



**UNITED STATES DEPARTMENT OF EDUCATION**  
OFFICE OF HEARINGS AND APPEALS  
OFFICE OF ADMINISTRATIVE LAW JUDGES  
400 MARYLAND AVENUE, S.W.  
WASHINGTON, D.C. 20202-4615  
TELEPHONE (202) 245-8300

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In the Matter of

**LM**

Respondent

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**Docket No.: 21-40-OF**

**Overpayment/Pre-offset Hearing**

Debt ID: 12500044868

Appearances:

Brittany Coleman, AFGE Local 252, for LM

Lydia Makande, the Office of the General Counsel, U.S. Department of Education, Washington, D.C., for U.S. Department of Education

Before: Daniel J. McGinn-Shapiro, Administrative Law Judge

**DECISION**

On September 27, 2021, Respondent, an employee of the U.S. Department of Education (the Department or Education), filed a request for a pre-offset hearing with the Office of Hearings and Appeals (OHA) through her union representative.<sup>1</sup> The request challenged the existence of an alleged overpayment of \$4,134.27.<sup>2</sup> The Department asserts that the alleged

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<sup>1</sup> Respondent, through her representative, has also filed a request for a waiver. The waiver matter is docket number 21-39-WA and Charles Yorby III has been assigned as the waiver official in that matter. The pre-offset hearing request was sent after working hours on Friday, September 24, 2021. It was not received and officially filed until the next working day, on Monday, September 27, 2021.

<sup>2</sup> See Letter from United States Department of the Interior to [redacted] (Sept. 7, 2021) (hereafter "Debt Letter").

overpayment arose from the Respondent's use of the incorrect pay codes when she used advanced annual leave and sick leave during eight pay periods in 2020 and 2021.<sup>3</sup>

### **Parties' Arguments**

In response to a notice of the debt, Respondent's union representative filed a request for a pre-offset hearing on September 27, 2021. Both parties filed briefs with supporting documentation primarily addressing whether Respondent owes a debt. Additionally, both parties filed supplemental briefs addressing the specific issue of whether, if the debt exists, the Department is correct in its calculation of the debt.

#### **I. Request for Pre-Offset Hearing**

In her request for a pre-offset hearing, Respondent states that she disputes the existence of the debt because she did not receive any additional money in her paycheck. Respondent further argues that the alleged debt arose because Education failed to properly process her donated leave. Specifically, Respondent contends that the Department incorrectly processed the leave that was donated to her through Education's Voluntary Leave Transfer Program (VLTP) and Voluntary Leave Bank Program (Leave Bank). Respondent alleges that Education did not allow her to use leave from those programs while she was eligible for the programs, and forced her to use advanced annual leave and advanced sick leave for her "medically related absences."<sup>4</sup> Respondent states that Education posted her donated leave hours after the period she could use them had already expired.

Respondent asserts that despite contacting the Department many times, her issues were not resolved until a representative from Education's employees' union escalated the issue to a

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<sup>3</sup> Agency Brief in Support of Debt Determination (Oct. 22, 2021) (hereafter "Dep't Brief") at 1.

<sup>4</sup> Respondent's Petition for a Pre-Offset Hearings and to Inspect Agency Records (Sept. 24, 2021) (hereafter "Request for Review") at 1.

human resources supervisor. That supervisor directed a Department human resources representative to process corrections in 2019 and 2020 to credit Respondent with her donated leave hours and multiple corrections were made in 2020 and 2021 instead. Respondent asserts that she received the same amounts in her paycheck, and she cannot determine what corrections Education made to her unused donated leave and advanced sick leave balances.

## II. Department Brief

In its brief, the Department argues that Respondent owes a valid debt resulting from Respondent's misuse of incorrect pay codes when she used advanced sick and annual leave during eight pay periods in 2020 and 2021.

The Department asserts that the corrections were made to account for the paid leave that Respondent used that she was not entitled to take, and that the hours of advanced sick and annual leave were automatically converted by the system to cover any leave balance deficiencies. Because there were some hours that were no longer available for use, a debt was generated to recover payment for the use of leave that Respondent was not eligible to claim.

Education further contends that Respondent used leave from the voluntary leave transfer program (VLTP) after January 31, 2021, when she was no longer eligible for the program. Specifically, Respondent attempted to use leave from the VLTP during pay periods 8, 9, and 10 in 2021, all of which were after January 31, 2021.<sup>5</sup> At each of those pay periods, WebTA, the Department's time and attendance processing system, issued Respondent a warning that she "must be an active leave share recipient to use leave share pay codes." Additionally, Department employees reminded Respondent on multiple occasions that she could not use VLTP leave for

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<sup>5</sup> In its initial brief, the Department also asserts that Respondent used VLTP leave during pay period 5 of 2021. *See* Dep't Brief at 2, 5. In its supplemental brief, however, Education argues only that Respondent erroneously used VLTP leave during pay periods 8 through 10 in 2021. *See* Agency's Supplemental Brief in Support of Debt Determination (Dec. 20, 2021) (hereafter Dep't Supp. Brief) at 4-5.

absences after January 31, 2021.

Education additionally addresses Respondent's argument that the overpayment resulted in part because Respondent was not allowed to use hours donated to her through the Leave Bank. The Department argues that, like the VLTP program, employees may only use Leave Bank hours during the period that the employee is approved to use hours from the program. While Respondent has been a member of the Leave Bank program since approximately 2003, her most recent medical emergency for which she received approval to use Leave Bank hours was the period of February 2 through August 29, 2020, which is the period between pay periods 4 and 18 in 2020. Education contends that even if Respondent was approved to use Leave Bank hours during pay period 15 in 2020, she did not attempt to use those hours. The Department notes for that pay period Respondent's timesheet shows 27 hours of LS5, the code for VLTP leave, and not LM1 or LM2 the code for Leave Bank hours.

Finally, Education argues that Respondent owes a debt for using leave for which she had not received prior approval to use. The Department specifically asserts that Department policy on leave dictates that employees are responsible for understanding and abiding by the rules and regulations that govern the use of leave and this responsibility includes requesting leave in advance and ensuring that there is available leave approved to cover the time requested. Education states that, at times, Respondent used leave for which she was not approved, and each time she received a warning in WebTA that there was no approved leave request for the leave period on the timesheet. The Department asserts that for those times when Respondent used unapproved or unavailable leave, the system automatically converted and pulled leave from available categories. Education contends that when no alternative leave is available the system automatically converts the leave to leave without pay, which resulted in the debt at issue in this

matter.

### **III. Respondent Brief**

In her initial brief, Respondent first argues that if Respondent was eligible to use VLTP leave through January 31, 2021, as the Department informed Respondent in past emails, she was entitled to use that leave during pay period 15 in 2020. Alternatively, Respondent asserts that during that pay period Respondent's supervisor approved her use of Leave Bank hours. Respondent contends that, therefore, she was eligible to use Leave Bank leave during pay period 15 in 2020. In response to the Department's argument that Respondent incorrectly coded her time for pay period 15 in 2020, Respondent replies that both Respondent's supervisor and a human resources specialist advised her to use the coding that she was entered.

Second, Respondent asserts that the entries for VLTP hours on her timesheet are either there because the codes were entered by other Department employees, acting on behalf of the Department, or because Respondent was instructed to use those codes. She further contends that the Department made corrections to those timesheets without her approval. Respondent argues that she should not be held responsible for other Department employees' incorrect actions or instructions and their amendments to her timesheets to correct the mistakes.

Third, Respondent argues that she was correct to use annual leave in lieu of sick leave during pay periods 11 and 15 in 2021. Respondent asserts that she, in compliance with Department policy, requested leave in advance, when possible, and completed a leave request as soon as practicable. She further contends that her supervisor approved her advanced leave, which is permissible up to 240 hours per year. In short, Respondent argues that the Department

has not “articulate[d]” how her use of advanced annual leave violated leave policy.<sup>6</sup>

Finally, Respondent asserts that if the debt is determined to be valid, she challenges the amount of the debt. Specifically, Respondent argues that the amount of the debt is incorrect “due to [the Department’s] numerous mistakes concerning the alleged [d]ebt.”<sup>7</sup>

#### **IV. Department’s Supplemental Brief**

In her brief, Respondent advanced an alternative argument that, if the debt was valid, it was for the incorrect amount. This is a new argument that was not presented in her brief, nor in her initial request for a pre-offset hearing. To ensure that the Department had an opportunity to respond to Respondent’s alternative argument, both parties were provided with an additional opportunity to address the specific issue of the amount of the debt.

Education first acknowledges that Respondent was eligible to use Leave Bank hours during pay period 15 in 2020, but asserts that because she never requested or used Leave Bank hours this issue is “not germane to the creation or amount of the debt.”<sup>8</sup>

The Department further argues that the debt in pay period 15 of 2020 is valid and for the correct amount of debt. Education contends that this is because the system automatically converted leave from categories for all pay periods between pay periods 15 in 2020 and 15 in 2021 and it resulted in an overpayment during pay period 15 in 2020.

The Department additionally addresses the debt generated during pay periods 5 and 6 in 2021. Education argues that during those pay periods, Respondent used more annual and sick leave than she had accrued. The Department also asserts that Respondent did not have the required approval to use the leave she had accrued. Education contends that this lack of approval

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<sup>6</sup> Respondent’s Brief in Opposition to Agency’s Brief in Support of Debt Determination (Nov. 18, 2021 (hereafter Respondent’s Brief) at 25.

<sup>7</sup> Id. at 26.

<sup>8</sup> Dep’t Supp. Brief at 2.

and shortage of available hours resulted in the system converting the leave to leave without pay.

Education further reiterated that the VLTP hours used by Respondent during pay periods 8 through 10 in 2021 were not appropriate because her medical emergency had terminated and she was no longer eligible for use of those hours. The Department argues that whether she was given inaccurate instructions to use VLTP codes, the use of those codes when the leave is not available results in an overpayment.

Finally, Education clarifies that although the leave used during pay periods 11 and 15 in 2021 was referenced in its brief, the leave used during these periods is not a basis for Respondent's debt.

#### **V. Respondent's Supplemental Brief**

Respondent responds to the Department's supplemental brief by reasserting many of her previous arguments, including that Leave Bank hours should be applied to pay period 15 in 2020 and that other employees, on behalf of the Department, provided inaccurate advice, entered wrong leave codes on Respondent's timesheets, and made erroneous corrections to the timesheets. She also argues that the Department has not shown that the corrections made for underpayments in pay resulted in periods 5 and 6 for 2021 to address Respondent being initially underpaid are now a valid basis for an overpayment. Respondent also argues that the Department fails to show that the automatic corrections it relies upon to argue that the debt is for the correct amount are accurate or that she did not have sufficient approved advanced leave to cover any corrections that were required.

#### **Issues**

The issues to be addressed are:

#### **1. Whether Respondent has shown that the debt assessed for Voluntary Leave**

**Transfer Program hours used during pay period 15 in 2020 is not valid.**

- 2. Whether Respondent has shown that the debt assessed for the use of Voluntary Leave Transfer Program Hours in 2021 is not valid.**
- 3. Whether Respondent has shown that the debt assessed for the use of annual, advanced annual, and advanced sick leave in 2021 is not a valid debt.**

### **Summary of Decision**

The record in this matter demonstrates that Respondent was entitled to use VLTP hours during pay period 15 in 2020. Therefore, the portion of the assessed debt accrued in that pay period is invalid. The record additionally shows that Respondent's use of annual, and advanced annual and sick leave during pay periods 5 and 6 in 2021 did not result in a valid debt. The record, however, has not shown that Respondent was authorized to use the VLTP hours she claimed in pay periods 8, 9, and 10 in 2021. Therefore, that portion of the debt is valid.

### **Facts**

#### **I. Voluntary Leave Transfer Program**

Respondent was approved to participate in the Department's VLTP based on a medical emergency that began on or around November 19, 2019.<sup>9</sup> During the summer 2020, the Department received a letter from Respondent's doctor dated June 2, 2020. Respondent's doctor asked that Respondent be considered for the leave transfer program "until January 31, 2021."<sup>10</sup>

On December 3, 2020, Respondent's supervisor emailed her regarding the use of leave from the VLTP in pay period 25 of 2020.<sup>11</sup> In that email, the supervisor stated that Respondent was "an approved Leave Share participant until January 2021."

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<sup>9</sup> Dep't Exhibit 4.

<sup>10</sup> Dep't Exhibit 5.

<sup>11</sup> Respondent's Exhibit 6 at 3.

On March 3, 2021,<sup>12</sup> and then again on April 22, 2021<sup>13</sup> a human resources specialist in the payroll department (Payroll Specialist) sent emails to groups of people, including Respondent, that again referenced that Respondent could only use VLTP leave until January 31, 2021. Then, on June 1, 2021, a representative from the Department's human resources - Workforce Relations Division (WRD Specialist) contacted Respondent and asked for updated medical information.<sup>14</sup> This requested resulted in series of email exchanges among the Respondent, Respondent's union representative, WRD Specialist, and another human resources specialist. Among the exchange of emails was a June 7, 2021 email from the WRD Specialist noting 1) that the documentation from the medical provider indicated that the Respondent's medical emergency ended on January 31, 2021 and 2) that the Department had not received further medical documentation.<sup>15</sup> The WRD Specialist informed Respondent and her union representative that there was no basis to continue listing Respondent as a voluntary leave recipient unless she submitted a new request with supporting documentation stating that the medical emergency extended beyond January 31, 2021.<sup>16</sup> The WRD Specialist, therefore, gave Respondent two options, to either submit a new request with supporting documentation or to provide the requested medical documentation to continue being a current recipient.<sup>17</sup> On June 22, 2021, the WRD Specialist informed his colleague that he had not received any response to his June 7, 2021 email nor had Respondent or her union representative requested any extension of time to obtain necessary medical documentation.<sup>18</sup>

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<sup>12</sup> Respondent's Exhibit 10 at 2.

<sup>13</sup> Dep't Exhibit 6 at 5.

<sup>14</sup> Dep't Exhibit 3 at 6.

<sup>15</sup> Dep't Exhibit 3 at 1.

<sup>16</sup> Dep't Exhibit 3 at 2.

<sup>17</sup> Dep't Exhibit 3 at 2.

<sup>18</sup> Dep't Exhibit 3 at 1.

After the end of the 20<sup>th</sup> pay period in 2021, Respondent had used 128 of the 240 hours of leave that had been donated, with a remaining balance of 112 hours.<sup>19</sup>

## **II. Voluntary Leave Bank Program**

Respondent contends that part of the reason she has an overpayment was that the Department prohibited her from using leave from the Leave Bank program. Beginning on February 2, 2020, Respondent had a medical emergency that permitted her to use leave from the Leave Bank.<sup>20</sup> Her eligibility for leave from the Bank Program for that medical emergency ended on August 29, 2020.<sup>21</sup>

### **Principles of Law**

The Department, like all federal agencies, is required to administer a Voluntary Leave Transfer Program. Through the VLTP, federal employees can donate annual leave directly to another employee who has a personal or family medical emergency and who has exhausted all available paid leave.<sup>22</sup> The VLTP requires an employee to use all of their accrued annual or sick leave prior to using transferred annual leave.<sup>23</sup> The regulations, however, allow transfer of leave to be retroactively substituted for a period of leave without pay or used to liquidate an indebtedness for advanced annual or sick leave under certain circumstances.<sup>24</sup>

When a medical emergency is the reason for an employee's use of VLTP leave, the employee "is not permitted to use or receive any transferred leave under this subchapter after the medical emergency terminates."<sup>25</sup> A "medical emergency" terminates on the date "as of which"

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<sup>19</sup> Dep't Exhibit 4.

<sup>20</sup> Dep't Exhibit 7.

<sup>21</sup> Dep't Exhibit 7.

<sup>22</sup> See 5 U.S.C. §§ 6331 – 6340.

<sup>23</sup> See 5 U.S.C. § 6333(b); 5 C.F.R. § 630.909(b).

<sup>24</sup> See 5 C.F.R. § 630.906(e).

<sup>25</sup> 5 U.S.C. § 6335(b); see also 5 C.F.R. § 630.910(c).

(1) “the leave recipient notifies the employing agency of such leave recipient, in writing, that the medical emergency no longer exists;” or (2) “the employing agency of such leave recipient determines, after written notice and opportunity for the leave recipient (or, if appropriate, another person acting on behalf of the leave recipient) to answer orally or in writing, that the medical emergency no longer exists;” or (3) “the leave recipient is separated from service.”<sup>26</sup>

In an offset matter, this tribunal determines whether the Department’s determination that the debt exists and is for the amount assessed is clearly erroneous.<sup>27</sup>

### **Analysis**

#### **I. Pay Period 15 in 2020**

During pay period 15 in 2020, Respondent used 27 hours marked LS5, which is the leave code for VLTP hours.<sup>28</sup> As the Department acknowledges, Respondent had approval to use VLTP hours during pay period 15 in 2020.<sup>29</sup> The Department, however, argues that the adjustments made during pay period 18 in 2021 resulted in an overpayment during pay period 15 in 2020. The Department does not adequately explain why this occurred. The document submitted by the Department shows that after her use of VLTP hours, she still had a remaining balance of 112 hours.<sup>30</sup> VLTP hours can be retroactively applied to a pay period during which an employee was eligible for the program to substitute for a period of leave without pay or can be used to liquidate an indebtedness incurred because of use of advanced sick or annual leave.<sup>31</sup>

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<sup>26</sup> 5 U.S.C. § 6335(a).

<sup>27</sup> See 34 C.F.R. § 32.9(b).

<sup>28</sup> See Dep’t Exhibit 1 to Mot. for Extension of Time at 1; Dep’t Supp. Brief at 2; Dep’t of the Interior, *Payroll Accounting Guide* at Appendix K-4, available at <https://www3.irc.doi.gov/services/hr/payroll/manuals/docs/PAG.pdf> (last visited Feb. 25, 2022).

<sup>29</sup> Dep’t Supp. Brief at 3.

<sup>30</sup> See Dep’t Exhibit 4.

<sup>31</sup> See 5 C.F.R. § 630.906(e); OPM, Fact Sheet: Voluntary Leave Transfer Program, available at <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/voluntary-leave-transfer-program/>.

The Department has not sufficiently explained why the adjustments made resulted in a debt for pay period 15 in 2020 when: (1) Respondent has a leave balance VTLP leave; (2) she claimed VLTP leave; (3) she was eligible for VLTP leave during the relevant pay period; and (4) VLTP leave is available to be retroactively applied to substitute for a period of leave without pay or to liquidate a debt. In short, the record does not support that there is a valid debt incurred in pay period 15 in 2020.

This portion of the debt is the only portion of the debt incurred in 2020. Respondent was only eligible for Leave Bank hours in 2020.<sup>32</sup> Because the debt incurred in 2020, it is not valid and owed, the use of Leave Bank hours is a moot point.

Additionally, in the debt notice, the Department notes that it gave Respondent credit for 20 hours of advanced annual leave for pay period 15 in 2020.<sup>33</sup> Advanced annual leave may only be used within the leave year.<sup>34</sup> Therefore, because the only debt assessed for 2020 has been determined to be invalid, this credit is no longer available to offset the debt.

## **II. Voluntary Leave Transfer Program Leave used in 2021.**

Respondent could not use VLTP leave after the termination of her “medical emergency” that was the basis for her eligibility for the program.<sup>35</sup> The Department argues that her medical emergency terminated on January 31, 2021. The record demonstrates that this is correct.

Under the statute, there are three ways that a medical emergency can terminate: (1) when the employee informs the agency in writing that the medical emergency no longer exists; (2) when the employee leaves federal service; or (3) on the date “as of which . . . the employing agency of such leave recipient determines, after written notice and opportunity for the leave

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<sup>32</sup> See Respondent’s Exhibit 1 at 5.

<sup>33</sup> Debt notice at 2.

<sup>34</sup> See Human Capital Policy 630-1: Leave Administration at Section VI(A)(7)(a).

<sup>35</sup> 5 U.S.C. § 6335(b); *see also* 5 C.F.R. § 630.910(c).

recipient (or, if appropriate, another person acting on behalf of the leave recipient) to answer orally or in writing, that the medical emergency no longer exists.”<sup>36</sup> The record does not indicate that Respondent informed the Department that her medical emergency ended or that she left federal service. Therefore, the only basis for the medical emergency terminating would be the date determined by the Department. This date, however, can only be determined “after written notice and opportunity for the leave recipient . . . to answer . . . .”<sup>37</sup>

The applicable regulation further articulates that the termination of a medical emergency for a VLTP is “[a]t the end of the biweekly pay period in which the leave recipient's employing agency determines, after written notice from the agency and an opportunity for the leave recipient (or, if appropriate, a personal representative of the leave recipient) to answer orally or in writing, that the leave recipient is no longer affected by a medical emergency.”<sup>38</sup> Similarly, the OPM policy on VTLPs states that if the medical emergency terminates based on the Department’s determination, it terminates “[a]t the end of the biweekly pay period in which the agency determines, after written notice to the leave recipient and opportunity for response, that the medical emergency is over.”<sup>39</sup>

In support of its argument that Respondent’s medical emergency terminated on January 31, 2021, the Department cites to a letter from Respondent’s doctor asking that she be put into the VTLP until January 31, 2021, and an email chain in which OHR representatives communicated with Respondent and her union representative.<sup>40</sup> The email exchange begins on June 1, 2021, and, in it, OHR informed Respondent and her union representative that Respondent

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<sup>36</sup> 5 U.S.C. § 6335(a).

<sup>37</sup> Id.

<sup>38</sup> 5 C.F.R. § 630.910(a)(2).

<sup>39</sup> OPM, Fact Sheet: Voluntary Leave Transfer Program, *available at* <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/voluntary-leave-transfer-program/>.

<sup>40</sup> Department Brief at 3, 4.

needed to submit additional medical information or another application if she wanted to continue to use VTLP leave after January 31, 2021.<sup>41</sup>

The regulation and OPM policy make it clear that the Department cannot, in June 2021, give notice to Respondent that it had determined that her medical emergency had terminated over five months earlier on January 31, 2021. The regulations and OPM policy do not state that the medical emergency ends on the date selected by the agency. Rather, they state that the medical emergency terminates at the end of the pay period “**in which** [the Department] determines, **after written notice** . . . and an opportunity for [Respondent] to answer]” that the medical emergency has ended.<sup>42</sup>

As noted, however, on December 3, 2020, a human resources specialist emailed Respondent and, in that email, noted that Respondent could only use leave share leave for periods prior to January 31, 2021. Leave share leave is VLTP leave. This provided Respondent with notice and an opportunity to respond to the department’s determination that her medical emergency, and eligibility for VLTP hours would end in January 2021. In other words, the record in this case dictates that Respondent became ineligible for VLTP leave at the end of pay period 4 in 2021.<sup>43</sup>

Respondent used VTLP leave in pay periods 8, 9, and 10 in 2021.<sup>44</sup> All of these pay periods occurred after the pay period in which Respondent’s medical emergency ended, as determined by the Department after notice and an opportunity for Respondent to respond.

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<sup>41</sup> Dep’t exhibit 3.

<sup>42</sup> 5 C.F.R. § 630.910(a)(2); OPM, Fact Sheet: Voluntary Leave Transfer Program, *available at* <https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/voluntary-leave-transfer-program/>.

<sup>43</sup> Pay period 4 in 2021 occurred between January 31, 2021 and February 13, 2021.

<sup>44</sup> See Dep’t Brief at 2, Dep’t Exhibit 1 to Req. for Extension at 9-13. Although Respondent’s timesheet for pay period 5 in 2021 initially included improper use of VLTP hours, that entry was changed to use advanced annual leave. See Dep’t Exhibit 1 to Req. for Extension at 3; Respondent’s Exhibit 9 at 1.

Therefore, all of these uses of VLTP leave were attempted after Respondent was no longer eligible to use VLTP leave. The portion of the debt incurred from the use of VLTP leave in 2021 is substantiated.

Respondent asserts that the pay codes for use of VLTP leave during two of the pay periods were entered into the system by the Department itself. She further alleges that her use of VLTP leave was based upon instructions she received from Department officials. These assertions appear more relevant to the question of who was at fault for the improper use of VLTP leave. In this offset matter, however, I only look to see whether the Department's determination that the debt exists and is for the amount assessed is clearly erroneous.<sup>45</sup> If the record demonstrates that VLTP was improperly used, it is not clear error to amend a timesheet to address the improper use of leave. And, if that amendment results in a debt, the existence of the debt is not clearly erroneous.

### **III. Other Leave Used in 2021**

The Department asserts that Respondent's debt also derives from Respondent using leave for which she was not approved.<sup>46</sup> Specifically, the Department argues that Respondent used leave for which she was not approved to use and in excess of the leave that Respondent had accrued during pay periods 5, 6, 8, 9, and 10 in 2021.<sup>47</sup> The Department asserts that the use of leave without permission, and the use of more leave than Respondent had accrued would result in the leave being converted to leave without pay. Respondent's WebTA time and attendance entries during each of these pay periods includes a warning notice that there is no approved leave

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<sup>45</sup> See 34 C.F.R. § 32.9(b).

<sup>46</sup> Dep't Brief at 6.

<sup>47</sup> Dept' Brief at 6; Debt Letter at 2.

requests for the leave taken.<sup>48</sup> For each of these pay periods, however, Respondent's supervisor certified her timesheet and other Department employees processed the timesheets with the unapproved leave and excess leave included.<sup>49</sup> Although the leave may not have been approved in the system, the certification of the timesheet with the leave indicates that Respondent was effectively approved to use the leave. This would also constitute an approval for the use of advanced leave to cover any shortages.

The Department argues that in the Department's published policy, Human Capital Policy 630-1, states that employees have a responsibility to understand the rules and regulations governing leave and request leave in accordance with the rules.<sup>50</sup> Although the policy does state this, it does not indicate the consequences for using unapproved leave. In fact, the Department's policy on discipline and adverse actions indicates that the penalty for failure to follow procedures for requesting leave range from reprimand to removal. The policy does not include in its penalties that the leave use will retroactively be found ineffective and give rise to a debt.<sup>51</sup>

### **Findings of Fact and Conclusions of Law**

1. Respondent is an employee of the Department of Education.
2. During at least eight pay periods in 2020 and 2021, Respondent used leave.
3. Respondent was entitled to use leave from the Voluntary Leave Transfer Program during the pendency of her approved medical emergency. This period expired on January 31, 2021.
4. Respondent's failure to receive prior approval for the use of leave does not render the use of that leave invalid nor does the use leave that was not previously approved give rise to a debt.
5. The record demonstrates that Respondent was eligible for the 27 hours of leave used

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<sup>48</sup> See Dep't Exhibit 1 to Motion for Extension of Time at 3, 5, 9, 11, and 13.

<sup>49</sup> See Dep't Exhibit 1 to Motion for Extension of Time at 4, 6, 10, 12, and 14.

<sup>50</sup> Dep't Brief at 6.

<sup>51</sup> See Human Capital Policy 751 at 14.

in pay period 15 of 2020. That portion of the debt is not valid.

6. The credit given to Respondent for 20 hours of annual advanced leave for pay period 15 in 2020 is no longer valid and so this credit should not be applied when calculating the amount of debt owed by Respondent.
7. The record does not demonstrate that Respondent was entitled to the 44 hours of voluntary leave transfer program hours that she used in pay periods 8, 9, and 10 in 2021. That portion of the debt is valid.
8. The record demonstrates that Respondent was entitled to the hours of annual and advanced sick and annual leave taken during pay periods 5 and 6 in 2021. That portion of the debt is not valid.

### Order

Based on the foregoing findings of fact and conclusions of law, it is **HEREBY ORDERED:**

Respondent is liable for 44 hours of leave which she erroneously used with credit applied for any other leave that is available for pay periods 8 through 10 in 2021. The Respondent is liable for a portion of this debt and consistent with 34 C.F.R. §32.4(a), within seven (7) days of the date of this Decision, the Respondent may request a voluntary repayment schedule or Respondent may pay this debt in full.<sup>52</sup> If the Respondent fails to request a voluntary repayment schedule within seven (7) days of the date of this Decision, the U.S. Department of Education may recover this debt by involuntary offset consistent with the applicable law and regulations.

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Daniel J. McGinn-Shapiro  
Administrative Law Judge

**Date of Decision: March 2, 2022**

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<sup>52</sup> As noted, there is a related waiver proceeding pending. Any stays on collection of the debt in that matter may still be in place.