



UNITED STATES DEPARTMENT OF EDUCATION  
WASHINGTON, D.C. 20202

In the Matter of

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**KH**

**Docket No. 19-18-WA**

Salary Overpayment Waiver Proceeding

Debt ID 181981112818

Respondent.

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**DECISION DENYING WAIVER REQUEST**

The Office of Hearings and Appeals (OHA) received a request, dated March 20, 2019, for a waiver of a debt from Respondent, a U.S. Department of Education (Department) employee, in the above-captioned proceeding. On March 21, 2019, the matter was assigned to me as waiver official. Respondent's waiver request comes in response to deductions from Respondent's pay taken during two pay periods in the total amount of \$271.95 to reimburse the federal government for health insurance premiums that the Department was unable to collect during a previous pay period when Respondent was in unpaid leave status.

Respondent submitted several documents with her waiver request to support her argument that a waiver should be granted. On March 21, 2019, I issued an Order Governing Proceedings providing Respondent the opportunity to supplement her filings by April 15, 2019. Respondent did not respond in a timely manner. However, because there was some question whether Respondent received the Order, and out of an abundance of caution and to firmly ensure Respondent's due process rights are protected, Respondent was given an additional opportunity to file additional documentation on or before June 13, 2019. On May 31, 2019 Respondent filed a response with attached documents but has made no other filings since that time.

Based on the submitted information, Respondent has failed to prove that she is without "fault" as the term is used in waiver proceedings, so the waiver request is denied. This is a final agency decision. Respondent, however, may still challenge the validity or amount of the debt in a separate pre-offset hearing, which she must request within 10 days of receipt of this decision.<sup>1</sup>

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<sup>1</sup> 34 C.F.R. § 32.6(b). Because this constitutes a final agency decision, **Respondent may not challenge the denial of her waiver request.** 34 C.F.R. § 32.5(a)(1). If Respondent wants a pre-

In a waiver proceeding, the debtor does not challenge the validity of the debt,<sup>2</sup> 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.<sup>3</sup> 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,<sup>4</sup> which, thereby, exercises waiver authority and jurisdiction on behalf of the Secretary of Education to waive<sup>5</sup> claims of the United States against a former or current employee of the Department.<sup>6</sup> The undersigned is the authorized Waiver Official who has been assigned this

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offset hearing, she must file a timely request for a pre-offset hearing. A timely request is one that is filed in the OHA within ten (10) calendar days of receipt of an adverse waiver decision. The request must be in writing and must specify if Respondent is requesting a hearing to: (1) challenge the existence (validity) of the alleged debt; (2) challenge the amount of the alleged debt; (3) obtain relief from the involuntary repayment schedule the Department is authorized to implement in the absence of an acceptable voluntary repayment collection; or all or any combination of those options. If challenging the existence (validity) or amount of the alleged debt, Respondent must provide the reasons why she believes the debt is not valid or the amount is not correct. If seeking relief from the authorized involuntary repayment collection schedule, she must establish extreme financial hardship. Financial hardship is established only by the submission of a financial statement signed under oath or affirmation. Respondent must also submit all documentary evidence to support her challenges and extreme financial hardship. Submissions, including the request for a pre-offset hearing, should be in pdf format and, if emailed, should be sent as an attachment to the email, not put into the body of the email.

<sup>2</sup> 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, which as noted, Respondent may request within 10 days of receipt of this decision. 34 C.F.R. § 32.6(b).

<sup>3</sup> 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. No. 13-40-WA, U.S. Dep't of Educ. (Dec. 5, 2013) at 2 n.5.

<sup>4</sup> 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).

<sup>5</sup> *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).

<sup>6</sup> *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

matter by OHA.<sup>7</sup> Jurisdiction is proper under the Waiver Statute at 5 U.S.C. § 5584.

## PROCEDURAL HISTORY

During a portion of 2018, including pay period 15, Respondent was out of work on extended leave under the Family and Medical Leave Act (FMLA leave). Because FMLA leave is an unpaid leave status, the Department was unable to collect Respondent's share of her health insurance premiums. Once Respondent returned to a paid work status, the Department collected the missing premiums. It appears that the Department failed to provide notice before collecting this debt, as required by the regulations.

In March 2019, Respondent examined her leave and earnings statements (LESs) and noticed a pay deduction on her LES for pay period 17 of \$53.76 for "Health Benefits Pre-." Respondent inquired about the deduction in an email to a representative from the U.S. Department of the Interior (DOI), the agency that processes payroll actions for the Department of Education. Respondent determined from the DOI response that the \$53.76 debt was part of a larger \$271.95 debt, the debt at issue in this proceeding, with the remaining \$218.19 collected during pay period 18. In a document dated March 20, 2019, Respondent requested that this debt be waived.

Respondent asserts that before her inquiry in March 2019, she had no knowledge of the debt incurred during pay period 15 or the deductions taken during pay periods 17 and 18 to collect this debt. Respondent contends that on October 25, 2018, while pursuing a waiver of other debts not at issue in this proceeding, Respondent spoke with the DOI representative and requested "all debt letters related to [her] unpaid FMLA leave" and the DOI representative's response did not include any letters related to the debt at issue in this proceeding. She further notes that when the deductions were first made, she was still on FMLA leave and did not notice the reduction in her pay. And, as Respondent indicates, there is significant evidence to indicate that Respondent was not provided notice of the debt before these deductions were made, as required by 34 C.F.R. § 32.3 and 5 U.S.C. § 5514(a)(2).<sup>8</sup> Finally, Respondent contends that she did not know if she would have insurance when she was on FMLA leave.

In support of the contention that repayment would be inequitable, Respondent asserts that she is attempting to recover from the financial hardship caused by being in an unpaid status for four months, while continuing to care for a family member. Respondent additionally argues that

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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>.

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

<sup>8</sup> The failure by the Department to satisfy the statutory and regulatory notice requirements before collecting a debt is not sufficient grounds for a granting a waiver. Whether the Department provided proper notice of the debt before collecting the debt once Respondent returned to pay status does not affect what Respondent knew or should have known about the debt being incurred while in unpaid status.

the failure to provide proper notice before collecting the debt renders the collection of the debt inequitable.

## 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.<sup>9</sup> An employee's contribution to her health care coverage is disclosed as a deduction on her leave and earnings statements.<sup>10</sup> In this matter, the overpayment in salary arose from an inability to deduct Respondent's contributions from a pay period in fiscal year 2018.

Determining whether waiver is appropriate in this matter requires consideration of two factors: (1) whether Respondent can prove that there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of Respondent, known as the "fault standard;" and (2) whether Respondent can show that it is against equity and good conscience for the Federal government to recover the overpayment, known as the "equity standard."<sup>11</sup>

In general, a Department employee does not have the right to keep pay obtained as a result of overpayments of salary.<sup>12</sup> An exception to that rule is that a waiver may be granted as an equitable remedy, but only when an employee can meet the "fault standard."<sup>13</sup> 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."<sup>14</sup> Essentially, a waiver cannot be granted when "under the particular circumstances involved, a reasonable person would have been aware that he or she was receiving more than entitled."<sup>15</sup> 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 . . . ."<sup>16</sup> As, in this case, when an employee uses leave, that employee should know basic information about and consequences of using that kind of leave.

Based on what Respondent has filed in this matter, Respondent should have known she was incurring a debt for unpaid health premiums.

Respondent acknowledges that she was knowingly out of work on FMLA leave during pay period 15 of 2018. The basic right exercised under FMLA is to use "up to 12 workweeks of **unpaid**

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<sup>9</sup> 5 U.S.C. § 8906(c).

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

<sup>11</sup> *See, e.g., In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

<sup>12</sup> *In re D*, 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.

<sup>13</sup> *See In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005).

<sup>14</sup> *In re Spencer*, Dkt. No. 11-01-WA, U.S. Dep't of Educ. (June 7, 2011) at 2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

leave during any 12-month period.”<sup>17</sup> It is reasonable to conclude that if an employee is not receiving pay, the Department cannot take an employee’s share of health premiums from zero pay.

Respondent asserts that she did not know if she would have health insurance while out of the office on FMLA leave. However, the Office of Personnel Management’s fact sheet about FMLA leave lists only two “Job Benefits and Protections.” That upon return an employee will be returned to the same or an equivalent position and that:

An employee who takes FMLA leave is entitled to maintain health benefits coverage. An employee on unpaid FMLA leave may pay the employee share of the premiums on a current basis or pay upon return to work.<sup>18</sup>

Respondent asserts that when she inquired about FMLA from the Department’s human resource specialists, she was not told about maintaining health coverage while on FMLA leave and that the Department has failed to fulfill its obligations to properly post information about FMLA. She further argues that Department employees should not be expected to know where to obtain information about leave that they elect to use if not provided the information by internal postings or human resources employees at the Department of Education. Finally, Respondent contends that if she had been given proper notice, she would have canceled her health insurance while on unpaid leave.

As noted above, Respondent is an employee of the U.S. Department of Education. In that role, she is also an employee of the federal government. As a federal employee, Respondent is charged with at least a basic knowledge of the leave she elects to use, and the general rules, regulations, and policies governing that leave, including those promulgated by the federal government’s human resources agency, the Office of Personnel Management.

In short, Respondent should have known she was in an unpaid leave status, that she was receiving a health benefit, and that she would be incurring a debt for the unpaid premiums during that pay period. In fact, in an earlier separate overpayment waiver proceeding, Respondent requested that three other debts be waived that arose from the Department’s inability to collect Respondent’s contribution to health insurance when she was on unpaid leave status. In that case, this tribunal concluded that Respondent could not meet the fault standard in relation to those three debts because:

(1) Respondent “should have reasonably known that she would be in unpaid status . . . and that the Department could not collect health benefit contributions when she was not receiving pay;” and

(2) “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.”<sup>19</sup>

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<sup>17</sup> OPM, *Fact Sheet: Family and Medical Leave*, <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/family-and-medical-leave/> (last visited 4/30/2019).

<sup>18</sup> *Id.*

<sup>19</sup> *In re K*, Dkt. No. 18-53-WA, U.S. Dep’t of Educ. (Nov. 26, 2018).

Respondent has failed to show why she did not reasonably anticipate that she would be required to repay her health premiums. Therefore, I am unable to conclude that she has met the fault standard burden and I cannot grant her waiver request.<sup>20</sup> 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 debt 181981112818 to the United States Department of Education is **HEREBY DENIED**.

So ordered this 18th day of June 2019.

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Daniel J. McGinn-Shapiro  
Waiver Official

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<sup>20</sup> 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.