**UNITED STATES DEPARTMENT OF EDUCATION**
OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202
TELEPHONE (202) 245-8300

In the Matter of

**W**

Respondent.

**Docket No. 18-49-WA**

Salary Overpayment Waiver Matter

Debt IDs: 81421616027; 81561616027; and 181561616027

**DECISION DENYING WAIVER REQUEST**

The Office of Hearings and Appeals (OHA) received a request, dated August 22, 2018, for a waiver of a debt from Respondent, a former U.S. Department of Education (Department) employee, in the above-captioned proceedings. Respondent's request comes in response to the notice of a debt resulting from an overpayment of salary to Respondent.

After a request for clarification, Respondent indicated that she was also requesting a pre-offset hearing to challenge the debt. It was determined that the pre-offset matter, 18-51-OF, would proceed first. On August 30, 2018, I issued an order staying this matter and the collection of the debt in this matter pending the outcome of both proceedings. On May 21, 2020, Administrative Law Judge Angela Miranda issued a decision in 18-51-OF concluding that the debt at issue was partially valid and partially invalid and providing Respondent with an opportunity to submit a voluntary repayment schedule for that portion of the debt that was determined to be valid.[1] Only the debt that was determined to be valid is at issue in this waiver proceeding, which is for $162.68.

On May 26, 2020, I issued an Order Governing Proceedings in the above-captioned matter. This order required the Respondent to file any additional documentation for the record on or before June 10, 2020. Respondent was also told in this order that if she needs additional time to respond to the order, she needs to submit a request to OHA on or before June 10, 2020. After

[1] Respondent's initial request was for a waiver of Debt 81421616027. During the pre-offset matter, it was determined that there were three related debts all issued on the same day, and all three were addressed in the pre-offset matter. I similarly determine that the request for a waiver is for any portion of any of the three debts that was determined to be valid.

receiving no response, I issued an Order Extending Opportunity to Supplement File on June 18, 2020. This order allowed Respondent to submit additional documentation by July 6, 2020, at which point the file would be closed and the evidence weighed to decide this matter. To date, Respondent has elected not to file any additional submissions. The file is therefore closed.

Having received no response and having reviewed the submitted information, I conclude that Respondent failed to meet her burden of showing that 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 challenge[2] 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 waive[5] 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 assigned this matter by OHA.[7] Jurisdiction is proper under the Waiver Statute at 5 U.S.C. § 5584.

## PROCEDURAL HISTORY

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[2] Refraining from challenging the validity of the debt for the purposes of a waiver proceeding does not preclude Respondent from raising that challenge in a separate pre-offset hearing, which Respondent did in matter 18-51-OF.

[3] 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.

[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) (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).

The Respondent was a former Human Resources Specialist in the Executive Resources Division of the Department's Office of Human Resources until her separation from Federal service on June 7, 2018. Prior to the separation, the Respondent was on medical leave during pay period 6 through 12 of fiscal year 2018 (February 18 – May 26, 2018). While on leave, the Respondent did not have access to the Department's time and attendance system ("WebTA"). Due to the Respondent's inability to access WebTA, her time was recorded by a designated timekeeper from the Respondent's Principal Office Component at the direction of the Respondent's immediate supervisor. Because the Employee Express System can be accessed outside of the Department's network, however, Respondent should have had access to her leave and earnings statements ("LES") throughout the time-period in question.

In the pre-offset matter, the only part of the debt that was determined to be valid was the overpayment that resulted from the conversion for pay period 8 and, so, only that portion of the debt is addressed.

On March 19, 2018, the Respondent's supervisor communicated to the designated timekeeper that the annual leave requests for pay period 8 needed to be canceled. The timesheet originally prepared and certified reflected a combination of regular time worked (in the office and via telework at home), leave without pay ("LWOP") in lieu of Family (Medical Self), annual leave in lieu of Family (Medical Self), and sick leave in lieu of Family (Medical Self).

The Respondent applied to participate in the Department's Voluntary Leave Transfer Program ("VLTP") in January. The Respondent's application was not accepted until April 4, 2018; however, it was initially active for January 7, 2018 until May 1, 2018. On May 3, 2018, a Department of the Interior ("DOI") payroll technician sent an email to the Respondent's designated timekeeper indicating items "ran through calc" needed discussing and amending regarding pay periods 6-8 of 2018. (OES Document 25) On May 16, 2018, the Respondent's designated timekeeper prepared corrected timesheets for pay periods 6 through 8 of 2018. In pay period 8 of 2018, the corrected timesheet changed all initial time processed, whether processed as regular time worked, leave without pay, or annual leave in lieu of Family (Medical Self) to "LS1."

On May 17, 2018, the DOI payroll technician indicated conversions based on the corrected timesheet for pay period 8 of 2018 were processed. The original timesheet for pay period 8 of 2018 was prepared by a designated timekeeper on March 19, 2018, verified by an alternate designated timekeeper on April 2, 2018, certified by the Respondent's supervisor and processed on April 3, 2018. That original timesheet showed the Respondent was paid for 36.30 hours of work and 9.30 hours of paid annual and sick leave in lieu of Family (Medical Self) Used, for a total of 46 hours. On the Respondent's original LES only the 9.30 hours of paid annual and sick leave were itemized, the additional 36.30 hours of paid time was not.

To complete the 80-hour standard work requirement, the Respondent was charged with 34 hours of leave without pay. On May 17, 2018 (during pay period 12 of 2018), a correction was processed for pay period 8 of 2018 and 80 hours of Leave Share (Medical Self) Used 1st Emergency (LS1) were substituted for all prior entries on this timesheet.

On that same date, the DOI payroll technician processed conversions for pay period 8 of 2018. In discussing the conversions for pay period 8 it was noted that the Respondent had not worked and that the regular hours for pay period 8 were incorrect. The payroll technician communicated that the employee/Respondent was originally paid for 46 hours and this is corroborated by a leave and earnings statement for pay period 8 of 2018 showing the Respondent was paid her regular rate of pay for 46 hours. Upon completion of the conversion, the payroll technician reported the Respondent is entitled to only 24 paid hours. This conversion resulted in the 22-hour overpayment to Respondent.

On August 14, 2018, the Department's Debt Management Coordinator issued 3 notices of overpayment. As previously stated, in the pre-offset matter, only part of one of these debts, debt ID 81561616027, relating to pay period 8 was determined to be valid. The overpayment for pay period 8 totaled $717.20, however, given that the Department asserts it recovered $317.68 from Federal withholding, state withholding, Medicare, OASDI, Retirement, TSP, and FEGLI – regular, additional, optional, and family, the debt was reduced by $317.68. The debt was further reduced by $171.84, as the Department asserted that it paid this amount in the Respondent's health insurance benefits but was unable to provide adequate documentation to validate this debt and so the Respondent was credited this amount. After considering all credits to the Respondent, the valid debt amount is $162.68.

## DISCUSSION

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."[8]

It is well established that "no employee has a right to pay that he or she obtains as a result of overpayments."[9] 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."[10] Rather, the fault standard imposes a duty on Department employees to seek correction of the erroneous payment regardless of the government's mistake."[11] As part of this fault standard, a respondent must also show that she did not "accept the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous."[12] Once an employee knows or should know of a salary overpayment, the employee is

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

[9] *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.

[10] *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.

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

[12] *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.

required to set aside money to repay the overpayment of salary.[13]

Our decision in *In re Spencer* explained the fault standard in more 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."[14] 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)."[15] We begin the fault 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."[16] 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."[17]

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."[18] Specifically, employees have a duty to review and react to errors that are clear on the face of a leave and earnings statement.[19]

As the Respondent notes, administrative errors were made by the Department. Furthermore, the Respondent did not have access to WebTA and so could not check her payment information while she was on leave. The Respondent, however, did have access to the Employee Express System during the period in question. The Employee Express System allows an employee to access their LES. The LES for Respondent in pay period 8 shows that the Respondent was paid for 46 hours; 5.30 hours of paid annual leave and 4.00 hours of paid sick leave. While these 9.30 hours of leave were accounted for, the additional 36.30 hours of paid time was not accounted for by any paid leave status.

As noted, Federal employees have an obligation to review their LESs and react to apparent errors contained on the statements. A federal employee, and especially a Human Resources

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[13] *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.

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

[15] *Id*.

[16] *Id*.

[17] *Id.*

[18] *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.

[19] *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.

Specialist, should have known they had an obligation to understand the basis for the additional 36.30 hours of paid time. Because Respondent was not working during pay period 8, this additional time not being explained by any paid leave status on the LES should have raised a red flag for the Respondent and prompted her to inquire about the basis of this paid time. Despite two opportunities to do so, the Respondent has not submitted documents to indicate that she made a timely inquiry into the basis of the time paid for pay period 8 once she was paid for that period. Because a waiver cannot be granted without meeting the fault standard it is not necessary to address whether Respondent's financial hardships would justify granting a waiver if Respondent had met the fault standard. This decision constitutes a final agency decision.

ORDER

Pursuant to the authority of U.S.C. § 5584 (2012), Respondent's request for waiver of the entire debt to the United States Department of Education is **HEREBY DENIED**.

So ordered this fifteenth day of July, 2020.

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Daniel J. McGinn-Shapiro
Waiver Official