UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

In the Matter of:	
BONITA G. RENNER,	18-AF-0087-OH-002
Petitioner.	April 2, 2019

Appearances:

Dorothy Crow-Willard,
AFGE Local 3972
For Petitioner

Micah Lemons, Esq.
U.S. Department of Housing and Urban Development
For the Government

BEFORE: Alexander FERNÁNDEZ, Administrative Law Judge

DECISION AND ORDER

This matter is before the Court upon a request for hearing filed by Bonita G. Renner ("Petitioner"), pursuant to 5 U.S.C. § 5514, as implemented by 24 C.F.R. §§ 17.83 *et seq.* Petitioner requests review of a decision by the United States Department of Housing and Urban Development ("HUD") to seek repayment of an alleged nontax debt totaling $17,380.20 by offsetting her salary.

The hearing in this matter was held on August 23, 2018, in Washington, D.C. Petitioner and her representative appeared via video teleconference. At the hearing, the Court received the testimony of Linda Hawkins, HUD's Director of Policy, Programs, and Advisory Staff; and Petitioner.

APPLICABLE LAW

FEGLI. The federal government established the Federal Employees' Group Life Insurance (FEGLI) Program on August 29, 1954. FEGLI is administered by the United States Office of Personnel Management (OPM), which makes available optional life insurance ("Basic coverage") to certain employees of the federal government. 5 U.S.C. § 8714a. OPM also offers

additional optional life insurance coverage ("Optional coverage") to those employees that are eligible for Basic coverage. 5 U.S.C. § 8714b.

Employees are responsible for paying their enrollee share of insurance premiums for every pay period during which they are enrolled. 5 U.S.C §§ 8714a, 8714b (employees are responsible for the *full cost* of any Optional coverage they elect to have.). The employee's share of costs for Basic coverage and Optional coverage should be withheld from the employee's pay during each period that such insurance is in effect. 5 U.S.C §§ 8714a, 8714b; 5 C.F.R. § 890.502(a).

If the employing office makes an administrative error as to the employee's enrollment, the employing office may retroactively correct such error. 5 C.F.R. § 870.103(a). When an agency erroneously under-withholds a premium from an individual's pay, the agency must submit the under-withheld amount to OPM for deposit regardless of whether the agency recovers the under-deduction. 5 C.F.R. §§ 870.401(f), 870.402(f), 870.404(d).

Salary Offset. The Secretary is authorized to collect repayment of a debt owed by a federal employee to the United States via deductions at officially-established pay intervals from the employee's pay account. 5 U.S.C. § 5514. After a determination that an employee is indebted to the United States, the Secretary must provide the employee with written notice of his intent to offset the employee's salary a minimum of 30 days prior to the first deduction. 24 C.F.R. § 17.89. Thereafter, the employee may request a hearing concerning: (1) the existence or amount of the debt; or (2) the Secretary's proposed offset schedule. 24 C.F.R. § 17.91(a). The Notice of Intent also informs the employee of their right to request a waiver of salary overpayment from HUD.

Waiver of Debt. The FEGLI statute provides that the collection of amounts properly due may be waived by the agency if, "in the judgment of the agency, the individual is without fault and recovery would be against equity and good conscience." 5 U.S.C. § 8714b(d)(2). Interestingly, the regulations promulgated by OPM to implement the FEGLI statute require agencies to apply the general waiver statute at 5 U.S.C. § 5584, rather than the FEGLI statute, when determining whether to waive collection of FEGLI premium under-deductions. See 5 C.F.R. § 870.404(d). That same regulation also specifically refers to the general waiver statute's implementing regulations at 4 C.F.R. chapter I, subchapter G, which no longer exist. Id.

"Waiver of debts under 5 U.S.C. § 5584 is an equitable remedy." In re Phyllis J. Wright, 1996 U.S. Comp. Gen. LEXIS 428, *3 (Comp. Gen. Aug. 27, 1996). Like the FEGLI statute, the general waiver statute also authorizes a waiver to be granted if "collection of [the debt] would be against equity and good conscience" but adds the additional consideration of whether collection is "not in the best interests of the United States." 5 U.S.C. § 5584(a).[1] Generally, these conditions are met where there is a finding that "the erroneous payment of pay or allowances occurred through administrative error." In re Garnette F. Miller, 1986 U.S. Comp. Gen. LEXIS 353, *4 (Comp. Gen. Oct. 16, 1986); see also Harrison v. OPM, 2017 MSPB LEXIS 3453, *5 (M.S.P.B. Aug. 8, 2017) (citing OPM's regulations for waivers of overpayments made from the Civil Service Retirement and Disability Fund stating that recovery is against equity and good

[1] Whether or not the "best interests of the United States" should actually be in play for FEGLI under-withholding cases is at best a point of discussion, as the FEGLI statute itself does not require consideration of this factor.

conscience when it would cause financial hardship to the person from whom it is sought). Waiver must depend on the facts in each case because by statute "an indication of...fault...on the part of the employee" precludes waiver. Wright, 1996 U.S. Comp. Gen. LEXIS 428, *3. Fault is considered to exist if it is determined that an employee exercising *reasonable* diligence should have known that an error existed but filed to take corrective action. Id. (emphasis added).

HUD's Review of Waiver Requests. HUD's review of Waiver Requests is contained exclusively within the Office of the Chief Human Capital Officer (OCHCO). Once the decision of whether or not to grant a waiver is made, it is not reviewable by anyone outside of OCHCO. Waiver Requests are submitted to the Administrative Resource Center, a part of the United States Department of Treasury's Bureau of Fiscal Service (BFS). HUD contracts BFS to provide payroll services on its behalf. BFS reviews the waiver request and submits to HUD a memorandum summarizing the record and making a recommendation ("BFS Memorandum"). The BFS Memorandum is generally received by HUD's Director of Policy, Programs, and Advisory Staff ("Director of Policy"), who is also the Supervisory Human Resources Specialist.

After HUD's Director of Policy Programs reviews the BFS Memorandum and the waiver, she then generates an internal HUD memorandum that is submitted to the Chief Human Capital Officer recommending whether to grant or deny the Waiver Request at issue. The Chief Human Capital Officer's decision on the waiver request is final as there is no appeal right in salary offset cases.[2]

FINDINGS OF FACT

On October 30, 2006, Petitioner began her first federal employment, having accepted the position of Multifamily Review Appraiser with the HUD Field Office in Indianapolis. Among the documents Petitioner completed as a new federal employee was for the selection of life insurance, referred to as an SF-2817. On the SF-2817, Petitioner indicated that she wished to have both Basic coverage and Optional coverage, which was two multiples of Option B coverage. When selecting this coverage, Petitioner did not review any charts or written information about the premiums she would have to pay with these options. She did, however, ask Rose Ellison, the human resources specialist assisting her, how much the premiums would be. Ms. Ellison did not give her an answer.

When processing Petitioner's paperwork, HUD did not accurately input her FEGLI elections into its systems. Instead of entering into its system that Petitioner requested Basic coverage plus two multiples of Option B coverage, a HUD employee only input Petitioner's request for Basic coverage. As a result, HUD deducted premiums only for Petitioner's Basic coverage from her bi-weekly paychecks. This error continued unnoticed.

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[2] HUD's procedure regarding waiver applications raises the specter of "home-towning." Often if not virtually always, the office making the recommendation to the Chief Human Capital Officer is the office that caused the error in the first place. See Wright, 1996 U.S. Comp. Gen. LEXIS 428, *3 ("We recognize that erroneous payments usually arise as a result of mistakes by those who are charged with the administrative responsibility for making the payments."). At the very least, a conflict of interest is present because FEGLI under-deductions arising from a mistake by human resources, must be paid by HUD to OPM if they are waived. Moreover, due process may be affected as well. An employee never has their waiver request considered by a disinterested party. See Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (Due process requires the opportunity to be heard at a meaningful time and in a *meaningful manner*.) Last and as important, the optics are disastrous. It is virtually impossible to argue equity and best interest while allowing the same office that made the error to decide whether or not to waive.

In October 2014, Petitioner accepted a job with the United States Department of Agriculture (USDA). When she transferred to her new position, a Standard Form 50 (SF-50) was generated documenting the termination of her HUD employment. That SF-50 showed that Petitioner had only Basic FEGLI coverage. Sometime after her transfer to USDA, Petitioner spoke with a personnel actuary employed by BFS with whom Petitioner previously worked while at HUD. The actuary informed Petitioner that there seemed to be a mistake in her deductions and assured her that USDA would resolve the issue. Petitioner believed the issue was merely paperwork related, but informed her supervisor at USDA about it nonetheless. Her supervisor said he would look into it, but nothing ever came of it.

Following the near-death of her handicapped son in 2016, Petitioner moved to Colorado to be closer to him and assist with his care. In December of 2016, Petitioner accepted the position of Single-Family Review Appraiser with HUD's Denver office with a start date of February 6, 2017. When she re-joined HUD, she was not asked to review her FEGLI coverage. And, the SF-50 generated to memorialize her transfer back to HUD listed her coverage as "Basic."

In February of 2017, Petitioner contacted a human resources specialist, to get a retirement estimate. The specialist informed Petitioner that, in reviewing Petitioner's personnel folder, she discovered that both HUD and USDA had failed to process the correct FEGLI coverage for Petitioner. The specialist asked Petitioner if she would like to have the mistake corrected. Petitioner stated that she would and asked the specialist what the cost would be. The specialist responded merely by stating that a bill would be generated for the under-deduction of Petitioner's salary and did not further elaborate. Petitioner received a bill dated April 16, 2017 from HUD in the amount of $179.52 in April 2017. Believing this was the total amount due for the under-deduction, Petitioner promptly paid the bill. In May 2017, Petitioner received a second bill from HUD for $17,200.68.[3]

Petitioner submitted a request for a waiver of the debt resulting from the alleged overpayment of her salary. On July 17, 2017, a supervisory human resources specialist at BFS sent a BFS Memorandum to the Director of Policy. In the BFS Memorandum, the specialist recommended that HUD grant Petitioner's waiver request, because Petitioner was without fault and collection of the debt would be against equity and good conscience.

Despite receiving this recommendation, on November 29, 2017, HUD denied Petitioner's waiver request. In a letter to Petitioner, HUD conceded that it was responsible for the error. However, the letter also noted that had Petitioner reviewed her Earnings and Leave statements and SF-50s, Petitioner would have been alerted to the error. As a result, HUD reasoned that "collection of this debt is being executed with equity and good conscience, and is in the best

[3] Petitioner also received a third bill that failed to consider Petitioner's payment on the first bill.

interest of the Department and the Federal Government."[4]

DISCUSSION

HUD claims Petitioner is indebted to it in the amount of $17,380.20 for unpaid life insurance premiums due for the Optional coverage Petitioner elected to receive when she was first hired. Petitioner disputes the validity and amount of the debt. In addition, Petitioner argues that the Court should reverse HUD's decision to deny Petitioner's request for a waiver of the debt.

I. The debt in this case is valid.

Petitioner claims that a debt does not exist in this case because there was no contract between her and HUD for Optional Coverage, and she did not receive a benefit (or die).

The administration of FEGLI is governed by the statute and its implementing regulations and not by common law contract principles. Although Basic coverage is automatic unless it is waived by an employee, Optional coverage must be specifically elected within 60 days after an employee becomes eligible for coverage. 5 C.F.R. § 870.504. Optional coverage is effective the first day an employee is in pay and duty status after the employing office receives the election. 5 C.F.R. § 870.505; U.S. OFFICE OF PERSONNEL MANAGEMENT, Federal Employees' Group Life Insurance (FEGLI) Program Handbook, pg. 4 (April 2014). Therefore, the effective date for Optional coverage is not contingent upon the employee's elections being appropriately entered into a payroll system or the withholding of premiums from the employee's pay.

Petitioner does not dispute that she elected to receive Optional coverage in the form of Option B with a multiple of two times her pay when she was first hired in 2006. On the SF-2817 completed by Petitioner in 2006, Petitioner signed that she wanted such coverage and authorized deductions to pay the full cost of it. The election form was received in the employing office on November 8, 2006. Therefore, based on the FEGLI regulations, Petitioner's Optional coverage became effective not later than November 8, 2006.

Pursuant to the FEGLI regulations, Petitioner's Optional coverage was considered in effect when she submitted the form to HUD. However, HUD's systems did not reflect that Petitioner had Optional coverage until February of 2017. HUD admits that it made an error by not processing her Optional coverage election when Petitioner submitted her SF-2817. That error resulted in the appropriate premiums not being withheld from Petitioner's pay as required by statute and regulation for 10 years. When the error was discovered, Petitioner was asked if she wanted to continue her coverage. She indicated that she did even though she was not told the

[4] Whether collection is specifically "in the best interest of the Department" is undoubtedly not a valid consideration for waiver determinations. The general waiver statute only requires consideration that collection is "in the best interest of the *federal government*" and does not mention the agency. 5 U.S.C. § 5584. This distinction is significant because in the case of FEGLI under-withholdings, the agency is required to pay the deficiency. Therefore, it would *rarely* be in the agency's best interest to waive an employee's debt. Moreover, the Court questions whether *any* "best interest" consideration should be given when the FEGLI statute states no such requirement.

cost of doing so when she asked for it.[5] HUD retroactively corrected the error on Petitioner's enrollment as it is authorized to do pursuant to the regulation. 5 C.F.R. § 870.103(a). However, because the appropriate premium amounts had not been withheld from Petitioner's pay for the past 10 years, she incurred a valid debt to the government.[6]

Petitioner also disputes the validity of the debt because she did not receive a benefit. Specifically, Petitioner argues that no claims were filed on the Optional coverage and it is unlikely her family would have been able to recover the Optional coverage benefits had she passed away before the error was discovered.

The amount of additional optional life insurance in force for an employee at the date of the employee's death shall be paid. 5 U.S.C. § 8714b(f). Although HUD's systems did not reflect Petitioner's Optional coverage until February 2017, the Director of Policy testified credibly that the employee's Official Personnel Folder (OPF) is reviewed upon the death of the employee and the insurance selected on the most recent SF-2817 would be applied for a claim of life insurance benefits. This is supported by the requirement that coverage is effective on the date an eligible employee submits the SF-2817 to the employing agency. 5 C.F.R. § 870.505. Therefore, there is a preponderance of evidence that Petitioner's beneficiaries could have collected on a claim for Optional coverage.[7] See In re Jerry, No. 05-29-WA, *5 (U.S. Dep't of Educ. Feb. 16, 2006) ("It is well settled that an employee's beneficiary is entitled to receive the full amount of life insurance the employee elected even though insufficient premium payments were deducted."), *available at* https://oha.ed.gov/oha/files/2019/03/2005-29-WA.pdf.

II. HUD has proven the amount of the debt.

Petitioner argues that HUD has failed to prove the amount of the debt because it offered inconsistent amounts for the debt. In support of this argument, Petitioner cites to the multiple bills she received from HUD, and the FEGLI Error Calculation sheet that provides a calculation

[5] Petitioner claims she would have cancelled the Optional coverage had she known the cost for the premium. This argument is not supported by her testimony, because Petitioner continues to receive Optional coverage despite being permitted to cancel her coverage at any time. See 5 U.S.C. § 8714b(b)(2) (Providing that an employee may reduce or stop coverage Optional coverage at any time); FEGLI Handbook, pg. 86. Since February 2017 through the date of the hearing on August 23, 2018, Petitioner maintained her FEGLI Optional coverage even though the full cost of the premiums was being deducted from her pay.

[6] By comparison, if an employing agency fails to withhold appropriate amounts from an employee's pay under the Federal Employees Health Benefits program, OPM regulations specifically state that the employee incurs a debt to the United States. 5 C.F.R. § 890.502(a). Somewhat inconsistently, OPM's FEGLI regulations do not contain an analogous provision defining under-withholding as a debt. But the definition of "debt" in HUD's salary offset regulations is sufficiently open-ended to allow the Court to find that Petitioner incurred a debt in this case. See 24 C.F.R. § 17.83(f); see also In re Gordon Field, M.D., 1987 U.S. Comp. Gen. LEXIS 903 (Comp. Gen. June 22, 1987) (assuming without discussion that under-withholding of FEGLI premiums creates debt via overpayment); In re Jason, No. 10-01-WA (U.S. Dep't of Educ. Aug. 24, 2010) (same), *available at* https://oha.ed.gov/oha/files/2019/03/2010-01-WA.pdf.

[7] Of course, this assumes that HUD's personnel office would do what is required (and expected) by reviewing Petitioner's OPF and catching the mistake it made when Petitioner was first hired. Understandably, given Petitioner's history with HUD's handling of personnel matters, there is concern that this would not happen. However, the Director testified credibly that this is the appropriate procedure, and absent evidence to the contrary, there is a preponderance of evidence that this matter would have been resolved correctly. Moreover, beneficiaries are not required to identify the benefits claimed on the Claim for Death Benefits (FE-6) form, which is submitted to the deceased employee's human resources office. Therefore, although Petitioner's family might not have known that she also elected Optional coverage, it is expected that they would have been paid Optional coverage proceeds regardless.

of the missed costs of Petitioner's Optional Coverage for each pay period. All these documents represent different amounts claimed to be owed to HUD.

HUD has the burden to prove the amount of the debt in question. See 24 C.F.R. § 26.24(g) ("The burden of proof shall be upon the proponent of an action or affirmative defense ... unless otherwise provided by law or regulation."). HUD must meet this burden by a preponderance of the evidence. 24 C.F.R. § 26.25(a); see also Delikosta v. Califano, 478 F. Supp. 640, 643 n.4. (S.D.N.Y. 1979) ("The standard of proof in an administrative hearing is generally preponderance of the evidence.").

Petitioner was sent bills from HUD on April 16, 2017 and May 16, 2017. The bills collectively totaled $17,380.20, which is the amount of the debt claimed by HUD. At the hearing, the Director explained that typically when there is an overpayment, an initial bill is generated reflecting the most recent pay periods during which the overpayment took place. Then, after review of the overpayment history, a subsequent bill reflecting the remainder of the pay periods may be sent to the employee. Without evidence to rebut this testimony, the Court finds the Director's testimony sufficiently explains the discrepancy between the bills and supports the amount claimed by HUD.

HUD also submitted a FEGLI Error Calculation sheet that reflects a balance of $17,565.40. HUD notes that although the FEGLI Error Calculation sheet suggests that Petitioner owes more than the amount of HUD's claim in this case, HUD clarifies that it is only pursuing the lesser amount of $17,380.20. In addition, HUD acknowledges Petitioner's evidence that her biweekly pay was garnished at least twice to repay the debt to HUD and admits that the claimed amount of $17,380.20 does not reflect Petitioner's payments or the current balance.

The Director's testimony and the documentary evidence within the record sufficiently prove Petitioner's debt to HUD totals $17,380.20. Although the parties agree that Petitioner made payments towards this debt, that does not impact the Court's obligation to determine the amount of the debt claimed. See 24 C.F.R. § 17.95. Accordingly, the Court finds that Petitioner is indebted to HUD in the amount of $17,380.20.[8]

III. HUD's review of Petitioner's waiver request was flawed.

The Court recognizes that its jurisdiction in salary offset cases is limited to determining the existence and amount of the debt, and any offset schedule to be imposed. See 24 C.F.R. § 17.91(a). Review and modification of HUD's determination to deny a waiver request is not within its purview. See In re Michelle Simmons, HUDOHA 17-JM-0137-OH-006, *Order Denying Motion for Summary Judgment* (HUDOHA May 9, 2018). Still, an assessment of HUD's reasoning to deny Petitioner's request for a waiver raises some concerns, and further supports the argument that waiver requests decided "in-house" should be reviewable by another office.[9]

[8] This amount, as stipulated by HUD, does not reflect the current balance of the debt, which should include credits for the payments Petitioner has already made.

[9] Another solution would be for the Secretary to delegate the authority to grant or deny waivers to its Office of Hearings and Appeals, as the United States Department of Education has done. See U.S. DEPARTMENT OF

In the denial of Petitioner's request for a waiver of the debt, HUD acknowledges it was responsible for the error that caused Petitioner to be overpaid. And yet, HUD determined that collection of the debt is "being executed with equity and good conscience, and is in the best interest of the Department and the Federal Government." The only basis cited in the denial was that Petitioner would have been alerted to the error had she reviewed her Earnings and Leave Statements and SF-50s as is expected of employees. Aside from this statement, the letter to Petitioner denying her waiver request lacked an analysis of how collection of the debt was being executed with equity and good conscience, or why it is in the best interest of the Department and the federal government.

At the hearing, the Director attempted to elaborate on the reasoning behind denying Petitioner's waiver request. She stated the decision was based upon the fact that it is incumbent upon employees to review Earnings and Leave Statements. She also stated she considered that the FEGLI regulations place responsibility for paying the premiums on employees even when an error is made.[10] In addition, she claims she considered how other waiver requests are treated in an attempt to be consistent. Based on the Director's testimony and the information in the letter denying Petitioner's waiver request, the Court concludes the only *fact* considered was Petitioner's receipt of Earnings and Leave Statements and SF-50s during the overpayment period. This is troubling because case law applying the general waiver statutes requires consideration beyond whether the error was evident on Earnings and Leave Statements and SF-50s.

A. Petitioner is not at fault.

HUD admits it caused the error that led to Petitioner's salary overpayment. However, HUD claims that Petitioner is partially at fault because she should have been aware of the overpayment, because of the incorrect information reflected on her Earnings and Leave Statements and the SF-50s that were generated.

A waiver may be granted unless there is "an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver of the claim." 5 U.S.C. § 5584(b)(1). Fault exists if it is determined that the concerned individual should have known that an error existed but failed to take action to have it corrected. In re Hollis W. Bowers, 1986 U.S. Comp. Gen. LEXIS 1637, *9-10 (Comp. Gen. Jan. 22, 1986). In determining whether to grant a waiver, the decisionmaker should engage in "a careful analysis of all pertinent facts, not only those giving rise to the overpayment but those indicating whether the employee reasonably could have been expected to have been aware that an error had been made." In re James A. Johnson, 1971 U.S. Comp. Gen. LEXIS 2155, *3 (Comp. Gen. Sept. 14, 1971); see also In re Thomas J. Strenger, 1974 U.S. Comp. Gen. LEXIS 1512, *6 (Comp. Gen. Nov. 7, 1974) (considering whether the employee had a lengthy service

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EDUCATION, ADMINISTRATIVE COMMUNICATIONS SYSTEM, Handbook for Processing Salary Overpayments (Handbook, ACS-OM-04), pg. 7 (revised January 2012).

[10] It is puzzling that HUD would consider the regulations placing the responsibility for paying premiums on the employees when determining whether to grant a waiver request. Such regulations are the basis for determining whether a debt is owed in the first place. Factoring them into the waiver determination as well unreasonably stacks the deck against employees with legitimate bases for receiving a waiver of their debt.

history in positions of responsibility with federal government that would give him reason to know of the requirements for step increases, which led to his overpayment).

The HUD error arose in this case when Petitioner was a new employee to both HUD and the federal government. She was also under considerable stress around the time she was hired due to circumstances at home and her new job. She testified credibly that she did not pay much attention to her insurance elections other than that she was requesting "a little extra." In fact, she did not know the cost of her FEGLI premiums even though she asked for that information.

Petitioner also testified that she did not understand the significance of her SF-50s, or the information they relayed until several years after being employed by HUD. She also was not advised that it was incumbent on her to review her Earnings and Leave Statements for errors. Petitioner acknowledges she likely reviewed an Earnings and Leave Statement in 2006 when HUD first employed her. Still, she never saw anything on her Earnings and Leave Statement that led her to believe something was amiss. After all, she noticed that HUD was deducting "something" for her FEGLI coverage although it was not clear whether the deduction was for Basic coverage, Optional coverage, or both.

HUD's error in failing to input her Optional coverage occurred at the onset of Petitioner's employment with HUD and the Federal Government. At that time, it is reasonable that Petitioner would not have noticed that her SF-50 reflected only Basic coverage. See In re Jack A. Shepherd, 1979 U.S. Comp. Gen. LEXIS 2285, *8-9 (Comp. Gen. July 20, 1979) (noting that "every federal employee, regardless of his experience, interests, or work specialty, has a duty to examine his own personnel and pay records when they are furnished to him, and to ascertain whether all of the entries are correct" but concluding that the complainant might not reasonably have been expected to notice error on an SF-50 merely two months after his employment given his relative inexperience in personnel matters). Indeed, even the Director testified that HUD is inclined to grant a waiver in certain instances involving new employees.[11]

It is also reasonable that in 2006, Petitioner did not recognize that HUD was not deducting the correct amount from her pay to cover both the Basic coverage and the Optional coverage she elected to receive. See Bowers, 1986 U.S. Comp. Gen. LEXIS 1637, *9 (waiving a portion of the debt because the deduction for FEGLI shown on the complainant's Earnings and Leave Statements appeared reasonable even though it did not include the premiums for optional coverage); cf. Jerry, No. 05-29-WA, *5 (noting that the employee should have noticed the under-deduction for additional FEGLI coverage on his Earnings and Leave Statements because he was previously enrolled in FEGLI at the same level of additional optional coverage); In re Michael J. Smith, 1988 U.S. Comp. Gen. LEXIS 985, *4 (Comp. Gen. Sept. 12, 1988) (finding that the failure to detect errors is not reasonable when *no* deductions are made). Petitioner here noticed that "something" was being deducted for her FEGLI coverage.

And, given that Petitioner did not attempt to change her elections during the overpayment period, Petitioner might not have had reason to *ever* question the deductions based on the

[11] At the hearing, Ms. Hawkins gave the following example: an employee of one year who was prematurely promoted without spending time-in-grade would typically get a waiver, because that new employee is not expected to understand personnel rules for promotions.

information reflected on her Earnings and Leave statements.[12] See In re M, No. 16-30-WA, *5 (U.S. Dep't of Educ. Oct. 14, 2016) (considering that the employee was a new federal employee, and not an employee in the human resources who should be held to a higher standard because they have specialized knowledge in that area), *available at* https://oha.ed.gov/oha/files/2019/03/2016-30-WA.pdf; In re Fuesel, 1988 U.S. Comp. Gen. LEXIS 152, *1 (Comp. Gen. Feb. 2, 1988) (granting waiver because employee had no special knowledge of personnel law or payroll processes, reasonably relied on information provided her and was not advised that the payment was erroneous until nearly 2 years later); Miller, 1986 U.S. Comp. Gen. LEXIS 353, *4 ("Any *significant* unexplained increase in pay or allowances which would require a reasonable person to make inquiry concerning the correctness of his pay or allowances, would ordinarily preclude a waiver when the employee fails to bring the matter to the attention of appropriate officials." (emphasis added)). A review of the FEGLI Error Calculation sheet even demonstrates that Petitioner's Optional coverage premiums would have begun at $17.64 per pay period and only increased as Petitioner went up in age brackets. Even if the deductions were made to Petitioner's pay as expected, they might not have been sufficiently significant for Petitioner to have reason to question them. Therefore, it is reasonable that Petitioner did not have reason to question whether the appropriate FEGLI withholdings were being made.

B. Collection of this debt is not equitable.

Petitioner claims that collection of this debt would be inequitable. In support of this argument, Petitioner notes that the debt was caused by HUD's mistake in processing her enrollment. In addition, Petitioner claims that collection of this debt would cause her financial hardship.

There are no rigid rules governing the equity standard. In re A, No. 15-43-WA, *5 (U.S. Dep't of Educ. Sept. 4, 2015), *available at* https://oha.ed.gov/oha/files/2019/03/2015-43-WA.pdf. Therefore, the person deciding whether to grant or deny a waiver must "balance the equities" by considering multiple factors to determine whether repayment would be inequitable. Id. An "established reason it may be inequitable to require repayment of a debt would be if recovery of the claim would impose an undue financial burden upon the debtor under the circumstances." In re K, No. 15-40-WA, *5 (U.S. Dep't of Educ. July 24, 2015), *available at* https://oha.ed.gov/oha/files/2019/03/2015-40-WA.pdf. However, "the mere fact that an administrative error caused the overpayment does not immediately mean it would be against equity and good conscience of the United States to seek repayment." In re D, No. 13-28-WA, *6 (U.S. Dep't of Educ. Oct. 24, 2013), *available at* https://oha.ed.gov/oha/files/2019/03/2013-28-WA.pdf.

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[12] At the hearing, the Director testified that Petitioner should have realized, based on her Earnings and Leave Statement, that Optional coverage premiums were not being deducted. However, this argument is unfair. During the overpayment period, Petitioner's Earnings and Leave Statements reflected that she was receiving FEGLI Coverage based on her salary. There was no discernable indication that the coverage was for Basic coverage only. Cf. In re E, No. 15-61-WA, *5 (U.S. Dep't of Educ. Feb. 5, 2016) (finding that the employee was partially at fault because his Earnings and Leave Statements listed "FEGLI-REG" which should have put him on notice that withholdings for additional, optional coverage was not being taken from his pay), *available at* https://oha.ed.gov/oha/files/2019/03/2015-61-WA.pdf. Had the Earnings and Leave Statements also included a deduction for Optional coverage premiums, an additional line item would be included as it is currently reflected. Asking Petitioner to recognize that the Optional coverage premiums was missing from her Earnings and Leave Statements is akin to requiring Petitioner to identify something that is not there. Although personnel specialists such as the Director are accustomed to the nuances of Earnings and Leave Statements, it is reasonable to conclude that Petitioner never noticed the error on those documents.

Petitioner submitted a declaration explaining, "I am responsible for supporting my disabled adult son and my husband, who, because of a heart condition, had to retire early and can no longer work. It would be a serious hardship for me to pay for eleven years' worth of Option B coverage." Petitioner also testified credibly at the hearing as to the tragic circumstances affecting her family, and the burden she must bear to provide for three adults. Based on this evidence, it would be against equity and good conscience to collect the debt in this case. See e.g., In re J, No. 17-04-WA, *5 (U.S. Dep't of Educ. Mar. 23, 2017) (finding a $2,298.00 debt to be substantial in light of the employee's financial burdens), *available at* https://oha.ed.gov/oha/files/2019/03/2017-04-WA.pdf; A, No. 15-43-WA, at *5 (waiving an almost $1,000 debt and noting "financial obligations associated with caring for and supporting a family member or loved one can make repayment of a debt an undue, and inequitable, financial burden").

Based on the foregoing, the Court would likely have granted a partial waiver to Petitioner if the Court had the authority to review Petitioner's waiver request and/or the Chief Human Capital Officer's denial thereof.[13] Whether HUD would have reached a different decision after undergoing a more detailed review and analysis is unknown. However, the Court is confident that allowing the same office that made the mistake to decide whether to waive the debt that it caused is not equitable even if it is in the best interests of the Department or the federal government.

IV. Petitioner's repayment schedule should be reduced to mitigate the financial burden caused by the administrative error.

HUD proposes an offset of Petitioner's salary by $368.40 per pay period to satisfy this substantial debt.

The Court is authorized to determine the repayment schedule in salary offset cases. 24 C.F.R. § 17.95. Generally, installment deductions shall be made over a period not greater than the anticipated period of employment. 24 C.F.R. 17.105(b). If possible, the installment payment will be sufficient in size and frequency to liquidate the debt in three years. Id. Installment payments of less than $25 per pay period or $50 a month will be accepted in only the most unusual circumstances. Id. The circumstances at bar are most unusual.

Here, Petitioner has testified to the financial burdens her family has faced due to tragic circumstances requiring her to be the primary breadwinner as well as a caretaker for her adult son. Petitioner's testimony was credible, and absent evidence to the contrary, collection of this debt will cause Petitioner financial harm. Coupling this with the fact that the debt in this case was not Petitioner's fault, the Court finds that the payment schedule should reflect the circumstances of this case. Accordingly, the Court finds that Petitioner shall pay $50 per month until the debt is satisfied.

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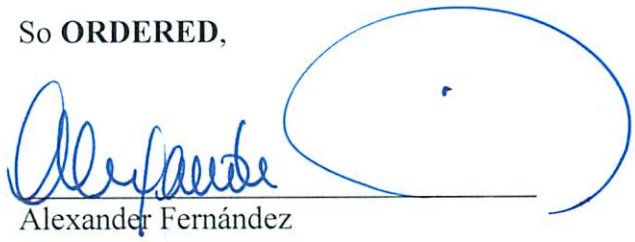
[13] The Court cannot conclusively say that a waiver of the total debt is warranted. Petitioner testified that after a few years, she began to understand the SF-50s being issued to her. Therefore, it is expected that Petitioner should have recognized that she only had Basic coverage at that time. At a minimum, Petitioner was notified of an error in her FEGLI coverage while she was at the Department of Agriculture. Although Petitioner claims she thought the mistake was "paper related" only, at that time Petitioner should have reviewed her SF-50 and/or her Earnings and Leave Statements and made further inquiries until the issue was resolved.

ORDER

The Court finds HUD's claim that Petitioner owes it a debt of $17,380.20[14] is valid although the Court disagrees with HUD's waiver decision. To satisfy this debt to HUD, Petitioner shall be required to pay no more than $50 per month until the debt is satisfied. Note that "*until the debt is satisfied*" is to be read regardless of pay status: active, retired, or otherwise. In no event shall the federal government collect more than $50 per month from Petitioner. And, the debt shall remain interest free. Petitioner is free to make lump sum payments, in all or part, at her discretion.

So **ORDERED**,



Alexander Fernández
Administrative Law Judge

Notice of Appeal Rights. A person suffering legal wrong because of a final agency action, or adversely affected or aggrieved by a final agency action, is entitled to judicial review of the agency action in a court of the United States pursuant to 5 U.S.C. §§ 701 to 706.

[14] Minus whatever garnished payments have already been paid.