

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

In the Matter of:

LINDA HOOKS,

Petitioner.

20-AF-0069-OH-001

August 20, 2020

Appearances:

Pamela Keith, Esq.
Temple Law Offices
For Petitioner

Jacqueline R. Baker, Esq.
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 Linda Hooks (“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”) seeking repayment of an alleged nontax debt totaling \$15,496.88 by offsetting a portion of her Social Security benefit payments. The debt originates from HUD’s advancement of unrequested annual and sick leave to Petitioner while she was hospitalized following a serious injury in April 2008. Petitioner subsequently separated from HUD employment in September 2010, but the outstanding negative balance of – 59.5 hours of annual leave and – 228 hours of sick leave was not returned to HUD. Petitioner requested a waiver of the debt on April 1, 2018, which was ultimately denied nearly a year later. Petitioner’s request for a hearing before this Court followed.

Upon receipt of the hearing request, the Court issued a Notice and Scheduling Order notifying the parties that the hearing would be limited to a review of the written record absent a showing of good cause for an oral hearing. Neither party requested an oral hearing. HUD filed a position statement and a copy of the Administrative Record on January 27, 2020 and filed an

amended position statement on March 27, 2020. Petitioner filed a reply on June 30, 2020. The record is now closed, and this matter is ripe for decision.

APPLICABLE LAW

Salary Offset. The Secretary of HUD (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). If the debt arises from an overpayment of salary, the employee may also request that HUD waive the claim for repayment under 5 U.S.C. § 5584.

Administrative Offset. The head of a government agency, like the Secretary, is also authorized to collect repayment of a debt owed by an individual to the United States via administrative offset. 31 U.S.C. § 3716. Administrative offset is the withholding of federal payments, such as Social Security benefit payments, due to an indebted individual in order to satisfy a claim. 31 U.S.C. § 3701(a)(1). After a determination that an individual is indebted to the United States, the Secretary must provide the individual with written notice of his intent to employ administrative offset a minimum of 60 days before referring the debt to Treasury for collection. 24 C.F.R. § 17.65. If the debt arises from an overpayment of federal pay or allowances, the individual may request that HUD waive the claim for repayment under 5 U.S.C. § 5584. As in salary offset cases, the individual may also request a hearing before this Court. 24 C.F.R. § 17.71. This Court’s role in administrative offset hearings is to reach a final agency decision regarding whether the debt is past due and legally enforceable. 24 C.F.R. § 17.73.

Waiver of Debt. Collection of amounts properly due may be waived by the agency if “collection of [the debt] would be against equity and good conscience and not in the best interests of the United States.” 5 U.S.C. § 5584(a). 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 3454, *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 conscience when it would cause financial hardship to the person from whom it is sought). Waiver determination must depend on the facts in each case because by statute “an indication of...fault...on the part of the employee” precludes waiver. *In re Phyllis J. Wright*, 1996 U.S. Comp. Gen. LEXIS 428, *3 (Comp. Gen. Aug. 27, 1996). Fault is considered to exist if it is determined that an employee exercising reasonable diligence should have known that an error existed but failed to take corrective action. *Id.*

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 Services ("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 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. The Chief Human Capital Officer's decision on the waiver request is final, as there is no appeal right in salary offset cases.

FINDINGS OF FACT

Petitioner was seriously injured on April 16, 2008, while she was employed as Assistant to Chief Procurement Officer at HUD. This injury damaged Petitioner's spinal cord and rendered her partially paralyzed. Following the injury, Petitioner was hospitalized, underwent surgery, and endured several months of intensive physical rehabilitation before returning home. In late October 2008, Petitioner returned to work. However, she left work again in late December 2008 after realizing the full impact the injury would have on her life. Petitioner is permanently disabled and has not worked since December 2008.

Petitioner was a relatively new government employee at the time of her injury. As such, she had not accrued enough annual or sick leave to cover the time she spent in the hospital. During an almost three-month time period following her injury, Petitioner's supervisor unilaterally decided to credit Petitioner's pay account with 232 hours of advanced sick leave and 77.5 hours of advanced annual leave.¹ It must be emphasized that there is no evidence demonstrating that Petitioner at any time requested or agreed to repay this advanced leave.

From July 6, 2008 through October 25, 2008, Petitioner went into leave without pay (LWOP) status and did not receive any monetary payment from the government. Petitioner alternated between regular pay status and LWOP status from October 26, 2008 through December 20, 2008. After late December 2008, Petitioner never returned to regular pay status and no longer received any monetary payments from the government. Petitioner was terminated from HUD for being absent without leave ("AWOL") on September 17, 2010.

On May 31, 2012, a bill in the amount of \$15,496.88, reflecting the unreturned advanced leave, was generated at the National Finance Center ("NFC"). Petitioner never received this bill or a Notice of Intent to Offset. Rather, Petitioner first became aware of the debt upon receipt of a letter from Treasury on March 2, 2018 which informed her that Treasury intended to withhold 15% of her monthly Social Security benefit payment. Petitioner submitted a request for a waiver of the debt on April 1, 2018.

¹ Although the Court generally does not assume the state of mind of the players before it, nothing but good intentions are assumed on the part of the supervisor's decision to credit Petitioner's account with the advanced sick and annual leave. Indeed, as a former supervisor, the Court acknowledges how difficult it is to see one's employees in life-altering situations.

In her waiver request, Petitioner argued that collection of the debt would cause a financial hardship and would be against equity and good conscience. Further, Petitioner claimed that she was denied her due process rights because she never received a Notice of Intent to Offset as required by 24 C.F.R. § 17.89. Petitioner repeatedly sought updates from HUD regarding the status of her waiver request throughout 2018. However, she received little guidance or information despite her attempts to elevate the issue within HUD's human resources administration. On December 7, 2018, a HUD representative informed Petitioner that the waiver request was pending signature of the deciding official.

Although Petitioner informed HUD of her current address multiple times throughout 2018, HUD sent its waiver decision to the incorrect address on March 5, 2019. Petitioner did not learn of this decision, nor did a HUD employee inform her of it, until months later. Rather, Petitioner received a second Treasury notice on September 29, 2019, again informing Petitioner of Treasury's intent to withhold 15% of her monthly Social Security benefit payment. On October 3, 2019, in response to this second notice, Petitioner contacted OCHCO to escalate adjudication of the waiver and suspend collection. Petitioner again contacted OCHCO on October 15, 2019, in an effort to ascertain the status of her April 2018 waiver request. On October 17, 2019, Petitioner finally learned of HUD's decision and received a copy of the letter denying her waiver request. Undoubtedly, absent her continuous efforts to communicate with HUD, Petitioner likely would never have received HUD's decision.

In HUD's response to the waiver request, HUD claimed that it had conducted a "complete review of the circumstances" regarding Petitioner's debt. This statement is laughable. Rather than addressing any of Petitioner's arguments, HUD simply stated that "[w]hen an employee is [*sic*] indebted for advanced sick or annual leave separates from Federal service, he or she is required to refund the amount of advanced leave or the agency may deduct that from any pay due to the employee upon separation." As a result, HUD denied the waiver, reasoning that "collection of this debt is being executed with equity and good conscience, and is in the best interest of the Department and the Federal Government."²

² As the Court has previously emphasized, whether collection is specifically "in the best interest of the Department" is not a valid consideration for waiver determination. See In re Steven Rawlins, HUDOHA 20-AF-0117-OH-002 (July 31, 2020). The 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.

DISCUSSION

HUD claims that Petitioner is indebted to it in the amount of \$15,496.88 resulting from unreturned payments of advanced annual and sick leave. Petitioner disputes the validity of the debt, arguing that the advanced payments were not the result of any action, choice, or agreement undertaken by her. Petitioner further requests reconsideration of her waiver request, claiming that collection will impose a financial hardship and is against equity and good conscience.

I. HUD has failed to prove that Petitioner owes a valid debt.

The head of a government agency, such as HUD, is authorized to deduct portions of an employee's pay if it has been determined that the employee is indebted to the United States. 5 U.S.C. § 5514(a)(1). HUD has the burden to prove the validity and amount of the debt. 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.").

HUD claims that Petitioner owes a valid debt totaling \$15,496.88 because she failed to repay the unearned annual and sick leave that her supervisor advanced to her. The statutes and regulations governing the advancement of unearned leave to federal employees are found at 5 U.S.C. §§ 6302 *et seq.* and 5 C.F.R. Part 630. The advancement of unearned annual leave "may be *granted*" to an employee at any time during the year in any manner prescribed by the head of an agency. 5 U.S.C. § 6302(d) (emphasis added). An agency "may *grant*" the advancement of unearned sick leave at the beginning of the year or when required by the exigencies of the situation. 5 C.F.R. § 630.402(a) (emphasis added).

In terms of repayment of properly granted leave, an employee who is indebted to an agency for advanced leave upon separation is generally required to repay the advanced leave. 5 C.F.R. § 630.209. However, if that employee's separation from the agency was caused by a "disability which prevents [her] from returning to duty," and the agency has determined this as the basis for separation upon medical evidence, then she is not required to repay. *Id.* § 630.209(b)(3).

HUD's dogged refusal to waive this purported debt suggests a fundamental misunderstanding of the English language and compels the Court to provide clarification. As defined by Merriam-Webster, the transitive verb "grant" means "to consent to carry out for a person" or "to permit as a right, privilege, or favor," such as "to grant a request."³ Thus, the granting of advanced annual or sick leave to a federal employee, as described in the relevant statutes and regulations, must be preceded by that employee's *request* for such leave.

³ See <https://www.merriam-webster.com/dictionary/grant> (August 20, 2020)

Here, HUD has failed to produce a single piece of evidence demonstrating that a request from Petitioner preceded her supervisor's advancement of the unearned annual and sick leave.⁴ Therefore, the Court finds that Petitioner played no part in the advancement of the unearned leave. It would be unconscionable to find that Petitioner, who was lying partially paralyzed in a hospital at the time these advancements were made, should be held legally responsible for her supervisor's unilateral (albeit very human) decision.

Further, Petitioner's injury may have imposed upon her a disability which prevented her from returning to duty, and HUD could have properly determined that any unreturned advanced leave (even if properly granted after a request) should have been waived under 5 C.F.R. § 630.209(b)(3). Accordingly, because Petitioner is not responsible for repayment of the erroneously advanced leave, the Court finds that the debt claimed by HUD is invalid and legally unenforceable.

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

Even if the Court assumes that Petitioner owes a valid and enforceable debt, which she does not, HUD's denial of Petitioner's waiver request raises serious concerns and further supports the argument that waiver requests decided "in-house" should be reviewable by another office.⁵ This is not the first time this issue has been broached by the Court. See In re Bonita G. Renner, HUDOHA 18-AF-0087-OH-002 (April 2, 2019); In re Steven Rawlins, HUDOHA 20-AF-0017-OH-002 (July 31, 2020).

In the denial of Petitioner's request for a waiver of the debt, HUD stated that it had conducted a "complete review of the circumstances" regarding Petitioner's debt. This is a bizarre statement, as HUD utterly failed to address any of Petitioner's arguments in support of the waiver.

After an eleven-month review process, the extent of HUD's analysis was a blithe repetition of two of Petitioner's numerous arguments in support of the waiver, followed by a boilerplate recitation of the general rule that unearned leave must be repaid upon separation. Nevertheless, 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." As in many other cases brought before this Court, the letter to Petitioner denying her waiver request is devoid of any analysis of how collection of the debt is being executed with equity and good conscience, or why it is in the best interest of the Department and the federal government.

Based on the information in the letter denying Petitioner's waiver request, the Court concludes that the only fact considered was Petitioner's failure to repay the advanced leave. This is deeply troubling, because not only does case law applying the general waiver statutes require

⁴ HUD's submission of a blank Repayment Agreement confirms there was no request. The form is BLANK. The Court yearns for the time when an eyeroll emoji becomes appropriate for inclusion in an opinion.

⁵ 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 EDUCATION, ADMINISTRATIVE COMMUNICATIONS SYSTEM, Handbook for Processing Salary Overpayments (Handbook, ACS-OM-04), pg. 7 (revised January 2012).

consideration beyond whether a debt exists, but the Court has previously made this requirement clear in similar cases involving waiver denials. See In re Imron A. Bhatti, HUDOHA 19-JM-0034-OH-001 (May 1, 2019); In re Bonita G. Renner, HUDOHA 18-AF-0087-OH-002 (April 2, 2019); In re Steven Rawlins, HUDOHA 20-AF-0017-OH-002 (July 31, 2020).

To deny a waiver simply because a debt exists, without analyzing the employee's individual circumstances, is to eviscerate due process requirements and abdicate administrative responsibility. *These opinions are written in an attempt to help administrators understand their responsibilities. If they are ignored, petitioners will continue to receive little, if any, due process.*

The following factors should also have been considered during the review of Petitioner's waiver request.

A. Petitioner is not at fault.

HUD has failed to show that the advanced leave resulted from any affirmative action by Petitioner. Ergo, there was no request. Regardless, HUD claims that Petitioner is at fault because she should have been aware of the advanced leave when reviewing her *Statements of Earnings and Leave* ("Pay Statements") and she should have subsequently addressed the issue with her supervisor upon return to normal duties.

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).

Here, there is no indication that Petitioner was aware of the annual and sick leave that had been advanced without her request. When the leave was advanced, Petitioner was recovering from a life-changing injury which left her hospitalized and prevented her from returning home for several months. It is unreasonable to expect an employee in this situation to prioritize a careful examination of their Pay Statements. However, it is reasonable to expect an employee's supervisor to inform the employee of their unilateral advancement of unrequested leave. There is no evidence that Petitioner was informed of the advanced leave by her supervisor at any point before, during, or after her temporary return to normal duties at HUD.

Because her supervisor failed to inform Petitioner of the unilateral advancement of unrequested leave, Petitioner first became aware of the "debt" owed to HUD upon her receipt of the first Treasury notice on March 2, 2018.

Collection of this debt would be inequitable.

Petitioner claims that collection of this debt would cause her a significant financial burden. In addition, Petitioner notes that the debt was caused by HUD's own affirmative conduct and did not flow from any act or request on her part. As HUD failed to consider these arguments in its denial of Petitioner's waiver, the Court is compelled to explain why collection of this debt, if valid, would be inequitable.

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>.

Here, Petitioner did not cause the advancement of unearned leave that led to this debt and bears no fault in failing to discover it. While this fact, standing alone, does not automatically determine that collection of the debt would be inequitable, the Court must also analyze Petitioner's current financial situation in order to weigh Petitioner's claim that collection of the debt would cause her a significant financial burden.

Petitioner is sixty-eight years old, permanently disabled, and unable to work. As a result of her injury, Petitioner finds it difficult to manage her day-to-day activities and requires medical care services. Petitioner's only sources of income to cover these necessary costs are her monthly Social Security benefit payment and her military retirement pay. If this debt was valid, and if HUD collected the debt according to its proposed repayment schedule, then Petitioner would be left with only \$750 per month from Social Security to cover her expenses.

After considering these factors, the Court finds that collection of the subject debt would cause Petitioner a significant financial burden. Because Petitioner bears no fault in this matter, and because collection of this debt will likely cause Petitioner a significant financial burden, it would be against equity and good conscience to collect the debt in this case.

Based on the foregoing, the Court would have granted a waiver to Petitioner if (1) the debt in this case was valid, and (2) if the Court had the authority to review Petitioner's waiver request and/or the Chief Human Capital Officer's denial thereof.

HUD's utter failure to provide any analysis of Petitioner's arguments, or of how collection of the debt would be executed with equity and good conscience, suggests that Petitioner's waiver request was never seriously considered. Whether HUD would have reached a different decision after undergoing any analysis is unknown.

ORDER

The Court finds HUD's claim that Petitioner owes it a debt of \$15,496.88 is invalid and legally unenforceable. Any offset of federal payments due Petitioner is **VACATED**. Any monies that may have been collected must be returned, with interest.

SO ORDERED.

**ALEXANDER
FERNANDEZ**

Digitally signed by: ALEXANDER
FERNANDEZ
DN: CN = ALEXANDER FERNANDEZ
C = US O = U.S. Government OU =
Department of Housing and Urban
Development, Office of the Secretary
Date: 2020.08.20 12:09:15 -04'00'

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.