, dated September 13, 2018, for a waiver of a debt from Respondent, a U.S. Department of Education (Department) employee, in the above-captioned proceedings. On September 17, 2018, the matter was assigned to me as waiver official. Respondent's waiver request comes in response to four (4) notices of debts resulting from overpayments of salary to Respondent in the total amount of **\$2,213.35**.¹

On September 18, 2018, I issued an Order Governing Proceedings in the above-captioned matter. On September 24, 2018, Respondent submitted her statement with supporting documentation.

The Order Governing Proceedings required the Department to file "a complete copy of the debt letters sent to Respondent, all attached documents, and any records or other evidence that explains the circumstances which caused the relevant debts to arise and/or that are relevant to the debts and this waiver request" on or before October 9, 2018. After the Department failed to respond, I issued an Order To Show Cause on October 11, 2018, directing the Department to file the debt letters and other documents by October 29, 2018. The Department sent copies of

¹ Additionally, on November 2, 2018, Respondent submitted information about a deduction of \$70.95 taken from her pay during the pendency of this matter. On November 6, 2018, Respondent further submitted an explanation of the adjustment from the U.S. Department of the Interior. Examining these two submissions and the debt letters for the four debts at issue in this matter, I conclude that this deduction is separate and distinct from the debts at issue in this case and therefore not before me. I cannot comment on whether the \$70.95 is a debt that can or cannot be waived or challenged in a pre-offset hearing, but if Respondent would like to request either or both of those processes related to this debt, she may file a separate request with the Office of Hearings and Appeals.

the debt letters to Respondent on October 25, 2018, and Respondent submitted the same to me on November 6, 2018, but the Department has submitted no other documentation.

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 for all debts other than those related to the conversion of holiday pay to leave without pay.

In a waiver proceeding, the debtor does not challenge² 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 Respondent or anyone else having an interest in obtaining the waiver.³ 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,⁴ which, thereby, exercises waiver authority and jurisdiction on behalf of the Secretary of Education to waive⁵ claims of the United States against a former or current employee of the Department.⁶ The undersigned is the authorized Waiver Official who has been

² 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 may challenge the validity or amount of the un-waived portion of the debts or argue that an involuntary repayment schedule imposed by the Department will cause “extreme financial hardship” in a separate pre-offset hearing. To do so, she should request such a hearing within 10 days of receipt of this decision. 34 C.F.R. § 32.6(b). As noted in the decision, however, this constitutes a final agency decision and Respondent may not challenge the partial denial of her waiver request. 34 C.F.R. § 32.5 (a)(1).

³ Under waiver decisions issued by the Comptroller General interpreting 5 U.S.C. § 5584, “pay” has been held to include all forms of remuneration in addition to salary. *See In re T*, Dkt. 13-40-WA (Dec. 5, 2013) at 2 n.5.

⁴ 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).

⁵ *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).

⁶ *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)

assigned this matter by OHA.⁷ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. § 5584.

PROCEDURAL HISTORY

In 2016, Respondent filed a “whistleblower” complaint with the Office of the Inspector General. Respondent feels that she has been retaliated against for that complaint. During much of 2017 and 2018, Respondent and her first line supervisor (Supervisor) engaged in numerous disputes about whether she should have a reasonable accommodation of 100% telework, about her REACH evaluation ratings, and other concerns. Respondent has indicated that she feels that many of these disputes are retaliatory.

In June 2017, Respondent went to the emergency room because of an apparent anxiety or pulmonary episode. In June 2017, Respondent submitted a request for 100% telework as a reasonable accommodation. From June 2017 until May 2018, Respondent was assigned temporarily to 100% telework pending a decision on her request. In a letter, dated May 11 2018, Supervisor informed Respondent that her request was denied and directed her to report for work in the office on May 22, 2018.

On May 21, 2018, Respondent met with a medical professional who sent a note to Supervisor requesting that Respondent be given time off between May 21 and 25, 2018. Respondent submitted a request for sick leave for that week at the same time. On May 23, 2018, Supervisor sent Respondent an email indicating that upon review of the doctor’s note he did not believe that her situation entitled her to sick leave, but he would put her on annual leave if she would like. It appears that Supervisor did not receive a response from Respondent that week, and Supervisor put Respondent on annual leave for May 22, 23, 24, and 25, 2018.

On May 28, 2018, Respondent’s doctor sent a letter to Supervisor indicating that the doctor believed that Respondent needed to work from home. The next day, May 29, 2018, Respondent sent Supervisor an email indicating that she believed that based upon the submitted medical documentation, Respondent should have been on sick leave all day on May 22 and 23, sick leave on the morning of the May 24 (with the remaining 3 hours of the day as administrative leave for parent-teacher conferences) and sick leave on May 25 for six hours with two hours of administrative leave. Respondent asked Supervisor to “correct [her] timesheet” and “do not use my vacation leave going forward without prior permission.” Respondent’s email also informed Supervisor that Respondent was appealing Supervisor’s decision to deny Respondent’s reasonable accommodation request, submitting an equal employment opportunity complaint, and stated she would be out of the office until further notice. Finally, Respondent’s email indicated

(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>.

⁷ See 5 U.S.C. § 5584(b) (2012) (noting the authority held by the authorized official in waiver cases).

that she believed that she should be paid for the one and a half hours she spent researching and drafting her email.

Over the next couple of months Respondent exchanged numerous emails with different Department employees, including Supervisor and executives in human resources. Additionally, in a letter dated June 8, 2018, Respondent's second line supervisor informed her that he was upholding Supervisor's denial of her request for 100% telework as a reasonable accommodation, and that she was expected to be back to work in her office on June 19, 2018.

On July 11, 2018, Respondent sent an email, one of many in a series of emails about family medical leave act issues, to Supervisor and two other people, in which she asked Supervisor again to correct her timesheet related to the denied sick leave and noted that she requested that he not use her annual leave without written permission.

On August 2, 2018, Supervisor amended Respondent's timesheet for May 22 through 25, 2018 changing annual leave to a combination of sick leave, administrative leave, and leave without pay.

Most of Debt 82261112818 arose out of this conversion of annual leave (a paid leave status) to leave without pay (an unpaid leave status). Additionally, a portion of Debt 82261112818 arose when the conversion of Respondent's status on May 25, the work day before Memorial Day, created a situation where, because Respondent was not in a pay status immediately preceding and immediately following a holiday she was ineligible for holiday pay. Because of this, Respondent's pay for eight hours of holiday leave on May 28, 2018 was converted to an unpaid leave status.

The other three debts that Respondent has asked to be waived relate to unpaid medical insurance premiums resulting from Respondent being in unpaid leave without pay status during pay periods 16, 17, and 19 in 2018 which was between July 8 and August 4, 2018 and between August 19 and September 1, 2018.

Respondent asserts that she has been denied whistleblower protections and that she has been harassed by Supervisor. She further argues that she did not do anything fraudulently, but rather the timesheets related to Debt 82261112818 were submitted on her behalf and that they were purposely entered with errors "to create additional havoc for me in an effort to further retaliate against me (whistleblower reprisal)." She further asserts that this was done "in spite of [her] specifically requesting that sick leave be entered on [her] timesheet and providing the appropriate medical documentation to support [her] request," and that she "immediately followed up after the error to inform [her] supervisor and others that the information was entered incorrectly and to request that it be fixed and how it should be fixed, to no avail." Finally, Respondent contends that she would have avoided all of the debts at issue if she did not have to be in unpaid leave status and instead had been allowed to do "reconvene for settlement," remain on 100% telework as a reasonable accommodation, or take advanced sick leave up to 240 hours.

In support of the contention that repayment would be inequitable, Respondent additionally asserts that she is assisting a family member who has suffered a serious illness, including contributing to the significant financial demands resulting from the illness.

DISCUSSION

Respondent raises a number of arguments about not receiving whistleblower protections, being harassed by her supervisor, whether she should have been granted 100% telework as a reasonable accommodation, and whether she met the requirements for sick leave. In an administrative matter like this, however, the scope of my jurisdiction is limited to whether Respondent has shown that she meets the requirements for a waiver of any or all of the debts at issue.⁸ Therefore, I will limit my review and cannot address equal employment opportunity matters and other concerns outside the scope of this waiver proceeding.

Annual leave is a paid leave status available to federal employees “for vacations, rest and relaxation, and personal business or emergencies.”⁹ Conversely, “[l]eave without pay (LWOP) is a temporary nonpay status and absence from duty . . .”¹⁰ It follows that, as occurred in this case, when an employee’s time is changed from annual leave to LWOP, a debt would arise. Additionally, when an employee is in unpaid status before and after a holiday, he or she is not entitled to compensation for that holiday.¹¹ In this matter, additional debt resulted when Respondent was put into LWOP status before and after the Memorial Day holiday and she was originally paid holiday pay for that day. Finally, under the Federal Employees Health Benefits Act of 1959 (FEHBA), the responsibility to pay premiums for the comprehensive employer-sponsored group health insurance program (known as the Federal Employees Health Benefits or FEHB) is shared by federal employees and the government, with each paying their share each pay period.¹² In this matter, three overpayments in salary arose when the Department was unable to deduct Respondent’s contribution during three pay periods wherein she was in unpaid LWOP status.

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.¹³

⁸ Cf. *In re CP*, Dkt. No. 17-25-OF, U.S. Dep’t of Educ. (Sept. 29, 2017) at 5.

⁹ OPM, *Fact Sheet: Annual Leave*, <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/annual-leave/>

¹⁰ OPM, *Fact Sheet: Leave Without Pay*, <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/leave-without-pay/>

¹¹ *In re Norman*, Dkt. No. 12-52-WA, U.S. Dep’t of Educ. (Oct. 26, 2012) at 4.

¹² 5 U.S.C. § 8906(c).

¹³ See, e.g., *In re David*, Dkt. No. 05-22-WA, U.S. Dep’t of Educ. (Dec. 14, 2005).

It is well established that “no employee has a right to pay that he or she obtains as a result of overpayments.”¹⁴ Waiver of an erroneous salary payment is an equitable remedy available only when an employee meets the “fault standard,” that there is no indication of fraud, misrepresentation, fault, or lack of good faith by the debtor.¹⁵ This 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 Under the fault standard, we cannot grant a waiver when “under the particular circumstances involved, a reasonable person would have been aware that he or she was receiving more than entitled,” or in other words, when “the debtor had no reasonable expectation of payment in the amount received.”¹⁷ 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.¹⁸ This duty aligns with “the employee’s particular capacity to know of the antecedents that may give rise to changes in pay,” especially because the employee is the person “who often initiates a change in status that results in a pay change”¹⁹

When determining whether an employee fulfills the “fault standard” we take into consideration 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

First, we address the overpayment that arose from the conversion of her status from May 22 through 25 from entirely annual leave to mostly LWOP with some sick leave and some administrative leave. Respondent knew that this conversion was happening, in fact requested that it occur. Supervisor, in writing, told Respondent that he did not believe she met the requirements for sick leave and that he would be willing to put her on annual leave, which he did. Having been told that sick leave was not an option, Respondent at least twice, in writing, asked Supervisor to amend her timesheet and told him that he was not to use her annual leave without her permission. After being asked multiple to amend the timesheet and not use annual leave, Supervisor changed Respondent’s time sheet for May 22 through 25 from annual leave to

¹⁴ *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.

¹⁵ *See In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep’t of Educ. (Dec. 12, 2005).

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

¹⁷ *Id.*

¹⁸ *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.

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.

a combination of sick leave, administrative leave, and leave without pay. This conversion was readily apparent on the leave and earning statements Respondent has submitted. Respondent reasonably should have known that amending time from a paid leave status would likely result in a debt arising. She had already been told that the amendment would not be to a paid sick leave status, and she still requested that her time be amended from annual leave. In fact, Respondent has not even argued that she lacked knowledge of the conversion of her status from annual leave or that it would result in a debt arising. In short, Respondent has failed to show that she did not reasonably know that the change she asked for would result in an overpayment, and she has failed the “fault standard” for the debt arising out of the conversion of her time for May 22 through 25.

Respondent, however, is not at “fault” for the debt that arose when she became ineligible for Memorial Day holiday pay on Monday, May 28, 2018. As noted above, Respondent should reasonably have known that her status on Friday, May 25, 2018, the work day before Memorial Day, could be changed from annual leave to LWOP. In an email sent the day after Memorial Day to Supervisor, Respondent told him that she was out of the office until further notice, which she should have reasonably anticipated would put her into unpaid status. There is no indication, however, that Respondent is or should be well versed in the rules about eligibility for holiday pay. It is reasonable that Respondent would not have known that by being in unpaid status the Friday before Memorial Day and the day after Memorial Day, she would not be eligible for holiday pay on Memorial Day. In short, Respondent meets the fault standard for that portion of the debt.

Finally, in relation to the three debts that arose from the Department’s inability to collect Respondent’s contribution to health insurance, Respondent has failed to show she is without “fault.” Respondent elected not to report to work between July 8 and August 4 2018 and between August 19 and September 1, 2018 despite being told in writing that, on appeal, her request to telework was denied and that she was required to report to work on June 19, 2018. She should have reasonably known that she would be in unpaid status for failing to report to work and that the Department could not collect health benefit contributions when she was not receiving pay. An employee should reasonably know that the failure to contribute his or her portion of the health benefit costs would result in an overpayment of salary and a debt.²² Therefore, I am unable to conclude that she has met the fault standard burden and I cannot grant her waiver request.²³

As noted above, Respondent has met the fault standard for the portion of the debt that arose from the conversion of eight hours of leave from holiday pay to leave without pay. For a waiver to be granted, however, it is not enough to meet the fault standard. In addition, I must also “balance the equities” by considering a number of factors to determine whether repayment

²² See *in re K*, Dkt. No. 18-09-WA, U.S. Dep’t of Educ. (April 9, 2018); *In re M*, Dkt. No. 16-52-WA, U.S. Dep’t of Educ. (Feb. 15, 2017).

²³ 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.

would be inequitable.²⁴ In this matter, I have determined that requiring repayment of a debt for which Respondent is not at “fault” would be inequitable. Specifically, Respondent is currently helping to provide for a relative who has suffered significant health problems, including helping to provide for the significant financial costs resulting from the illness. “Although there are no rigid rules governing the equity standard, in the past we have noted that the financial obligations associated with caring for and supporting a family member or loved one can make repayment of a debt an undue, and inequitable, financial burden.”²⁵ Here, Respondent has met her burden of showing that repayment of the debt for which she is without fault is inequitable and should be waived.

Respondent has only fulfilled the fault standard for that portion of one debt that resulted from the conversion of eight hours of leave on May 28, 2018 to leave without pay. Therefore, for the rest of the debt, her request must be denied. For the debt arising out of the conversion from holiday pay, Respondent is both without fault and repayment would be inequitable. So for that portion of the debt, the waiver is granted. 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 entirety of debts 82261112818, 182121112818, 182261112818, and 182541112818 to the United States Department of Education is **HEREBY GRANTED IN PART AND DENIED IN PART**.

So ordered this 26th day of November, 2018.

Daniel J. McGinn-Shapiro
Waiver Official

²⁴ See *In re A*, Dkt. No. 15-43-WA, U.S. Dep’t of Educ. (Sept. 4, 2015) at 5.

²⁵ *In re K*, Dkt. No. 16-5-WA, U.S. Dep’t of Educ. (May 11, 2017) at 5 (*citing In re T*, Dkt. No. 13-40-WA, U.S. Dep’t of Educ. (Dec. 5, 2013); *In re C*, Dkt. No. 15-27-WA, U.S. Dep’t of Educ. (June 3, 2015); *In re B*, Dkt. No. 14-33-WA, U.S. Dep’t of Educ. (Oct. 15, 2014); and *In re Z*, Dkt. No. 14-26-WA (July 24, 2014).