UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
OFFICE OF ADMINISTRATIVE LAW JUDGES
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In the Matter of

KH,

Respondent.

Docket No. 18-74-OF and 19-51-OF

Overpayment/Pre-offset Hearing

Appearances: KH, Respondent, pro se
Office of the General Counsel, U.S. Department of Education[1]

Before: Angela J. Miranda, Administrative Law Judge

DECISION

I. Jurisdiction and Procedural History

The Office of Administrative Law Judges has current jurisdiction over the above referenced matters.[2] By letter dated December 4, 2018, the Respondent requested a pre-offset hearing in

[1] The Department was initially represented by Karen Mayo-Tall, an attorney of the Office of the General Counsel. After the Department's brief was filed, that attorney separated from the Department of Education and no substitution of counsel was filed by the Department.

[2] The Department's policy is set forth in the U.S. Department of Education's Administrative Communications System, Handbook for Processing Salary Overpayments (ACSD-OFO-009, approved on January 19, 2012 and updated on July 12, 2022 and August 11, 2022). An erroneous payment to a federal employee, or former federal employee, creates a debt to the United States that requires collection or, in certain instances, allows waiver and various laws are available to the United States to administratively collect or waive these types of debts (5 U.S.C. §§ 5514 and 5584, 31 U.S.C. §§3711 and 3716. *See also,* Debt Collection Act of 1982 (Pub. L. 97-365, October 25, 1982), Federal Debt Collection and Procedures Act (Pub. L. 101-647, Title XXXVI, November 29, 1990), and Debt Collection Improvement Act of 1996 (Pub. L. 104-134, Section 31001, April 26, 1996)).

Historically, these administrative proceedings were the shared responsibility of the Comptroller General of the former General Accounting Office, now the Government Accountability Office, and the various Executive agencies, if the amount of the debt was below a certain dollar amount (*See, https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/waiving-overpayments/*). With Passage of the General Accounting Office Act of 1996 (Pub. L. 104-316, Section 103(d)), the authority for administrative proceedings to collect or waive these types of debts was given to the Director of Office and Management and Budget (OMB). The Director of OMB redelegated this authority to the Executive Agencies by memorandum, dated December 17, 1996, and the dollar limit previously imposed for jurisdiction by the Executive agencies was eliminated (*See,* https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/foia/gc_dec17.pdf.)

relation to four notices of debt that were related to one overpayment of salary and three debts related to payment of her share of health care benefits. Docket Number 18-74-OF was assigned to this proceeding. The request included ten (10) additional documents in support of the request for a pre-offset hearing. Those supporting documents are identified in the electronic file as exhibits to the request for hearing (Office of Hearing and Appeals Electronic Filing System (OES) Documents 2-11). Docket Number 18-74-OF includes a review of the following asserted debts:

DOI Notice Date	Debt ID	Reason	Amount
8/13/18	82261112818	Time sheet corrections for pay periods 2018-12 and 2018-13	$1,397.50
8/27/18	182121112818	Health care premium for pay period 2018-16	$ 271.95
9/24/18	182261112818	Health care premium for pay period 2018-17	$ 271.95
9/24/18	182541112818	Health care premium for pay period 2018-19	$ 271.95

Previously, on September 13, 2018, the Respondent filed a request for waiver of the overpayment due to the correction of the timecard for pay period 12 of 2018 and adjustment to timecard for pay period 13of 2018 and the three debts resulting from the Department paying the Respondent's share of her health care benefit in pay periods 16, 17, and 19 of 2018 with the Office of Hearings and Appeals (OHA). The request for waiver was assigned to a Waiver Official under Docket Number 18-53-WA. The Waiver Official issued a Waiver Decision on November 28, 2018. Therein, the Waiver Official granted the request for waiver in part and denied the waiver in part. Pursuant to 34 C.F.R. § 32.6(b), the Waiver Decision notified the Respondent of the right to request a pre-offset hearing to challenge the validity of the asserted debts, the amount of the asserted debts, or the imposition of an involuntary repayment schedule to be implemented by the Department in the absence of a written agreement for repayment accepted by the Department. Consistent with the grant of a partial waiver, the remaining asserted debt for Debt ID 82261112818 is $959.07 (OES Document 67).

On December 14, 2018, I issued an Order Governing Proceeding (OGP) under Docket Number 18-17-OF. That OGP established a briefing schedule and other procedures to be followed. On January 3, 2019, an Amended OGP was issued that corrected the mailing address for the Respondent and modified the briefing schedule. The Department and the Respondent requested extensions of time to the briefing schedules which were granted. The Department timely filed its brief on February 15, 2019, along with supporting documents. The Respondent filed her response to the Department's brief, an affidavit asserting extreme financial hardship, and supporting documents on April 5, 2019.

On June 25, 2019, the Respondent filed a request for a pre-offset hearing in relation to debt under Debt ID 181981112818, in the amount of $271.95. This request for a pre-offset hearing was assigned Docket Number 19-51-OF. A reprint of the notice of debt is dated January 1, 0001 (OES Document 2 in file 19-51-OF and OES Document 64 in file 18-74-OF). The notice of debt indicates this debt was incurred in pay period 15 of 2018 when the Department paid the Respondent's share of her health insurance benefits in that pay period. An Order Governing and Consolidating Proceedings was issued on July 2, 2019 (OES Document 3 in 19-51-OF and OES Document 62 in

18-74-OF).[3] Although given an opportunity to supplement their arguments filed in Docket Number 18-74-OF to address the issue related to the asserted debt for the Department's payment of the Respondent's share of her health insurance benefit in pay period 15 of 2019, no additional arguments were filed.

II. Issues

1. Whether the Department has established the asserted debt under Debt ID 82261112818 that resulted from a timecard correction to pay period 12 of 2018 and an adjustment to pay period 13 of 2018 is a valid debt.

2. Whether the Department has established the asserted debts under Debt IDs 182121112818, 182261112818, 182541112818, and 181981112818 resulting from the Department's payment of the Respondent's share of her health care benefit for pay periods 16, 17, 19, and 15 of 2018, respectively, are valid debts.

3. Whether, in the absence of an acceptable voluntary repayment agreement, the Respondent has established extreme financial hardship to obtain relief from imposition of an involuntary repayment schedule of 15% of disposable income, collected from each pay period, or as otherwise authorized, until the debt is fully paid.

III. Legal Framework/Applicable Laws and Regulations

A. Debt Collection and Administrative Offset

The Federal Claims Collection Act of 1966 (Pub. L. 89-905, July19, 1966) was enacted to avoid unnecessary litigation for the collection of claims of the United States. The law has been amended numerous times since 1996. One of the amendments resulted in codification at 31 U.S.C. §3711, which address the collection and compromise of a debt owed to the United States.[4]

Consistent with the original intent of the Federal Claims and Collection Act of 1966, the current statute requires the head of an executive agency to attempt collection of claims of the United States Government for money or property arising out of the activities of or referred to the agency (31 U.S.C §3711(a)(1)). The head of the agency must act under regulations prescribed by the head of the agency and the standards that the Attorney General and the Secretary of Treasury prescribe (31 U.S.C. § 3711(d)(1) and (2)).[5]

[3] The consolidation of these two proceedings was done for administrative efficiency and convenience of the parties. The debt asserted for the Department's payment of the Respondent's share of health insurance benefits in pay period 15 of 2018 is related to the same circumstances for the debts asserted following a corrected timecard for pay period 12 of 2018 and for the Department's payment of the Respondent's share of health insurance benefits in pay periods 16, 17, and 19 of 2018.

[4] This section was subsequently amended by the Debt Collection Improvement of 1996 and the General Accounting Office Act of 1996.

[5] The Attorney General and Secretary of Treasury published a notice of proposed rulemaking on December 31, 1997 (62 FR 68476-01) and the final rule was published on November 22, 2000 (65 FR 70390-01). The regulations for Federal Claims Collection Standards (FCCS) are found at 31 C.F.R. Parts 900-904. The final rule revised the FCCS issued by the Department of Justice and the General Accounting Office on March 9, 1994 and reflected changes under the Debt Collection Improvement Act of 1996 and the General Accounting Office Act of 1996.

The Department's regulations are found at Part 32 of Title 34 of the Code of Federal Regulations. Initially, using the Administrative Communications System (ACS), the Department established policy in relation to salary overpayments with the issuance of the Handbook for Processing Salary Overpayments (ACS-OM-04), hereinafter referred to as the Handbook. Revisions were made to that Handbook on January 19, 2012. On July 12, 2022, technical changes were made, and the Handbook was renumbered per the new ACS document numbering system (ACSD-OFO-009). Technical changes and updating of POC/Division references were made on August 11, 2022.

Notably, there is one exception to the applicability of the procedures for recovery of overpayments by administrative offset. These procedures do not apply to an employee election of coverage or of a change of coverage under a federal benefits program which requires periodic deductions from pay if the amount to recovered was accumulated over four pay periods or less (34 C.F.R. § 32.1(b)(2)(5)).

B. Notice Requirements

The relevant federal statute requires that the head of the agency provide notice to a federal employee prior to collection by administrative offset of a salary overpayment (31 U.S.C. §3716). The statute specifically requires that the notice be in writing, identify the type and amount of the claim, state the intention of the agency to collect by administrative offset, and explain the rights of the debtor. The agency must provide an opportunity to inspect and copy the records of the agency related to the claim, an opportunity for review within the agency of the determination of the claim, and an opportunity to make a written agreement with the agency to repay the amount of the claim (*Id.*).

The Department regulations provide that the pre-offset notice be in writing, establish the origin, nature, and amount of the overpayment, how interest is charged, and how administrative costs and penalties will be assessed (34 C.F.R. § 32.3(a) and (b)). The regulations require the Department to demand repayment while providing the opportunity to enter into a written repayment agreement with the Department (34 C.F.R. § 32.3(c)). The regulations require that the debtor be advised of the right to the right to request a waiver if waiver of repayment is authorized by law (34 C.F.R. § 32.3(d)). The regulations require that the Department identify the intention to deduct up to 15% of the employee's disposable pay to recover the overpayment if a waiver is not granted and the employee has not entered into a voluntary written repayment agreement (34 C.F.R. § 32.3(e)). Additionally, the Department must provide specific details about the amount, frequency, approximate beginning date and duration of the intended deduction (34 C.F.R. § 32.3(f)). The Department is required to provide the Government records supporting the debt with the notice or advise how those records will be made available to the employee for inspection and copying (34 C.F.R. § 32.3(g)). Lastly, the regulations require that the debtor be informed of the right to request a pre-offset hearing concerning the existence of, the amount of the overpayment, or seek relief from an involuntarily imposed repayment schedule (34 C.F.R. § 32.3(h)).

The Department policy, which is mostly consistent with the requirements of the applicable statutes and Department regulations, provides further instruction as to how the Department will process

salary overpayments and imposes additional requirements upon the Department.[6]

C. Requirement for a Hearing

The statute authorizing installment deduction for indebtedness to the United States resulting from an erroneous payment of pay and allowances, travel, transportation, and relocation expenses and allowances requires an opportunity for a hearing to challenge 1) that a debt exists, 2) the amount of the debt, or 3) in the case of an individual whose repayment schedule is established other than by a written agreement, to establish extreme financial hardship to be relieved of involuntary collection of 15% of disposable income (5 U.S.C. §5514(a)(2)(D)). The Department regulations are consistent with the authorizing statute (34 C.F.R. §§ 32.4(a) and 32.3(e)).

The authorizing statute demands that the hearing be conducted by an individual who is not under the supervision or control of the head of the agency and does not prohibit the appointment of an administrative law judge as the hearing official (5 U.S.C. §5514(a)(2)(D)).[7] The Department's regulations require that the hearing be conducted by a hearing official who is not an employee of the Department or under the supervision or control of the Secretary (34 C.F.R. 32.5(d)). With the implementation of the Handbook, the Department established policy interpreting this regulation and authorized an administrative law judge employed by the Department to preside over pre-offset hearings. This policy interpretation of the Department's regulation is consistent with the intent of the initiating statute.

The authorizing statute's provision for a hearing on the existence or amount of the debt requires that the agency provide government records to establish the agency's claim for the debt (5 U.S.C. § 5514(a)(2)(B)). The Department's regulation requires that a copy of the government records on which the determination of overpayment was made be included with the pre-offset notice or the employee be informed how those records will be made available to the employee (34 C.F.R. §32.3(g)). As such, the agency carries the initial burden of proof to establish the existence of and amount of the alleged debt.

The Department's regulations require the hearing official to decide whether the Secretary's determination of the existence or amount of the debt is clearly erroneous (34 C.F.R. § 32.9). The Department's policy describes the "clearly erroneous" standard by referencing a standard of review that governs appellate review of district court findings.[8] Neither the Department's regulations nor policy provide any rationale or explanation for requiring this standard of review in an administrative proceeding, which generally allows for a *de novo* review.

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[6] Current Department policy and practice shows the Department generally relies on its payroll agent, the Department of Interior, Interior Business Center to issue the required notice if the employee is a current employee. Often this notice is in the form of a "Bill for Collection" (as titled by the payroll agent in some notices), "Bill of Collection" (as titled in the Department's policy), or otherwise referenced as a debt letter. In the case where the employee is not a current employee of the Department, the notice is issued by the Department, often relying on the Bill for Collection generated by the payroll agent.

[7] This statute does not prevent a federal agency from appointing an administrative law judge employed by that federal agency from presiding over pre-offset hearings for an employee at that federal agency (*See,* 7 C.F.R. § 1951.111(b)(5) (defining the Hearing Officer for cases involving USDA employees as an Administrative Law Judge of the USDA or another individual not under the supervision or control of the USDA)).

[8] The Handbook relies on the "clearly erroneous" standard as described in *Anderson v. Bessemer,* 470 U.S. 564, 73-4 (1985).

D. Involuntary Collection and Extreme Financial Hardship

The authorizing statutes allow the agency to involuntarily collect on an established debt by installment deduction and administrative offset from the current pay, including basic pay, special pay, incentive pay, retired pay, retainer pay, or other authorized pay (5 U.S.C. § 5514 and 31 U.S.C. §§ 3711 and 3716). Pursuant to the statute, unless otherwise agreed to, the agency must limit collection to 15% of disposable pay (5 U.S.C. § 5514 (a)(1)). The authorizing statute allows a challenge to terms of an involuntary repayment schedule upon a showing of extreme financial hardship (5 U.S.C § 5514(a)(2)(D)).

The Department's regulations are consistent with the authorizing statute (34 C.F.R. §§ 32.3(e) and 32.2). The regulations require a showing of extreme financial hardship to obtain relief from an involuntarily imposed repayment schedule (34 C.F.R. §§ 32.4(c) and 32.5(a)(2)). The regulation requiring a showing of extreme financial hardship was found to be consistent with the authorizing statute (*See, Sibley v. United States Department of Education,* 913 F. Supp. 1181 (N.D. Illinois (1995)). The Department's policy as described in the Handbook is generally consistent with the authorizing statute and the Department's regulations.

E. Health Insurance Benefits

Health care insurance for employees is provided through Federal Employee Health Benefit (FEBH) plans identified by the Office of Personnel Management (5 U.S.C. § 8901(6)). Premiums are shared between the Federal government and the employee (5 U.S.C. § 8906(b) and (d)). Continued enrollment is available to an employee without change when the employee moves from one employing office to another without a break in service of more than three (3) days (5 C.F.R. § 890.303(a)(1)). An employee is responsible for paying the enrollee share of the cost of enrollment for every pay period during which the employee is enrolled (5 C.F.R. § 890.502(a)(1)). An employee incurs a debt to the United States in the amount of the proper employee withholding required for each pay period during which the employee is enrolled if the appropriate health benefits withholdings or direct premium payments are not made (*Id.*).

When an employee who is enrolled in FEHB enters leave without pay (LWOP) status or the employee's pay is insufficient to cover the employee's share of the premium, the employing office must inform the employee of available health benefits and choices (5 C.F.R. § 890.502(b)). The responsibility then transfers to the employee to elect to continue health benefits or terminate health benefits (5 C.F.R. § 890.502(b)(2)). If health benefits are continued, the employee must agree to pay the premium directly to the agency and keep payments current or the employee may request that coverage continue and agree that upon returning to employment or upon pay becoming sufficient to cover the premiums, the employing office will deduct, in addition to the current pay period's premiums, an amount equal to the premiums for a pay period during which the employee was in a LWOP status (5 C.F.R. § 890.502(b)(2)(i) and (ii)). When an election is not made, the employing office will terminate the enrollment and notify the employee in writing of the termination (5 C.F.R. § 890.502(b)(3)).

F. Telework/Flexiplace[9]

In response to an October 21, 1993 Office of Personnel Management Memorandum for Personnel Directors, the Department of Education developed policy related to flexiplace (PMI 368-1, dated August 30, 1995). On December 9, 2010, Congress passed the Telework Enhancement Act of 2010 (Pub. L. 111-292). Telework is a work flexibility arrangement under which an employee performs the duties and responsibilities of the employee's position from an approved worksite other than the location from which the employee would otherwise work (5 U.S.C. §6501(3)). With passage of that Act, each executive agency was required to establish a policy for telework and appoint a Telework Managing Officer to serve as an advisor for agency leadership, a resource for managers and employees, and as a primary agency point of contact for the Office of Personnel Management on telework matters (5 U.S.C. §§6502 and 6505).

In response to the passage of that Act, the Department revised its telework policy on June 9, 2015 (HCP 368-1(REVISED)).[10] The Department again revised its telework policy on October 1, 2018 (HCP 368-1), this time reducing the number of days an employee may telework to one day each week. Nonetheless, this revised policy allowed two exceptions to this new limitation. First an employee who was working outside the local commuting areas of Washington, D.C. or a Department Regional office with an approved 100% telework agreement that was signed prior to May 31, 2018, was excluded from the one workday per week limitation. Second, an employee was excluded from the one workday per week limitation if the additional telework days were allowed as a reasonable accommodation. On November 4, 2021, HCP 368-1 was revised and expanded to address telework and remote work programs at the Department.

G. Accrual of Leave and Effect of Non-pay Status

A federal employee accrues annual leave based on years of service (5 U.S.C. §6303). An employee with less than three years of services accrues one-half day each full biweekly pay period, an employee with three years but not more than 15 years of service accrues three-fourth day for each full biweekly pay period except the last full biweekly pay period in a year when one and one-fourth days of leave accrue, and an employee with 15 years of service or more accrues one full day for each full biweekly pay period (5 U.S.C. §6303(a)(1)-(3)). A federal employee accrues one-half day sick leave for each full biweekly pay period (5 U.S.C. §6307(a)).

Non-pay status affects the accrual of annual and sick leave. If a full-time employee accumulates a total of 80 hours of non-pay status from the beginning of the leave year, neither annual nor sick leave will accrue in the pay-period when 80 hours of non-pay status occurs (5 C.F.R.§630.208). An employee earns leave on a pro rata basis for each fractional pay period when service is interrupted by a non-leave-earning period (5 C.F.R. §630.204).

[9] Flexiplace, flexible workplace, work-at-home, telecommuting, and teleworking are interchangeable terminologies that refer to paid employment performed away from the office. (*See,* PMI 368-1, dated August 30, 1995 and in effect through June 8, 2015, until superseded on June 9, 2015 by PMI 368-1 (REVISED)).

[10] In this revision, the Department renamed the Flexiplace Program to the Telework Program.

H. Annual Leave, Advanced and Accumulated

The administration of annual leave for federal employees is controlled by federal statute and federal regulations. In addition to the law and regulations, certain federal employees may be subject to collective bargaining agreements negotiated with an executive agency that also address annual leave. The Office of Personnel Management (OPM) provides additional guidance for executive agencies related to leave administration and the processing of certain personnel actions. One type of guidance is a fact sheet that provided general information on annual leave entitlement (Annual Leave (opm.gov)).

By federal statute, annual leave, including annual leave that will accrue to an employee during the year may be granted at any time during the year at the direction of an agency head (5 U.S.C. § 6302(d)). Unless specifically excepted by position, a federal employee may accumulate not more than 30 days at the beginning of the first full biweekly pay period (5 U.S.C. § 6304). Except in limited circumstances, a federal employee who has been advanced leave is indebted to the agency (and the United States) for unearned leave when that employee is separated from service (5 C.F.R. §630.209). Upon separation the agency shall require the employee to refund the amount previously paid for unearned leave or shall deduct that amount from any pay that is due, unless the separation is due to death or disability of the employee (*Id.*).

An executive agency may implement policy regarding annual leave within the agency. The Department's policy on annual leave is found in Human Capital Policy (HCP) 630-1, Section VI(A). The Department's policy is consistent with the applicable federal statutes and regulations.

I. Sick Leave/Advancing Sick Leave/Advanced Sick Leave upon Separation from an Agency

The administration of sick leave for federal employees is controlled by federal statute and federal regulations. In addition to the law and regulations, certain federal employees may be subject to collective bargaining agreements negotiated with an executive agency that also address sick leave. An executive agency may implement policy regarding sick leave within the agency and lastly, the Office of Personnel Management provides additional guidance for executive agencies related to leave administration and the processing of certain personnel actions.

By federal statute, an agency has the discretion to advance a maximum of 30 days (240 hours) of sick leave with pay if an employee has a serious disability or ailment (5 U.S.C. §6307(d)). The applicable regulation identifies specific circumstances when exigencies of the situation allow the agency to advance sick leave, including when an employee is incapacitated for the performance of his or her duties by physical or mental illness, injury, pregnancy, or childbirth, has a serious health condition, or has been exposed to a communicable disease (5 C.F.R. § 630.402(a)(1)(i)-(iii)).

Except in limited circumstances, a federal employee who has been advanced leave is indebted to the agency (and the United States) for unearned leave when that employee is separated from service (5 C.F.R. §630.209). Upon separation the agency shall require the employee to refund the

amount previously paid for unearned leave or shall deduct that amount from any pay that is due[11] (*Id.*).

The Office of Personnel Management (OPM) provides a variety of fact sheets on issues of concern to federal employees. One such fact sheet explains general information (Sick Leave (General Information) (opm.gov)) and another fact sheet explains advanced sick leave (Advanced Sick Leave (opm.gov)). Therein, OPM explains that advanced sick leave may be liquidated by subsequently earned sick leave, by a charge against annual leave, or by refund upon separation, though the specifics of liquidation by subsequently earned sick leave are not enumerated in this fact sheet.

The Department's current policy regarding sick leave is found in HCP 630-1 Section IV(B). Notably, the applicable CBA and the Department policy are silent on how advanced leave will be liquidated upon return to work and how deductions will be made upon separation.

The Department's policy is consistent with federal statutes and regulations and provides that sick leave is available for use for multiple purposes. Some of those purposes include incapacity due to physical or mental illness; medical, dental, or optical examinations or treatment; and when attendance at work would jeopardize the health of others due to exposure to a communicable disease. Use of sick leave must be requested in advance unless the need to use sick leave is sudden and unexpected. Medical certification is generally not required for absences of three (3) workdays or less unless reasonable grounds exist to question whether an employee is properly using sick leave. When medical certification is requested or required, the certification must document the specific instance for which sick leave is being used.

J. Leave Administration

Consistent with its authority pursuant to 5 C.F.R. § 6311, OMP's regulations related to absences and leave are found in Part 630 of Title 5 of the Code of Federal Regulations (C.F.R.). OPM established that the head of an agency is responsible for the proper administration of the leave statutes and regulations (5 C.F.R. § 630.101). That responsibility includes maintaining an account of leave for each employee in accordance with the methods required by the General Accounting Office (*Id.*).

The Department's policy to meet this regulatory obligation is found in the Department's Human Capital Policy (HCP) 630-1, Leave Administration.[12] Chapter 63 of Title 5 of the U.S.C. and Part 630 of Title 5 of the C.F.R. are cited as authority for this policy (HCP 630-1, Section I). As such, this policy is expected to be consistent with the statutory and regulatory requirements and should not be more restrictive than those requirements. A copy of the Department's policy in place at the times in issue was provided as an exhibit to the Respondent's request for a pre-offset hearing (OES

[11] This requirement does not apply if the separation is due to the death or disability of the employee.

[12] The Department's Human Capital Policies are found on the Department's intranet at Human Capital Policies (HCPs) (sharepoint.com). The intranet site shows the most recent issue date for this policy as January 1, 2021. The dated indicated on the first page of the policy is "07/20/2018*" and the asterisk indicates the current policy "[s]upresedes HCP 601-1, dated July 20, 2018 and is current as of January 2021." This information seems to reflect the issue date of January 1, 2021, and suggests there were no changes to this policy as released on July 20, 2018.

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The policy establishes procedures on absences and leave, assigns general responsibilities on all leave matters, provides general information to all ED employees about leave, and promotes consistent application of leave policies throughout the Department (HCP 630-1, Section II). This policy defines two non-pay leave statuses. LWOP is a temporary non-pay status from a regularly scheduled tour of duty for which pay would otherwise be due and is granted upon the employee's request (HCP 630-1, Section IV). A second non-pay status is absence without leave (AWOL), which is an unauthorized absence from duty without pay (*Id.*). The responsibilities of leave approving officials include, among other things, assuring that all absences from duty are appropriately charged to leave or absence without leave in accordance with this policy, approving and disapproving employee leave requests, maintaining required records on leave, and submitting necessary records to other officials, when necessary (HCP 630-1, Section V(D)(3), (5) and (6))[14].

The policy explains that LWOP is granted at an employee's request and in most instances the granting of LWOP is within the supervisor's (approving official's) discretion, unless it is an employee entitlement under specific laws or executive order (HCP 630-1, Section VI, Chapter 4 (4-1)(1)(A)). LWOP is distinguished from AWOL because LWOP is permissive, and it may not be used to support a future disciplinary action (HCP 630-1, Section VI, Chapter 4 (4-3)(a)). AWOL is unapproved leave, which is not a form of discipline, but an incidence of AWOL may be the basis for a disciplinary or adverse action (HCP 630-1, Section VI, Chapter 9 (9-1)). Leave approving officials (supervisors) are required to carefully document the reasons for placing an employee in an AWOL status (*Id.*). Furthermore, the leave approving official is required to provide written notice to the employee that the employee was found to be AWOL and document the reasons for such a finding (HCP 630-1, Section VI, Chapter 9 (9-2)). If an employee provides justification for the unapproved absence, the AWOL may be replaced by the appropriate leave category (HCP 630-1, Section VI Chapter 9 (9-4)).

IV. Findings of Fact

1. On May 11, 2018, the Respondent's first line supervisor issued a memorandum decision on the Respondent's Reasonable Accommodation request, which denied the Respondent's request for 100% telework (OES Document 4 of 18-74-OF, pp. 9-11). That same memorandum indicated the Respondent was to report to her assigned office on May 22, 2018 (*Id.* p. 10). The memorandum decision enumerated the Respondent's rights to request a reconsideration by her second line supervisor within fifteen (15) calendar days of receipt of the decision), to file an EEO complaint within 45 calendar days of receipt of the decision, or to pursue a grievance in accordance with the Collective Bargaining Agreement (*Id.* pp. 10-11).[15]

[13] Substantively there is little difference from the policy in place in 2018 from the current policy. There was, however, a change in format of the outline of the provisions.

[14] Cites to HCP 630-1 in this decision are to the policy in effect at the relevant time. Therefore, the cites may be different from the current policy due to the change in format outline, as indicated in Footnote 14.

[15] While not material to the issue under review in this matter, this memorandum decision indicated the Respondent had been allowed a reasonable accommodation of 100% telework since at least August 3, 2017, and since that date further review of her reasonable accommodation had been on hold while the Department's contract with the Federal Occupational Health (FOH) Services was not active due to budget and lack of funds. However, in about mid-February

2. On May 21, 2018, at 4:19 pm, the Respondent notified her first line supervisor that she worked eight (8) hours from home performing her normal A-123A duties, "participating in multiple meetings, contract management and more" (OES Document 34 of 18-74-OF).

3. On May 21, 2018, at 6:31 pm, the Respondent's first line supervisor received a doctor's note by email from the Respondent's treating professional excusing her from work between May 21, 2019 and May 25, 2018 (OES Document 34 and 36 of 18-74-OF).

4. On May 23, 2018, at 2:42 pm, the Respondent's first line supervisor notified the Respondent via email that the doctor's note submitted on May 21, 2018, did not establish she was incapacitated for work and therefore use of sick leave is not available for the requested time off. The first line supervisor indicated he would approve annual leave for her absence from work on those days (OES Document 36 of 18-74-OF).

5. On Friday May 25, 2018, at 1:50 pm, the Respondent's first line supervisor notified her via email that he had not received a response to his May 23rd email, he had to certify time and attendance early due to the Monday holiday, and a certified timecard was processed for pay period 12 of 2018 that reflected the use of annual leave for May 22-25, 2018, but at her request a correction can be processed upon her return to work (*Id.*).

6. On May 29, 2018, at 9:30 am, the Respondent emailed her first line supervisor and copied two other individuals at the Department (OES Document 37 of 18-74-OF). The Respondent's email addressed her request for reasonable accommodation, prompt timesheet correction and "OOO Notice" (*Id.*, pp. 2-4). The Respondent objected to the processing of annual leave on May 22-25, 2018; reasserted her request for sick leave based on the May 21, 2018 doctor's note for May 22 and 23, 2018 (full days), May 24, 2018 (7:30 am-1:00 pm), and May 25, 2018 (six hours); requested a correction for May 24, 2018 allowing three (3) hours administrative leave for a parent teacher conference and two (2) hours administrative leave for May 25, 2018 (*Id.* pp. 3-4).The Respondent further directed that her "vacation leave should not be used going forward without prior permission" (*Id.* p. 4). The Respondent advised her first line supervisor she appealed his denial of her request for a reasonable accommodation, she will be out of the office until further notice (submitted via Outlook calendar invitation), she will submit another medical excuse, she requested that a new reasonable accommodation request to work from home be moved forward, and requested that notice be sent to her via cell phone text as she will not be checking work emails or voicemails (*Id.*).

7. On May 30, 2018, at 3:53 pm, the Respondent's supervisor emailed a response to the Respondent's May 29th email (OES Document 37 of 18-74-OF, p. 1). The Respondent's first line supervisor denied harassing the Respondent as the Respondent had asserted, informed the Respondent she does not have a current telework arrangement or a reasonable accommodation that permits full time work from a remote location, accepted the

2019, the FOH received funding and the Department received an updated medical report dated April 9, 2018. The May 11, 2018, memorandum based the decision to terminate the Respondent's continued reasonable accommodation on the updated medical report from FOH.

Respondent's request for absence for the current week, notified the Respondent that a corrective action will be taken regarding the annual leave processed during the second week of pay period of 12 of 2018, notified the Respondent that current and future absences will not be processed as annual leave (even if annual leave is available, unless specifically requested by the Respondent), and notified the Respondent that he will approve current and future absences as LWOP if she does not have available sick leave. In reference to the Respondent's request for administrative leave for parent/teacher conferences, the first line supervisor agreed to grant three hours administrative leave on May 24, 2018, even though the Respondent requested that leave by Outlook invitation instead of properly submitting an SF-71 (leave request). The first line supervisor requested an explanation of why she believed she was entitled to two (2) hours administrative leave on May 25th. Lastly, the first line supervisor advised her she may submit a new reasonable accommodation request at any time she believes it is appropriate and provided her the name of the FSA RA Program Coordinator. On May 31, 2018, at 7:49 am, the first line supervisor resent his May 30th email to the Respondent's personal email address.

8. On June 8, 2018, the Respondent's second line supervisor issued a memorandum reconsideration decision on the Respondent's Reasonable Accommodation request, which was initially denied by the Respondent's first line supervisor on May 11, 2018. (OES Document 4 of 18-74-OF, pp. 6-8). The reconsideration decision denied the Respondent's request for 100% telework as a reasonable accommodation and indicated the Respondent was to report to her assigned office on June 19, 2018 (*Id.* p. 6).

9. On July 12, 2018, the Respondent's first line supervisor issued a memorandum decision, which denied the Respondent's second request for a reasonable accommodation (OES Document 4 of 18-74-OF, pp. 3-5). In this request the Respondent requested a change in position away from her current first line supervisor. The memorandum decision enumerated the Respondent's rights to request a reconsideration by her second line supervisor within fifteen (15) calendar days of receipt of the decision), to file an EEO complaint within 45 calendar days of receipt of the decision, or to pursue a grievance in accordance with the Collective Bargaining Agreement (*Id.* pp. 3-4).

10. On August 2, 2018, a corrected timecard was processed for pay period 12 of 2018 (OES Document 30 of 18-74-OF). The corrected timecard made changes to paid annual leave that had been initially processed for May 22-25, 2018. The first line supervisor approved three (3) hours of administrative leave on May 24, 2018, when the Respondent was attending a parent/teacher conference. The first line supervisor approved 11 ½ hours of sick leave on May 22, 2018 (eight hours) and May 23, 2018 (three- and one-half hours). The first line supervisor approved 17 ½ hours of LWOP on May 23, 2018 (four- and one-half hours), May 24, 2018 (five hours), and May 25, 2018 (eight hours).

11. On August 15, 2018, the Respondent's second line supervisor issued a memorandum reconsideration decision on the Respondent's Reasonable Accommodation request for reassignment, which was initially denied by the Respondent's first line supervisor on July 12, 2018 (OES Document 4 of 18-74-OF, pp. 1-2). The reconsideration decision denied the Respondent's request for reassignment as a reasonable accommodation and indicated

the Respondent was to report to her assigned office on September 14, 2018 (*Id.*, p. 1).

12. On August 13, 2018, the Department's payroll agent (Department of Interior (DOI)) issued a Notice of Debt under Debt ID 82261112818, asserting a debt in the net amount of $1,397.40 that resulted from the processing of an amended timecard for pay period 12 of 2018, and causing a recalculation of eligibility for the paid holiday occurring on May 28, 2018, which occurred in pay period 13 of 2018 (OES Document 2 of 18-74-OF, pp. 1-5).

13. On August 27, 2018, the Department's payroll agent, DOI, issued a second Notice of Debt under Debt ID 182121112818, asserting a debt in the amount of $271.95 following the Department's payment of the Respondent's share of her health care benefit for pay period 16 of 2018 (OES Document 2 of 18-84-OF, pp. 6-7).

14. On September 24, 2018, the Department's payroll agent, DOI, issued a third Notice of Debt under Debt ID 182261112818, asserting a debt in the amount of $271.95 following the Department's payment of the Respondent's share of her health care benefit for pay period 17 of 2018 (OES Document 2 of 18-84-OF, pp. 8-9).

15. On September 24, 2018, the Department's payroll agent, DOI, issued a fourth Notice of Debt under Debt ID 182541112818, asserting a debt in the amount of $271.95 following the Department's payment of the Respondent's share of her health care benefit for pay period 19 of 2018 (OES Document 2 of 18-84-OF, pp. 10-11).

16. On December 6, 2018, the Respondent timely filed a request for a pre-offset hearing following the issuance of a Waiver decision addressing the four asserted debts.

17. On March 7, 2019, a representative of the DOI provided an excel sheet of the debts generated to the Respondent that included payments and balances of the debts after recoupment and calculation of the adjustment required by the Waiver decision previously issued (OES Document 30 of 18-74-OF, p. 1 and OES document 67).

18. In June 2019, the Department's payroll agent, DOI, provided the Respondent with a Notice of Debt under Debt ID 181981112818, asserting a debt in the amount of $271.95 following the Department's payment of the Respondent's share of her health care benefit for pay period 15 of 2018 (OES Document 64 of 18-74-OF, pp. 3-5 and Document 2 of 19-51-OF, pp. 3-5).

19. On June 25, 2019, the Respondent timely filed a request for a pre-offset hearing in relation to Debt ID 181981112818 (OES Document 63 of 18-74-OF and Document 1 of 19-51-OF).

V. Arguments

A. Respondent's Initial Requests for Hearings (OES Documents 1 and 63 of 18-74-OF and OES Document 1 of 19-51-OF)

On December 6, 2018, the Respondent filed a request for a pre-offset hearing in a letter that was dated December 4, 2018. The Respondent sought a hearing to challenge the validity and amounts of four asserted debts, one asserted debt arising from a correction to the Respondent's timecard for pay period 12 of 2018 and three asserted debts arising from the Department's payment of her share of the premium for the Respondent's health care benefit in pay periods 16, 17, and 19 of 2018. The Respondent asserts these are not valid debts because the debts were unjustly created.

The Respondent argued the debts were unjustly created because she should have been allowed to remain on 100% telework as a reasonable accommodation. The Respondent argued that denial of her request for a reasonable accommodation for 100% telework forced her into the non-pay status of LWOP for several months and her financial situation was exacerbated by the necessity of her relying on cash advances from multiple credit cards for expenses that were previously paid from her earnings. She asserted that in addition to relying on cash advances from her credit cards to meet her living expenses, she had fallen several months behind on other bills including her utility bills, her cell phone, and many other bills.

The Respondent's December 4, 2018, request for a hearing argues the asserted overpayments and her extreme financial hardship could have been avoided if her supervisor had not been allowed to continue violating her rights without being held accountable for his actions. The request indicates she was a whistleblower and she endured retaliation from her supervisor following her whistleblower actions.[16]

In the Respondent's request for a pre-offset hearing dated and filed on June 25, 2019, the Respondent requested review of Debt ID 181981112818, asserting a debt arising from the Department's payment of her share of the premium for the Respondent's health care benefit in pay period 15 of 2018 in the amount of $271.95. The Respondent challenged the validity of the debt by asserting she was unaware her health insurance benefits would continue while she was on unpaid leave, she requested details from Human Resources related to her first approval of FMLA but the HR representatives failed or refused to provide the requested information, she did nothing wrong, she is still trying to recover from the financial hardship of being on unpaid leave, and the Department failed to provide any notice of the debt prior to the Department collecting this debt by payroll deduction.

B. Department's Brief (OES Document 19 of 18-74-OF)

The Department filed its brief and supporting exhibits on February 15, 2019. The Department acknowledged that the Respondent had requested a waiver of four debts and a waiver was granted for only eight (8) hours of LWOP without pay that had been charged to the Respondent for the Memorial Day holiday in 2018. The Department also acknowledged that an EEO complaint has been accepted for investigation and one issue of that investigation was the Department's charge of LWOP for absences on May 22 through May 25, 2018, instead of advancing sick leave for at least

[16] Despite the assertion by the Respondent that she was a whistleblower and endured retaliation from her first line supervisor, there was no evidence filed in this proceeding that established the Respondent was a party asserting whistleblower protection in any an investigative, administrative, or judical proceeding and perhaps the assertion is an indication that the Respondent identified and reported an action or activity that she believed to be fraud, waste, abuse, or gross mismanagement.

a portion of the Respondent's absences on those days.

The Department asserted the four debts associated with the December 14, 2018, request for a pre-offset hearing arose from a period when the Respondent was on a temporary 100% telework schedule that extended from June 2017 through May 2018 and the Respondent's request for accommodation to continue to work 100% telework was denied. The Department asserts the Respondent was then directed to return to the office on May 22, 2019, and the debts were created when the Respondent requested a conversion of annual leave, which had been submitted on behalf the Respondent, for LWOP in pay period 12 of 2018.

The Department asserted the amount of the Debt totaled $1,700.87. In arriving at that total, the Department asserted the remaining debt resulting from processing of the corrected timecard for pay period 12 of 2018, after the partial waiver was granted was $885.02. The Department asserted the debt for the Respondent's share of the premium for the Respondent's health benefit that was paid by the Department was $271.95 for each of the pay periods 16, 17, and 19 of 2018, and subtotaled to $815.85. Therefore, the Department sought recovery of $1,700.87 from the Respondent.

The Department argued it was correct in charging LWOP for some of the Respondent's absences from May 22nd through May 25th in 2018. The Department asserts the charge of LWOP was made when the Respondent directed that the supervisor was not to apply any of her accrued annual leave to absences during that period and directed that her timecard for pay period 12 of 2018 be corrected from what was initially certified and processed.[17]

The Department argued it was correct in assessing a debt for the holiday pay the Respondent initially received for the Memorial Day holiday. The Department argues that the changes the Respondent directed for pay period 12 of 2018 resulted in the Respondent not being eligible for holiday pay on May 28, 2018. In support of this argument, the Department asserted an employee must in pay status or paid time-off status either before or after a holiday to be eligible for the paid holiday.

The Department argued it was correct to pay the Respondent's share of health insurance premiums in pay periods 16, 17, and 19 of 2018. The Department supports this argument by pointing out the Respondent did not "receive enough pay in those pay periods to cover the cost of her share" of the premium for the Respondent's health insurance benefit. Having established that the Department paid the Respondent's share of her health care benefit, the Department was entitled to establish that as a debt owed to the Department from the Respondent.

C. Respondent's Response or Narrative to the Department's Brief (OES Document 25 of 18-74-OF)

In response to the Department's brief, the Respondent asserted there were critical errors in the

[17] The record establishes that pay period 12 of 2018 included the workdays of May 14-18, 2018 and May 21-25, 2018. Monday May 28, 2018, was the Memorial Day holiday and was in pay period 13 of 2018. Due to the Monday holiday on May 28, 2018, payroll for pay period 12 of 2018 had to be certified and processed on the last workday in pay period 12 of 2018.

Department's brief. The Respondent's response enumerated the critical errors and offered her response and corrections page by page as presented in the Department's brief. The Respondent wanted to make clear she disputed the Department's representation in the brief and that she did not agree with what she viewed as erroneous agency claims.

The Respondent acknowledged she was physically out of the office from June 30, 2017 through September 4, 2018 and she teleworked on May 21, 2018 until about 4:00 pm. She asserts she had a medical appointment on May 21, 2018 and based on her clinical presentation at the appointment, her treating professional offered a medical excuse from work from the time of her appointment through May 25, 2018.

Relying on the medical excuse from work and the email from her first line supervisor dated May 30, 2018, the Respondent requested that her debt be dismissed. The Respondent specifically challenged the amount of the asserted debt as argued in the Department's brief and indicated the Department had not recognized that some of the asserted debt had already been repaid by recoupment from earnings received in some pay periods. The Respondent also challenged the arguments presented in the Department's brief, specifically countering the Department's payment of her health insurance premiums while she was on extended leave as unjustified because she was not aware that would occur and despite her many attempts to obtain reliable information from Department representatives, her inquiries were rebuffed, or her requests were ignored. She reports lack of knowledge because she had no access to her earning and leave statements, no access to the Department network, and no access to WebTA because her supervisor directed that she was not to perform work outside her approved work schedule.

In conclusion, the Respondent argued she met all the factors to make her eligible for a waiver, she dismissed the Department's opinions in their brief as unsupported, and she disputed the validity of the asserted debts. Her challenge to the validity of the debts was based on failure of the Department to provide proper notice, collection of debts from her pay that exceeded involuntary salary offset of 15% of disposable pay, and the failure of the Department to grant her multiple requests over multiple years to reassign her to a position under a supervisor other than her first line supervisor. In making these arguments and providing supporting documentation, the Respondent argued the Department failed to provide proper notice of the asserted debts, she did not engage in fraud, misrepresentation, fault, or lack of good faith that caused the asserted debts, it would be against equity and good conscience to recover the debts, and that she had shown the "pre-offset decision to collect the debts were clearly erroneous."

D. Respondent's Assertion of Extreme Financial Hardship (OES Documents 26 and 65 of 18-74-OF)

In support of the Respondent's request for relief from the Department's imposition of involuntary repayment agreement in the absence of an acceptable written repayment agreement, the Respondent provided an "Affidavit for OHA Financial Hardship" dated April 5, 2019, and an updated "Affidavit for OHA Financial Hardship" dated July 2, 2019. The affidavit enumerates the financial hardship the Respondent has experienced since May 2018 and enumerates additional circumstances that have added to her financial hardship. Additionally, the Respondent provided documents from her mortgage holder, utility providers, and numerous creditors evidencing her

financial hardship (OES Documents 51 – 61 of 18-47-OF).

VI. Analysis

A. Scope of Authority in Pre-offset hearings and Standard to Determine Validity (Existence) and Amount of an Asserted Debt

The authority of the Administrative Law Judge in a pre-offset hearing is limited. The primary issue to be addressed is whether the asserted debts are established as valid debts, including whether the asserted amount is correct. When a debt is found to be a valid debt, the Administrative Law Judge has the authority to determine if the debtor meets the criteria of extreme financial hardship to be excused from the statutorily authorized involuntary repayment schedule of up to 15% of disposable income in the absence of a written repayment agreement.

The Administrative Law Judge has no authority to review a waiver decision that was previously issued. In this matter, the Respondent sought a waiver of the debts under review in Docket Number 18-74-OF. That is the debt under Debt ID 82261112818, hereinafter referred to as the salary overpayment due to a correction and adjustment to the timecards for pay periods 12 and 13 of 2018, Debt IDs 182121112818, 182261112818, and 182541112818, hereinafter referred to as debts for payment of health care premiums for pay periods 16, 17, and 19, respectively. The waiver decision issued by the Waiver Official on November 28, 2018, under Docket Number 18-53-WA granted a partial waiver of the salary overpayment due to a correction to the timecards for pay periods 12 and 13 of 2018 finding that the Respondent was not at fault for the payment of eight (8) hours of holiday pay on Monday, May 28, 2018 and it would be against equity and good conscience to require repayment of that portion of the asserted overpayment. The Waiver Official denied waiver of the debts asserted for the Department's payment of health care premiums for pay periods 16, 17, and 19. That waiver decision is not subject to review in this proceeding and even if the overpayment due to the correction to the timecards for pay periods 12 and 13 is valid, the Department may not collect any portion of a debt that was waived by the Waiver Official.

In her request for a pre-offset hearing and her response to the Department's brief, the Respondent argues the determinations in relation to her denials for reasonable accommodations (100% telework and reassignment to a position under the supervision other than her first line supervisor prior to and in 2018) are the cause of the overpayments that have been asserted. She argues those denials were unjustified and references an EEO investigation. The denial of a requested reasonable accommodation and EEO investigations are administrative processes that are not within the reviewing authority of an Administrative Law Judge who is presiding over a pre-offset hearing. Furthermore, the Respondent's argument that those incorrect determinations caused the asserted overpayments is not substantiated by any of the evidence filed by the Department or the Respondent, and therefore, those arguments are unpersuasive.

In the determination of the validity of, or the amount of, an assessed overpayment, the issues of fault and equity are not material or relevant. To be eligible for a waiver of an overpayment, an employee subject to an overpayment, must show there was no indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee subject to an overpayment **and** it would be against equity and good conscience for the Federal government to

recover the overpayment. An overpayment of pay or allowances to a Department employee may follow an error in, or a change to, a timecard, authorization, or personnel action that resulted in an overpayment or other debt. The validity of an overpayment or other debt depends on whether the evidence legitimately establishes a debt in the amount that is asserted and the determination of fault or whether repayment is against equity and good conscience are not part of the analysis and determination.

B. Overpayment of Pay

In this case, the asserted overpayment in Debt ID 82261112818, was the result of a corrected timecard in pay period 12 of 2018 and an adjustment to the eligibility of holiday pay in pay period 13 of 2018. For an employee to be paid for a particular pay period, the employee's timecard must be properly validated, certified, and processed within the required time. In the case of pay period 12 of 2018, validation and certification had to be completed earlier than usual because the first Monday in the next pay period was a federal holiday.

After completing an eight (8) hour workday on Monday May 21, 2018, a medical excuse from work for the remainder of the week was forwarded to the Respondent's first line supervisor. Upon review of that medical excuse, the Respondent's first line supervisor notified the Respondent by email that the doctor's note did not establish that the respondent was incapacitated for work and therefore use of sick leave was not available for the absence. The first line supervisor indicated he would approve annual leave for her absence from work for the remainder of that week. When a response from the Respondent was not received, the first line supervisor notified the Respondent by email that her timecard for that pay period was certified with approved annual leave for her absences and she could request a correction upon her return to work. On May 29th, Respondent replied by email challenging the supervisor's determination of the adequacy of the doctor's note, reasserted her request for sick leave for her absences in the past week and in the upcoming week, and directed that her "vacation leave should not be used going forward without prior permission."[18]

On May 30, 2019, the first line supervisor emailed the Respondent indicating he accepted her request for leave for the current week, reminded her she does not have a current telework arrangement or a reasonable accommodation that permits full time work from a remote location, notified the Respondent a correction will be processed to her timecard for pay period 12 of 2018, that future absences will not be processed as annual leave, and if no sick leave is available then additional absences will be charged to LWOP. When the correction to the pay period 12 of 2018 timecard was processed, the first line supervisor approved a total of 11 ½ hours of sick leave, depleting the balance of sick leave earned and accrued to that pay period,[19] and approved 17 ½ hours of LWOP.

The corrected timecard resulted in an overpayment because the Respondent was initially paid for 32 hours of annual leave, which were restored with the correction. The attachment to the debt letter

[18] The Respondent's reply addressed other issues related to leave for a parent/teacher conference and discussed other issues concerns not specifically related to her request and use of leave.

[19] The approval of sick leave on May 22, 2018, and part of the day on May 23, 2018, represents a change in the first line supervisor's decision that the note from the Respondent's doctor was insufficient to establish her eligibility to use sick leave for the absences in the second week of pay period 12 of 2018.

dated August 13, 2018, explained how the overpayment was calculated (OES Document 2 of 18-74-OF, p. 2). The explanation establishes that the overpayment was properly determined based on the corrected timecard that changed annual leave to LWOP, and consequently is a valid debt.

The correction to pay period 12 of 2018 resulted in an adjustment to the Respondent's eligibility for holiday pay in pay period 13 of 2018. As indicated previously, May 28, 2018, was the Memorial Day holiday. When the timecard for pay period 13 of 2018 was initially processed, the Respondent was paid for the Memorial Day holiday. The Respondent was eligible for holiday pay because the Respondent was on paid annual leave on the Friday before that holiday when the timecard for pay period 12 of 2018 was initially processed. When the corrected timecard was corrected, the annual leave that had been charged for May 23-25, 2018, was corrected to LWOP. Because the Respondent was in a non-pay status the day before and the day after the holiday, she was not eligible for a paid holiday. This determination was and continues to be consistent with the Office of Personnel Management's policy on leave administration and eligibility for paid holidays (Holidays Work Schedules and Pay (opm.gov)). Consequently, the debt calculated for recoupment of the paid holiday was and is a valid debt.

C. Health Care Benefits Debts Created Due to Insufficient Pay

The debt letters for the Respondent's share of her health insurance benefit establish that in pay periods 15, 16, 17, and 19 of 2018, the Respondent's pay was insufficient to pay her share of her health insurance benefits. As was customary practice of the Department, the Respondent's share of her health insurance benefit was paid by the Department when her pay was insufficient to cover the employee share. The biweekly share of that benefit was $271.95, thereby totaling $1,087.80.

In an accounting provided by a DOI representative on March 7, 2019, the Respondent was informed that $53.76 was recouped in pay period 17 and $218.19 was recouped in pay period 18. These recoupments were credited toward the debt incurred in pay period 15 of 2018. The accounting shows the debt incurred for health insurance benefit in pay period 2016 was recouped in pay period 20. The March 7, 2019, DOI accounting shows the debt remaining for the Departments payment of the Respondent's health insurance benefit was $543.90.

The Respondent presented two arguments in challenging the validity and amount of the debt related to the Department's payment of her share of the health care benefit in pay periods 15, 16, 17, and 19 of 2018. The first challenge addressed the Department's continuation of her health care benefit when she entered periods of LWOP. The second argument challenged the amount of the debt.

The Respondent's challenge to the Department's calculation of the debt for payment of her health care benefit prevails. In its brief the Department calculated the debt to include payment of the Respondent's health care benefit for three pay periods (16, 17, and 19). The Department's brief was filed prior to the delayed issuance of the debt letter for the Respondent's health care benefit paid by the Department in pay period 15 of 2018, which was subsequently recouped from pay received by the Respondent in pay period 18 of 2018. Furthermore, the Department's brief did not recognize that the debt incurred for pay period 16 was collected in pay period 20.

In her response to the Department's brief, the Respondent argued she was unaware that her health insurance benefit continued when she was on LWOP and therefore she should not be held liable for the Department's payment of her share of her health care benefit. The federal regulation for withholdings, contributions, LWOP, premiums, and direct premium payment describes the procedures when an employee enters a LWOP status or when pay is insufficient to cover a premium (5 C.F.R. § 590.502). In that circumstance, the employing office must give the employee written notice of the choices and consequences when pay is insufficient or not available to deduct the required premiums. The employee must make his or her choice to continue coverage for the required premium or terminate coverage in writing. Unless the employee choses in writing the terminate coverage, the employing office may not terminate health benefit coverage (5 C.F.R. § 590.502(b)(2)). If the employee chooses to continue health benefit coverage, the employee must pay his or her share of the premium directly to the employing office and if the employee fails to keep current on the payment of his or her share of the premium, then the employing office will pay the employee's share of the premium and the employing office will recover the amount of accrued unpaid premiums as a debt (5 C.F.R. § 590.502(b)(2)(i) and (ii)).

While the record does not establish that the Respondent was provided notice of the option to continue or terminate her health care benefit, her argument that she should not be responsible for paying her share of the premium is not persuasive. The Department could not terminate the Respondent's health care benefit without her written permission. As a general practice, the Department simply paid the employee's share, presumably assuming the Respondent would not want her health care benefit to lapse while she was in the LWOP status. The Respondent benefited from the Department's unilateral decision and more importantly, the Respondent failed in her obligation to provide written notice to terminate her health care benefit if she did not want to pay her share of the premium while she was in a non-pay status. The Respondent, as any employee of the federal government, has an obligation to know and understand the conditions of her employment, eligibility for benefits, and her responsibility to pay her share of certain benefits, therefore her argument that she should not be held liable for her share of the health care benefit when the benefit continued due to the Department's payment of her required share while she was in a non-pay status is unpersuasive.

The Respondent also argued the Department violated the notice requirements of 34 C.F.R. § 32.3 when it collected her share of the health care premium without notice or an opportunity for her to challenge the existence of or amount of the debt. This argument is unpersuasive because the Respondent failed to recognize that the notice provision of this regulation does not apply to debts resulting from the Department's payment of the Respondent's share of her health care coverage (34 C.F.R. §32.1(b)(5), *See also*, 5 C.F.R. § 590.502(b)(2)(i) and (ii)). The Department was within its right to recoup the amounts it did from the Respondent's pay in pay periods 17, 18, and 20.

D. Recalculation of Debts Owed

As indicated earlier in this decision, the DOI adjusted the debt balance for the salary overpayment to $959.07 following the issuance of the waiver decision issued on November 26, 2018, under Docket Number 18-53-WA. On March 7, 2019, the DOI provided an accounting of the debts under Debt ID's 181981112818 (health care benefit for pay period 15 of 2018, recouped in pay periods 17 & 18 of 2018), 182121112818 (health care benefit for pay period 16 of 2018, recouped in pay

period 20), 182261112818 (health care benefit for pay period 17 of 2018), 182541112818 (health care benefit for pay period 19 of 2018), and 82261112818 (salary overpayment). Presuming additional collections were not made on the health care debts since March 2019, the debts owed total $1,502.97 ($271.95+$271.95+959.07).

E. Respondent's Establishment of Extreme Financial Hardship

The Respondent argued in her requests for pre-offset hearings and in her response to the Department's brief that she will encounter financial hardship if, in the absence of an accepted voluntary repayment agreement, the Department is allowed to involuntarily collect up to 15% of her disposable income, until the debts are fully paid. The Respondent has established she was without pay for several pay periods and during that time, she encountered additional expenses by relying on credit cards to meet her ongoing expenses. In support of that argument, the Respondent provided documentation of delinquency in paying bills, credit cards, and her mortgage. Given the documentation filed, the Respondent has established extreme financial hardship, and should she not submit a voluntary repayment agreement that is accepted by the Department, then the Department must limit its involuntary collection to no more than 10% of the Respondent's disposable income.

VII. Conclusion and Order

Having reviewed the arguments by the parties and the official government records included in this hearing record, the debts under asserted under Debt ID's 181981112818 (health care benefit for pay period 15 of 2018), 182121112818 (health care benefit for pay period 16 of 2018), 182261112818 (health care benefit for pay period 17 of 2018), 182541112818 (health care benefit for pay period 19 of 2018), and 82261112818 (salary overpayment) are established debts in the amounts indicated in each of the debt letters issued by the DOI. The official government records in this hearing record establish the DOI has recouped the debt for Debt IDs 181981112818 (health care benefit for pay period 15 of 2018) and 182121112818 (health care benefit for pay period 16 of 2018).

Pursuant to the waiver decision under Docket Number 18-53-WA, the Respondent was granted a partial waiver of Debt ID 82261112818, leaving a remaining amount of $959.07. Provided the DOI has not recouped any portion of the debt under Debt IDs 182261112818 (health care benefit for pay period 17 of 2018), 182541112818 (health care benefit for pay period 19 of 2018), a debt in the amount of $543.90 is established and owed by the Respondent.

For the reasons indicated in this decision, the asserted debts are valid debts that require repayment by the Respondent. Based on the foregoing findings of fact and analysis, it is **HEREBY ORDERED:**

1. The Respondent shall pay to the U.S. Department of Education, in a manner as required by law, the sum of $959.07 for the debt established under Debt ID 82261112818 (salary overpayment);

2. Provided the DOI has not made any additional recoveries since March 17, 2019, the

Respondent shall pay to the U.S. Department of Education, in a manner as required by law, the sum of $271.95 for the debt established under Debt ID 182261112818 (health care benefit for pay period 17 of 2018).

3. Provided the DOI has not made any additional recoupments since March 17, 2019, the Respondent shall pay to the U.S. Department of Education, in a manner as required by law, the sum of $271.95 for the debt established under Debt ID182541112818 (health care benefit for pay period 19 of 2018)

4. The Respondent shall have fifteen (15) days from receipt of this decision to complete and submit a Payment Agreement Form consistent with the instructions in the August 13, 2018, debt letter.[20] The signed form shall be submitted to the designated Payroll Operations Division, indicating a voluntary onetime payment agreement (by check or money order) or authorizing biweekly payroll deduction in a specific dollar amount.

5. The Respondent has established extreme financial hardship. If the Respondent fails to timely submit a signed voluntary payment agreement pursuant to this decision, which is acceptable to the Department, the Department is authorized to collect through payroll deduction an amount equal to no more than 10% of disposable income, until the debt is fully paid.

6. This decision and order is not intended to limit the Department's rights under 5 C.F.R. § 590.502(b)(2)(i) and (ii) to collect debts incurred for payment of the Respondent's health care benefit for pay periods 17 and 19 of 2018. The Department should, however, consider to the Respondent's extreme financial hardship in the collection of these debts.

7. This decision constitutes a final agency decision.

Dated: May 10, 2013

Angela J. Miranda
Administrative Law Judge

[20] For the convenience of the Respondent, a copy of the Agency's Payment Agreement form included with the debt letter is forwarded with this decision.