



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of
MM,
Respondent.

Docket No. 20-40-WA

Salary Overpayment
Waiver Matter

Debt ID: 02101792225

Decision Denying Waiver Request

The Office of Hearings and Appeals (OHA) received a request for a waiver of a debt and a pre-offset hearing from Respondent, a U.S. Department of Education (ED) employee, in the above-captioned proceedings. The pre-offset hearing is docket 20-41-OF and is currently pending before Administrative Law Judge Angela Miranda. 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 **\$1,250.27**. Respondent has indicated that this overpayment resulted from a failure to timely process a change in her health insurance after she transferred from another federal agency.

On August 31, 2020, an Order Governing Proceedings was sent via electronic mail in response to Respondent's waiver request. The Order Governing Proceedings required Respondent to file a complete waiver request on or before September 30, 2020. After Respondent did not file a response, an Order to Show Cause was issued on October 5, 2020 directing that Respondent show cause by October 30, 2020 why the record should not be closed and the matter decided on what had been submitted. Once again, Respondent did not file a response.

Unlike this waiver proceeding, the separate pre-offset matter is contested by ED. ED filed multiple exhibits in that proceeding on October 26, 2020. On October 30, 2020, I sent Respondent notice that a group of exhibits, Respondent's leave and earnings statements from ED for pay periods 8 through 19 in 2020, were relevant and would be added to the file. I invited Respondent to file any objections to this proffer of evidence by November 6, 2020. Respondent has not filed any objections to date.

The file has now been closed. Based on the submitted information, Respondent has failed to prove that she is without "fault" as the term is used in waiver proceedings, and so the

waiver request is denied. This is a final agency decision. The separate pre-offset hearing and the corresponding stay on any collection efforts, however, remain pending.¹

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.

JURISDICTION

The waiver authority involving former and current employees of ED 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 ED.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

Respondent has been an employee of the federal government since 2010. On March 31, 2020, Respondent joined ED from the U.S. Department of Housing and Urban Development (HUD). During Respondent's onboarding at ED, she was told that her health benefits would be automatically transferred and that she was not required to take any action related to her health insurance. On July 20, 2020, a human resources specialist from ED emailed Respondent to inform her that her health coverage had not been updated in ED's personnel and pay system and

¹ 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).

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 the separate pre-offset hearing, 20-41-OF.

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 ED'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). ED'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).

so Respondent's health premiums had not been deducted from Respondent's pay causing a salary overpayment.

Respondent argues that there was no way for her to know that the health insurance premiums were not being deducted. At HUD, she had enrolled in various activities and had paid fees as a member of the gym and the union. Because she was no longer at HUD, Respondent assumed the higher pay was a result of these fees no longer being deducted. Respondent asked that we waive the repayment because the overpayment and the error that caused the overpayment were outside of her control.

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

In general, an ED employee does not have the right to keep pay obtained as a result of overpayments of salary.⁹ 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."¹⁰ 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."¹¹ 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."¹² 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"¹³

Respondent notes that the error that cause the overpayment is not her fault, but was made outside her control. In past cases, we have noted that when determining whether an employee has met the fault standard, 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."¹⁴ Specifically, employees have a duty to review and react to errors that are clear on the face of a leave and earnings

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

⁹ *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.

¹⁰ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005).

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

¹² *Id.*

¹³ *In re Spencer*, Dkt. No. 11-01-WA, U.S. Dep't of Educ. (June 7, 2011) at 2.

¹⁴ 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.

statement (LES).¹⁵ Every two weeks, ED employees are issued an LES, which states the employees pay and any deductions from that pay.

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.¹⁶ An employee's contribution to her health care coverage is disclosed as a deduction on her LESs.¹⁷

On each of Respondent's LESs between pay periods 8 and 14 of 2020, there are stated deductions for taxes, life insurance and other items. There are not, however, any deductions for any items that reasonably could be understood to be health insurance premiums. Beginning in pay period 15, there is a listed deduction for "Health Benefits – Pretax."

Respondent had been a federal employee for almost 10 years when she joined ED. She should have known that she had an obligation to pay for health insurance. She does not even indicate that she thought she did not have to pay her health insurance premiums. She also had an obligation to check her LESs. If she had, she would have noticed that there were no deductions for health insurance. Respondent has failed to show why she did not reasonably discover and question why no deductions were made from her pay for health insurance. Therefore, I am unable to conclude that she has met the fault standard burden and I cannot grant her waiver request.¹⁸ 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 12th day of November, 2020.

Daniel J. McGinn-Shapiro
Waiver Official

¹⁵ 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.

¹⁶ 5 U.S.C. § 8906(c).

¹⁷ *In re Eric*, Dkt. No. 10-06-WA, U.S. Dep't of Educ. (Mar. 31, 2011) at 2.

¹⁸ 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.