

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

In the Matter of:

STEVEN RAWLINS,

Petitioner.

20-AF-0117-OH-002

July 31, 2020

Appearances:

Steven Rawlins

Pro Se

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 Steven Rawlins (“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 \$49,317.19 by offsetting his salary. The debt originates from HUD’s failure to properly code Petitioner as a reemployed annuitant at the outset of his employment in November 2014. This error resulted in Petitioner receiving both his full pay from HUD and his disability retirement payments from the United States Postal Service (“USPS”) until May 2018. Petitioner requested a waiver of the debt on February 12, 2019, claiming that he first became aware of the overpayment on May 16, 2018, when it was brought to his attention by a human resources specialist at HUD. On February 13, 2020, a HUD human resources executive denied Petitioner’s request to waive collection of the debt. Petitioner timely filed a hearing request with this Court on February 28, 2020, pursuant to 5 U.S.C. § 5514(a)(2)(D).

Upon receipt of the Petition, 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 request an oral hearing. HUD filed a position

statement and a copy of the Administrative Record on March 30, 2020. Petitioner filed a reply on April 24, 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.

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

On April 6, 2000, Petitioner began receiving disability retirement payments from USPS. Petitioner was hired by HUD on or around November 19, 2014, and indicated on his Declaration for Federal Employment that he received disability retirement pay from USPS. Because Petitioner was receiving a federal retirement annuity in addition to his salary as a federal employee, he should have been coded as a reemployed annuitant by the office in charge of payroll upon his hiring at HUD. Petitioner's federal salary, like that of all reemployed annuitants, should then have been offset by the amount of his retirement annuity.¹ See 5 U.S.C. § 8344; 5 C.F.R § 837.303.

Despite disclosing his USPS disability retirement pay, Petitioner was not coded as a reemployed annuitant when HUD hired him. HUD's error resulted in Petitioner receiving both his full federal pay and his annuity payments for 113 pay periods. It must be emphasized that this error did not flow from any deceptive conduct of Petitioner, as he properly disclosed his prior federal employment and retirement status on his Declaration for Federal Employment. Rather, this error occurred solely due to HUD's failure to properly exercise administrative oversight and diligence in the hiring process.

On or around May 16, 2018, after a random review of Petitioner's Official Personnel Folder, BFS contacted Petitioner seeking information on his reemployed annuitant status and informed him that the salary of a reemployed annuitant, absent a waiver, should be offset by the amount of his or her annuity payment. Prior to this correspondence in May 2018, Petitioner was unaware of the reemployed annuitant salary offset policy.

After Petitioner cooperated with BFS and provided the requested documents, BFS contacted Petitioner in July 2018 and provided him with two options to resolve the issue. The first option would immediately commence Petitioner's salary offset and result in the addition of any unpaid amounts to Petitioner's 2018 W-2. Petitioner chose the second option, which would see his salary offset commence in January 2019 and avoid the prospect of the debt being added to his 2018 W-2.

Petitioner submitted a request for a waiver of the debt on February 12, 2019, stating that the overpayment was not a result of his own error, expressing frustration that HUD did not realize its own mistake for almost four years, and claiming that the repayment of the debt would cause him a significant financial burden.

One month after the submission of the waiver request, on March 16, 2019, the National Finance Center ("NFC") sent Petitioner a notice of overpayment of salary and demand for payment. This initial bill reflected an overpayment of \$12,266.26 and explained NFC's intent to deduct approximately \$117.24 from Petitioner's bi-weekly pay. On April 16, 2019, NFC sent Petitioner a second notice of overpayment of salary and demand for payment, with an overpayment total of \$37,050.93 and an identical proposed pay period deduction. Because these

¹ The Office of Personnel Management may waive this salary offset requirement for reemployed annuitants. See 5 U.S.C. § 8344(i). There is no evidence in the record that Petitioner received such a waiver.

payments have not been returned to HUD, the total overpayment amount stemming from HUD's administrative error is \$49,317.19.

Petitioner received a response to his waiver request on February 13, 2020. In this response, HUD conceded that it was responsible for the error and that the overpayments resulted from a corrective action to code Petitioner as a reemployed annuitant. However, the letter also noted that had Petitioner reviewed his annuity statement, Petitioner would have been alerted to the error. 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

DISCUSSION

HUD claims Petitioner is indebted to it in the amount of \$49,317.19 resulting from salary overpayments that should have been withheld due to Petitioner's reemployed annuitant status. Petitioner does not dispute the validity or amount of the debt. Rather, Petitioner has requested reconsideration of his request for a waiver of the debt.

I. Petitioner owes HUD a valid debt in the amount of \$49,317.19.

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). The facts supporting the existence of a valid debt in this case are undisputed. Petitioner received overpayments not in accordance with his status as a reemployed annuitant for 113 pay periods during 2014-2018.

HUD has the burden to prove the 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.").

Petitioner was sent bills on March 16, 2019 and April 16, 2019. The bills collectively totaled \$49,317.19, which is the amount of the debt claimed by HUD. HUD has also provided documentary evidence, in the form of Petitioner's Statements of Earnings and Leave and Petitioner's Annuity Statements, demonstrating the amount of overpayment. Therefore, HUD has met its burden to prove the amount of the debt in question.

HUD has provided evidence showing that Petitioner received \$49,317.19 in overpayments over the course of 113 pay periods. These overpayments gave rise to a debt that Petitioner is obligated to return to the United States, and Petitioner does not dispute the validity

² Whether collection is specifically "in the best interest of the Department" is undoubtedly not a valid consideration for waiver determination. 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.

or amount of the debt. Accordingly, the Court finds that Petitioner is indebted to HUD in the amount of \$49,317.19.

II. 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). Nonetheless, an assessment of HUD's reasoning to deny Petitioner's request raises some concerns, and further supports the argument that waiver requests decided "in-house" should be reviewable by another office.³ 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 the denial of Petitioner's request for a waiver of the debt, HUD acknowledged that its own error resulted in Petitioner's overpayment. 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." The only reasoning cited in the denial, which was sent to Petitioner one year after his waiver request was submitted, was that Petitioner would have been alerted to the error had he reviewed his annual annuity statements. Aside from this statement, the letter to Petitioner denying his 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 receipt of his annuity statements during the overpayment period. This is especially troubling, because not only does case law applying the general waiver statutes require consideration beyond whether the error was evident on an employee's statements, 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). These opinions are written so they are considered in an attempt to help administrators understand their responsibilities. If they are ignored, petitioners may continue to receive little, if any, due process. In the Court's view, the following factors should also have been considered during the review of Petitioner's waiver request.

A. Petitioner is not at fault.

HUD admits that it caused the error that led to Petitioner's salary overpayment. However, HUD claims that Petitioner is partially at fault because he should have been aware of the overpayment after reviewing his annuity statements.

³ 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).

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, or should have been aware, that his federal pay should have been offset by his annuity payment upon the commencement of his employment at HUD. Petitioner acted in good faith when he disclosed his USPS retirement pay on his Declaration for Federal Employment, and there is no evidence that he was informed of the offset requirement prior to May 16, 2018. Petitioner complied with document requests from BFS when he was informed of the error and he has been cooperative throughout this process.

Further, there is no evidence supporting HUD’s position that Petitioner should have been made aware of the error when reviewing his annuity statements. Petitioner correctly states that, even after the government began reducing his annuity, there was no indication of such action in his statements. HUD’s claim that Petitioner should have been made aware of HUD’s own error by the omission of information on his annuity statements (information that remains omitted from his updated, offset annuity statements) fails to establish fault on the part of Petitioner and suggests a lack of good faith consideration from HUD.

B. Collection of this debt is not equitable.

Petitioner claims that collection of this debt would cause him a severe financial burden and may threaten his ability to keep his home. In addition, Petitioner notes that the debt was caused by HUD’s mistake and that it was not discovered until almost four years after his employment began. These concerns compel the Court to consider whether the collection of this debt 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 error that led to this debt and bears no fault in failing to discover HUD's mistake. 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 him a significant financial burden.

The average yearly salary for a federal employee at Petitioner's pay level (GS-7, step four) is \$41,030. Petitioner served in the military during the 1970s and has previously retired from a federal employment position. Therefore, it is likely that Petitioner, who alleges that he has health issues and is in danger of losing his home, is at or near retirement age. After considering these factors, the Court finds that the collection of the subject debt will likely 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 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. Whether HUD would have reached a different decision after undergoing any analysis is unknown. However, the Court is confident that allowing the same office that made the mistake to decide whether to waive the debt is not equitable, even if it is in the best interests of the Department or the federal government.

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

HUD proposes an offset of Petitioner's salary by \$117.24 per pay period to satisfy this 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 but may not exceed 15% of the employee's disposable pay unless the employee has agreed in writing to a greater amount. *Id.* Installment payments of less than \$25 per pay period or \$50 per month will be accepted in only the most unusual circumstances. *Id.* Despite the Court's sympathy for Petitioner's position, this case does not present those most unusual circumstances.

However, because Petitioner has claimed that the repayment schedule will cause him a severe financial burden, and because Petitioner bears no fault for the debt in this case, the Court finds that the repayment schedule should reflect these circumstances. Accordingly, the Court concludes that Petitioner shall pay \$25 per pay period until the debt is satisfied.

ORDER

The Court finds HUD's claim that Petitioner owes it a debt of \$49,317.19⁴ 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 \$25 per pay period 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 \$25 per pay period from Petitioner. And, the debt shall remain interest free. Petitioner is free to make lump sum payments, in all or part, at his discretion.

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
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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.

⁴ Minus whatever garnished payments have already been paid.