



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of

Docket No. 22-44-WA

HM,

Salary Overpayment
Waiver Matter

Debt ID: 210541809763D

Respondent.

DECISION DENYING WAIVER REQUEST

Respondent previously requested a pre-offset hearing contesting an \$894.78 debt identified by Debt ID 210541809763D. During that hearing, docketed as 22-19-OF, the Department retracted the debt letter and issued a corrected notice citing different pay periods. By letter dated July 26, 2022, Respondent indicated Respondent's changed position as "no longer questioning the amount of the debt" but requesting a waiver of the overpayment. On August 11, 2022, Administrative Law Judge Elizabeth Figueroa dismissed the pre-offset hearing based on Respondent's representation, but left in place a stay of collections pending issuance of a waiver decision. The waiver request has since been assigned docket number 22-44-WA and was assigned to me as Waiver Official.

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

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).

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

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 original debt letter was erroneous and retracted by the Department. Subsequently, the Department provided a corrected notice, after which Respondent retracted Respondent’s challenge to the validity and amount of the debt. Respondent now only requests a waiver of the debt.

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, no later than August 13, 2020 when the memorandum was published, 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

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

The amount or validity of a debt to the Department can only be challenged in a pre-offset hearing. In a waiver proceeding, "the debtor is presumed to have acknowledged the validity of the debt."¹³ In this case, Respondent has retracted Respondent's challenge to the validity and amount of the debt in the concluded pre-offset hearing.

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 from the President. As described in the guidance above, deferral of the tax was 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,

¹² *Id.*

¹³ *In re J*, Dkt. No. 17-04-WA, U.S. Dep't of Educ. (Mar. 23, 2017) at 2.

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.¹⁴ Failure to meet either standard is a conclusive basis for denying a waiver.

To meet the fault standard, an employee must neither know, nor should have known, of the erroneous payment.¹⁵ 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.¹⁶ 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 \$894.78 debt, associated with the corrected notice, to the United States Department of Education under Debt ID 210541809763D is **HEREBY DENIED**.

Charles S. Yordy III
Waiver Official

Dated: March 10, 2023

¹⁴ 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.

¹⁵ *In re M*, Dkt. No. 19-83-WA, U.S. Dep't of Educ. (Feb. 25, 2020) at 4, and cases cited.

¹⁶ *Id.*