



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of

Docket No. 22-04-WA

EM,

Salary Overpayment
Waiver Matter

Debt ID: 211101808579D

Respondent.

DECISION LIFTING STAY AND DENYING WAIVER REQUEST

Respondent, a former employee of the U.S. Department of Education, has filed an overpayment waiver request seeking a waiver of a \$932.63 debt identified by Debt ID 211101808579D. On February 11, 2022, this matter was assigned to me as the Waiver Official. Respondent also requested a pre-offset hearing to challenge the validity or amount of the same debt at issue in this case. The pre-offset hearing was docketed as 22-05-OF. To facilitate the hearing, I issued an order on February 16, 2022, staying this case.

The pre-offset hearing concluded on October 19, 2022, when the Administrative Law Judge (ALJ) issued a final decision. According to that decision, the Department retracted the debt letter and reissued a corrected one. Thereafter, “[t]he Respondent has acknowledged the corrected notice establishes a valid debt” in the amount of \$981.72. The ALJ established a deadline for Respondent to pay the debt and concluded the hearing.

Because the pre-offset hearing has concluded, I lift the stay and proceed with deciding the pending waiver request. Based on the following analysis, I conclude that Respondent is not eligible for a waiver of the debt.

JURISDICTION

The waiver authority involving former and current employees of the Department was delegated to the Office of Hearings and Appeals (OHA) which, thereby, exercises authority and jurisdiction on behalf of the Secretary of Education to waive claims of the United States against a former or current employee of the Department.¹ The undersigned is the authorized Waiver Official

¹ The Department’s policy is set forth in its Handbook for Processing Salary Overpayments. U.S. Department of Education, Administrative Communications System Departmental Handbook, HANDBOOK FOR PROCESSING SALARY OVERPAYMENTS (ACS-OM-04, revised Jan. 2012).

who has been assigned this matter by OHA. Jurisdiction is proper under the Waiver Statute at 5 U.S.C. § 5584.²

BACKGROUND

Prior to initiating a payroll deduction, the Department is required to provide a written notice to the employee.³ Among other things, that notice must explain the “origin, nature and amount of the overpayment.”⁴ It must also include Government records on which the overpayment determination was made, or an explanation of how such records will be made available to the employee for inspection and copying.⁵

In this case, the revised debt letter filed in the pre-offset hearing established a debt for deferral of taxes in pay periods 19 through 24 of 2020. The debt at issue in this case arises from the deferral of Old Age, Survivors and Disability Insurance (OASDI) taxes, also referred to as payroll taxes or social security taxes.⁶ Employers, including the federal government, are obligated to withhold and pay payroll taxes on wages subject to them.⁷ However, a memorandum of the President required deferral of OASDI tax collection for federal employees.⁸ The memorandum specifically ordered the Secretary of the Treasury to “defer the withholding, deposit, and payment” of OASDI taxes from September 1, 2020, through December 31, 2020.⁹ The Federal Register published the memorandum on August 13, 2020. Publication in the Federal Register “is sufficient to give notice of the contents of the document to a person subject to or affected by it.”¹⁰ Therefore, as of August 13, 2020, Respondent had notice that OASDI taxes would be deferred and, therefore, collected at a later date.

Additionally, the Department published information on its website explaining the deferral of OASDI taxes, including the fact that affected employees could not opt out of deferred OASDI tax withholding.¹¹ The site also indicated that, beginning pay period 2021-01, the tax would be

² The Office of Management and Budget delegated the authority to waive amounts in excess of \$1,500 to the executive agencies from which claims arose by letter dated Dec. 17, 1996, available at https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/foia/gc_dec17.pdf; see *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep’t of Educ. (June 14, 2005) at 1, n.1.

³ 34 C.F.R. § 32.3.

⁴ *Id.* § 32.3(a).

⁵ *Id.* § 32.3(g).

⁶ <https://www.irs.gov/newsroom/employers-can-withhold-make-payments-of-deferred-social-security-taxes-from-2020> (last visited Mar. 8, 2023).

⁷ <https://www.irs.gov/businesses/small-businesses-self-employed/depositing-and-reporting-employment-taxes> (last visited Mar. 8, 2023).

⁸ 85 Fed. Reg. 49587–88 (Aug. 13, 2020), available at <https://www.federalregister.gov/documents/2020/08/13/2020-17899/deferring-payroll-tax-obligations-in-light-of-the-ongoing-covid-19-disaster> (last visited Mar. 8, 2023).

⁹ Federal agencies also received additional guidance from the Office of Management and Budget requiring implementation of payroll tax deferral for all eligible employees. MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, M-20-35, Office of Management and Budget (Sept. 11, 2020).

¹⁰ *Id.* § 1507; see *Lyng v. Payne*, 476 U.S. 926, 943 (1986).

¹¹ Deferring Payroll Tax Obligations for ED Employees, U.S. Dep’t of Educ., <https://connected.ed.gov/Pages/Deferring-Payroll-Tax-Obligations-for-ED-Employees.aspx> (last visited Feb. 23, 2022). This content is currently archived by the Department’s Webmaster at <https://usdedeop.sharepoint.com/sites/connected/fofo/Pages/social-security-tax-withholding-deferral-civilian-faqs.aspx> (last visited Mar. 8, 2023).

deducted over the course of 25 pay periods.¹² For employees who separated or retired before the end of the year, the website explained:

I am separating or retiring before the end of this year; will I be required to pay the deferred taxes back?

If you separate or retire in 2020 before the Social Security tax can be collected in 2021, you are still responsible for the Social Security tax repayment. As more information becomes available on the collection of any deferred Social Security taxes, it will be posted here.

The Department's Chief Human Capital Officer also issued notice directly to all departmental employees by email on September 4, 2020, stating:

If your gross pay in any covered pay period is less than \$4000, the majority of your Federal payroll taxes between mid-September 2020 and December 31, 2020 will be deferred to 2021. The payback period for deferred taxes will occur between January 1, 2021-April 30, 2021. Your eligibility will be automatically calculated by the Department's payroll provider on a pay period-by-pay period basis. If you are eligible for the deferral, you will automatically see a change in your paycheck for the check corresponding to the implementation pay period.

ANALYSIS

My authority to grant a waiver is limited by the language of the Waiver Statute. Under 5 U.S.C. § 5584(a), I may only waive a claim "arising out of an erroneous payment of pay or allowances . . . or arising out of an erroneous payment of travel, transportation or relocation expenses and allowances." I conclude that a deferral of an employee's payroll tax obligation does not constitute an "erroneous payment." Nothing about the deferral was "erroneous," but rather was done intentionally to carry out a memorandum of the President. As described in the guidance above, deferral of the tax is not an "overpayment" and requires subsequent payment of the deferred taxes, even if an employee separates from employment before paying the taxes back. Therefore, I conclude that the debt at issue in this case is not eligible for waiver under 5 U.S.C. § 5584(a).

Even if I were to conclude this debt could be waived, Respondent would not qualify for a waiver. Waiver of an erroneous salary payment is an equitable remedy. Determining whether waiver is appropriate requires consideration of two factors: (1) the fault standard: whether there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of Respondent, and (2) the equity standard: whether Respondent can show that it is against equity and good conscience for the Federal Government to recover the overpayment.¹³ Failure to meet either standard is a conclusive basis for denying a waiver.

¹² *Id.*

¹³ 5 U.S.C. §§ 5584(a), (b)(1); *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005) at 3-5.

To meet the fault standard, an employee must neither know, nor should have known, of the erroneous payment.¹⁴ Where an employee does know an overpayment has occurred, the employee cannot qualify for a waiver, but is expected to set aside money to repay it.¹⁵ In this case, Respondent benefited from notice of the 2020 OASDI tax deferral from multiple sources including publication in the Federal Register. Therefore, Respondent would not qualify for a waiver under the ordinary standards.

ORDER

Pursuant to the authority at 5 U.S.C. § 5584, Respondent's request for waiver of the debt to the United States Department of Education originally captioned Debt ID 211101808579D, and subsequently recaptioned and recalculated as a result of pre-offset hearing 22-05-OF, is **HEREBY DENIED**.

Charles S. Yordy III
Waiver Official

Dated: March 8, 2023

¹⁴ *In re M*, Dkt. No. 19-83-WA, U.S. Dep't of Educ. (Feb. 25, 2020) at 4, and cases cited.

¹⁵ *Id.*