

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

In the Matter of:

**Roberto J. Hernandez,**

Respondent.

Case No. 23-JM-0130-OH-002

June 3, 2024

**INITIAL DECISION AND ORDER**

This matter is before the Court upon a request for hearing filed by Roberto J. Hernandez (“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 a non-tax debt totaling \$3,373.50. HUD seeks to collect the debt by offsetting a portion of HUD’s pending payment to Petitioner for accrued annual leave.

Petitioner is a former federal employee who was employed by HUD until December 31, 2021. The debt in question arises from contributions HUD made to Petitioner’s health benefit premiums while he was on Paid Parental Leave (“PPL”) for the birth of his child. HUD alleges Petitioner must repay the contributions it made for him because Petitioner did not complete a mandatory 12-week work requirement after the PPL ended. Petitioner maintains the birth of his child aggravated a medical condition that caused him to be unable to return to work to fulfill the 12-week work requirement. Petitioner submits that HUD should waive repayment of the health benefit premium debt for that reason.

**PROCEDURAL HISTORY**

The Court initially ordered a hearing limited to a review of the written record, but then granted Petitioner an oral hearing set for October 25, 2023. In addition to seeking recovery of the \$3,373.50 in health benefit premium contributions, HUD originally believed that Petitioner had not been approved to take PPL and, therefore, he also owed \$16,863.69 in salary compensation. HUD withdrew that allegation after determining that Petitioner had indeed been approved to take PPL. Based on that finding, HUD counsel requested continuance of the October 25, 2023, hearing to allow HUD time to reconsider, in light of Petitioner’s medical condition, a previous request he filed with HUD to waive repayment of the health benefit premium contributions, which HUD had also denied. On February 23, 2024, HUD informed the Court it would not reverse its denial of that request. Accordingly, the Court held the oral hearing

on March 25, 2024. Petitioner and HUD each submitted post-hearing briefs on April 22, 2024. The record is now closed.

### **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. See 5 U.S.C. § 5514 and 24 C.F.R. §§ 17.83 *et seq.* Upon determining that the employee is so indebted, the Secretary must, at least 30 days prior to the first pay deduction, provide the employee with written notice of the intent to offset the employee’s salary. See 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. See §§ 17.89(g) and 17.91(a). Hearings are conducted in accordance with 24 C.F.R. part 26, subpart A. See § 17.89(g).

**Paid Parental Leave.** PPL is, *inter alia*, paid time off in connection with the birth of a child to an employee who has a current parental role in connection with the child under the Family and Medical Leave Act. See 5 U.S.C. § 6382(d)(2)(B)(i) and 5 C.F.R. § 630.1203(a)(1). PPL is implemented under 5 C.F.R. §§ 630.1701 *et seq.*

An employee who is granted PPL is mandated to work no less than twelve additional weeks for the employing agency beginning on the first scheduled workday after the PPL concludes. See 5 C.F.R. § 630.1705. An employee who fails to do so may be required to repay: (1) the employing agency salary received during the PPL period; and (2) the employing agency’s contributions to the employee’s health benefit premiums during the PPL period. See § 630.1705(e) and (f).

**Waiver of health benefit contributions.** An employee who is unable to complete the 12-week work requirement may seek to have reimbursement of the employing agency’s contributions to the employee’s health benefit premiums waived. See 5 C.F.R. § 630.1705(e) and (f)(2). HUD’s review of such waiver requests is contained exclusively within the Office of the Chief Human Capital Officer (“OCHCO”). OCHCO’s determinations are not subject to the Court’s review, which as discussed, is limited to: (1) the existence or amount of the debt; or (2) the Secretary’s proposed offset schedule. See 5 C.F.R. § 630.1705(f)(2); 24 C.F.R. §§ 17.89(g) and 17.91(a).

**Waivers may be conditioned on a serious health condition.** OCHCO may not impose the reimbursement requirement if, in its judgment, the employee is unable to return to work for the required twelve weeks because of:

[t]he continuation, recurrence, or onset of a serious health condition (including mental health) of the employee or the child whose birth or placement was the basis for the paid parental leave, but, in the case of the employee’s serious health condition, only if the condition is related to the applicable birth or placement.

5 C.F.R. § 630.1705(f)(2)(i).

OCHCO's determination may be based upon a health care provider's certification of the same. OCHCO may also require additional examinations and certification from other such providers at its own expense if it deems it necessary. See § 630.1705(g).

**Agency reimbursement and waiver policies.** OCHCO is responsible for adopting its own set of policies governing when it will or will not apply the reimbursement requirement described in 5 C.F.R. § 630.1705(f). A single set of policies for HUD should be in place so that HUD employees are treated consistently. See 5 C.F.R. § 630.1705(g).

## FINDINGS OF FACT

Petitioner is a disabled combat veteran who, as a result of his service, is diagnosed with post-traumatic stress disorder ("PTSD"). Petitioner worked for HUD as a Program Analyst from October 2020 through December 2021. His supervisor was Frederick Shaw.

On October 12, 2021, Petitioner's child was born. On October 20, 2021, Petitioner emailed Mr. Shaw his PPL application. Included in his application was an "Agreement to Complete 12-Week Work Obligation" ("Agreement") signed by Petitioner. Therein, Petitioner agreed that failure to complete the required 12-week work obligation may require him to reimburse any contributions paid by HUD to maintain his health insurance coverage unless he meets statutory conditions that bar the required reimbursement.

The time and attendance code "FMLA Paid Parental Leave-Biological Birth" was added to Petitioner's on-line time sheet. From October 18, 2021, through December 31, 2021, Petitioner submitted time sheets claiming PPL, which were certified by Mr. Shaw and then processed. On December 20, 2021, Petitioner emailed Mr. Shaw that his last day at HUD would be December 31, 2021, because he was experiencing increasing difficulty due to his "injuries,"<sup>1</sup> and, in consultation with his care team, he determined that other employment would be in his best interest. The Court notes that December 31, 2021, was the last workday of that year, and as shown, Petitioner did not return to work at HUD after that date.

On March 15, 2022, OCHCO determined Petitioner had not fulfilled his 12-week work obligation. OCHCO also mistakenly believed Petitioner had not submitted a request for PPL or received prior approval to use PPL. On that basis, HUD sought to recoup the aforementioned \$16,863.69 from Petitioner. OCHCO denied a request from Petitioner to waive repayment of the \$16,863.69, based on that mistake.<sup>2</sup> As discussed *supra*, HUD eventually concluded that Petitioner's PPL had been approved, and withdrew that demand.

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<sup>1</sup> The Court infers Petitioner's reference to "injuries" refers to his PTSD, as he has disclosed no other injuries. This understanding aligns with Dr. Triebwasser's statement that Petitioner has been declared disabled by the U.S. Department of Veterans Affairs as a result of his PTSD.

<sup>2</sup> The Court is concerned that OCHCO may not act as a disinterested party when reviewing waiver or reconsideration requests, especially when the request arises as a result of OCHCO's own mistake. Such situations present an appearance of conflicting interests and a lack of unbiased due process. Here, it is perplexing that OCHCO could have initially found Petitioner had not submitted a request for or received approval for PPL when there was ample evidence indicating otherwise. Putting aside the PPL application that Petitioner emailed to Mr.

On April 7, 2023, Petitioner also asked HUD to waive, due to his PTSD, repayment of the contributions it made toward his health benefit premiums. He included a letter from Joseph Triebwasser, MD, his psychiatrist for over nine years, who is employed by the U.S. Department of Veterans Affairs. Dr. Triebwasser stated that Petitioner suffered from PTSD, for which he had been declared disabled by the Department of Veterans Affairs and it was his understanding that Petitioner's resignation occurred in the context of his PTSD, his associated child-care responsibilities, and work-related stress.

OCHCO initially denied that request based on its mistaken belief that Petitioner had not been approved for PPL. However, once it was determined that Petitioner had indeed been approved for PPL, HUD filed a *Motion for Continuance*, dated October 25, 2023, requesting time to reconsider that request in light of Dr. Triebwasser's letter.

Upon reconsideration, OCHCO again denied the waiver, in part, because HUD had agreed to waive the salary repayment "with the understanding that [Petitioner] would still be responsible for the Government's portion of [health benefit] premiums paid." However, during the March 25, 2024, hearing, HUD counsel stated they were unaware of such an agreement between HUD and Petitioner. In its post-hearing brief, HUD further confirmed that the Parties had not come to an agreement regarding HUD's demand for repayment of its contributions to Petitioner's health benefit premiums.

## DISCUSSION

In order to recoup its contributions to Petitioner's health benefit premiums, HUD seeks to withhold the \$3,373.50 from Petitioner's accrued annual leave payout of \$4,791.70. As HUD has now maintained its denial of Petitioner's request to waive that repayment, HUD contends Petitioner has no recourse but to do so because its denial is not reviewable by this Court. However, Petitioner claims HUD is required to waive the alleged debt because his PTSD is a serious health condition that, due to the birth of his child, caused him to be unable to return to work. As discussed below, the Court finds Petitioner must repay HUD the \$3,373.50, despite the lack of justification OCHCO provided in support of its denial of Petitioner's waiver request.

### I. HUD has Discretion to Deny Petitioner's Waiver Request.

Petitioner specifically contends the phrase "an agency may not impose the [reimbursement] requirement" in 5 C.F.R. § 630.1705(f)(2) requires HUD, i.e., OCHCO, to waive repayment when there is a serious health condition related to the birth of the child whose birth was the basis for the PPL. Petitioner also contends he did not agree to repay HUD the \$3,373.50 in exchange for HUD waiving its demand for repayment of the \$16,863.69.

However, by signing the Agreement, Petitioner consented to working the 12-week minimum and acknowledged the consequences of not doing so. Further, § 630.1705(f)(2) does

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Shaw, Petitioner would not have received the PPL time and attendance code, entered his continuing time and attendance online, and been certified and paid for 12 weeks of PPL had he not been approved. At the very least, such evidence indicates follow-up investigation was required. However, the record shows no consideration of that evidence in OCHCO's initial denial of Petitioner's waiver request.

not require OCHCO to waive the reimbursement requirement in light of Petitioner's PTSD if OCHCO determines that Petitioner's PTSD was not a serious health condition that, due to the birth of Petitioner's child, caused him to be unable to return to work. Rather, under § 630.1705(f)(2), granting the waiver "is at the *agency's sole and exclusive discretion*" and the determination that a serious condition prevented Petitioner from working the required twelve weeks is "*in the agency's judgment*." (Emphasis added). Thus, as the Court is limited only to determining whether the debt is owed. The Court is unable to review OCHCO's waiver denial, even though OCHCO provides no explanation for its denial based on the evidence before it, including the letter from Petitioner's long-time psychiatrist, Dr. Triebwasser, of the U.S. Department of Veterans Affairs.

Petitioner further argues that if OCHCO was not satisfied with his statement and the statement of Dr. Triebwasser, it was required to send him for an additional medical examination. However, 5 C.F.R. § 630.1705(g) merely states that HUD "*may* require additional examinations and certification from other health care providers." (Emphasis added). There is no requirement that HUD "must" or "shall" do so. See id. Here again, OCHCO's exercise of its decision-making is outside of the Court's discretion. Accordingly, as Petitioner agreed to the 12-week work requirement and OCHCO has denied his request to waive repayment of its contribution to his health benefit premiums due to his PTSD, HUD may offset the amount owed from the accrued annual leave payment due to Petitioner.

## II. OCHCO's Denial of Petitioner's Waiver Request Lacks Support.

Although the Court lacks jurisdiction to overturn OCHCO's denial of Petitioner's waiver request, the Court is deeply concerned over the lack of justification OCHCO provided in support of its denial. Specifically, 5 C.F.R. § 630.1705(f)(2) requires OCHCO to consider whether Petitioner's PTSD was a serious health condition that, due to the birth of his child, caused him to be unable to work the required twelve weeks. Although OCHCO states Petitioner's medical records were "taken into consideration," its denial provides absolutely no explanation as to why Dr. Triebwasser's letter was insufficient to grant the waiver.<sup>3</sup> Instead, OCHCO pins its denial on an agreement with Petitioner that did not occur, stating, in relevant part:

The agency has agreed to waive Mr. Hernandez' debt regarding repayment of his Paid Parental Leave in the amount of \$16,863.69 with the understanding that he would still be responsible for Government's portion of FEHB premiums paid in the amount of \$3,373.50. Therefore, the department's decision to deny this waiver request remains with the employee's responsibility for the premiums.

Simply put, OCHCO's denial should address Petitioner's medical condition, not an unrelated and never agreed to quid pro quo.

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<sup>3</sup> As OCHCO did not explain why the employee's health condition was insufficient to waive repayment, this suggests OCHCO did not consider opting to seek further certification and examination of the condition as permitted under § 630.1705(j).

Were it in the Court's purview, this matter would be remanded back to OCHCO for reconsideration due to lack of supporting analysis. In failing to provide its analysis, OCHCO neglects its responsibility to Petitioner, for whom several thousand dollars are at stake, and its responsibility to all similarly situated HUD employees.<sup>4</sup> Further, OCHCO's lack of a precise explanation flies in the face of 5 C.F.R. § 630.1705(j), which expressly tasks HUD with "adopting its own set of policies governing when it will or will not apply the reimbursement requirement . . . so that employees within an agency are treated consistently." OCHCO avoids this opportunity, only stating "the agency's policy is to review these records as part of the standard waiver request process." This merely states the obvious – that OCHCO reviews records as part of its waiver process, without identifying the existence or severity of claimed health conditions.

On the other hand, a policy is meant to inform HUD employees about *what* are the *criteria* used to review waivers so an employee can have some level of predictability. Here, OCHCO provides HUD employees with no criteria to determine what might constitute a serious health condition. In this instance, OCHCO, which is responsible for the welfare of all HUD employees, seems to have no concern for clarity and transparency.

Accordingly, although the Court recognizes HUD's delegation to OCHCO of sole and exclusive discretion and judgment in determining the disposition of Petitioner's waiver request as delegated to, the Court questions OCHCO's ability to do so in an impartial and transparent manner. Unfortunately, this is not the first time the Court has felt it necessary to speak out regarding OCHCO's review of such matters. See In re Bonita G. Renner, HUDOHA 18-AF-0087-OH-002 (April 2, 2019) (in denying Petitioner's request to waive repayment of insurance premiums erroneously deducted by OCHCO, no analysis of how collection of the debt was being executed with equity and good conscience, or why it was in the best interest of HUD and the federal government); In re Linda Hooks, HUDOHA 20-AF-0069-OH-001 (August 20, 2020) (failing to address any of Petitioner's arguments in response to waiver request). See also In re Steven Rawlins, HUDOHA 20-AF-0017-OH-002 (July 31, 2020). OCHCO's adjudication of these waiver requests raises serious concerns and further supports the argument that waiver requests decided "in-house" should be reviewable by another office.<sup>5</sup>

Finally, having conducted the hearing in this matter, and having considered the evidence and testimony presented at the hearing, if authorized to do so as an Administrative Law Judge, I would rule for the Petitioner, and deny the amount sought by HUD.<sup>6</sup>

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<sup>4</sup> Although not raised as an issue, the OCHCO decisions in this matter were all made after the Petitioner's separation as an employee, even though they dealt with his benefits as an employee.

<sup>5</sup> One solution would be for the Secretary to delegate the authority to grant or deny waivers to the Office of Hearings and Appeals, as the United States Department of Education has done within its department. See U.S. DEPARTMENT OF EDUCATION, ADMINISTRATIVE COMMUNICATIONS SYSTEM, Handbook for Processing Salary Overpayments (Handbook, ACS-OM-04), p. 7 (revised January 2012). See also <https://oha.ed.gov/salary-overpayment-matter/> ("The Office of Hearings and Appeals . . . is responsible for making determinations on the timeliness of . . . waiver requests, . . . issuing rulings on waiver requests and developing policies for the efficient processing of waiver . . . requests.") (last visited May 14, 2024).

<sup>6</sup> The transcript of the hearing in this matter, and the exhibits presented by the parties are available for appellate review by the Secretary or an appropriate federal court.

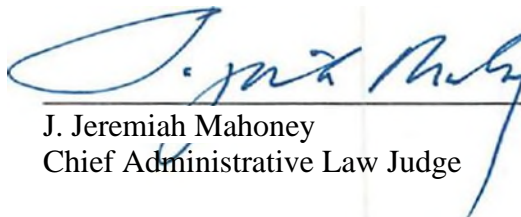
## INITIAL DECISION

The Court is not authorized to determine that HUD's claim, as decided by OCHCO, is other than valid and legally enforceable in the amount of \$3,373.50. Accordingly, it is:

**ORDERED** that the Secretary is authorized to offset the amount of the debt from the payment due the Petitioner for his unused annual leave. It is:

**FURTHER ORDERED** that the Order imposing a *Stay of Collection Proceedings* in this matter is **VACATED**.

So **ORDERED**.



J. Jeremiah Mahoney  
Chief Administrative Law Judge

**Notice of appeal rights.** The appeal procedure is set forth in detail in 24 C.F.R. §§ 26.25(f) and 26.26. This Order may be appealed by any party to the Secretary of HUD by petition for review. Any petition for review and the required brief must be received by the Secretary within 30 days after the date of this Order. An appeal petition shall be accompanied by a written brief, not to exceed 15 pages, specifically identifying the party's objections to the *Initial Decision and Order* and the party's supporting reasons for those objections. Any statement in opposition to a petition for review must be received by the Secretary within 20 days after service of the petition. The opposing party may submit a brief, not to exceed 15 pages, specifically stating the opposing party's reasons for supporting the ALJ's determination, or for objecting to any part of the ALJ's determination.

**Service of appeal documents.** Any petition for review or statement in opposition must be served upon the Secretary by mail, facsimile, or electronic means at the following:

U.S. Department of Housing and Urban Development  
Attention: Secretarial Review Clerk  
451 7th Street S.W., Room 2130  
Washington, DC 20410  
Facsimile: (202) 708-0019  
Scanned electronic document: [secretarialreview@hud.gov](mailto:secretarialreview@hud.gov)

**Copies of appeal documents.** Copies of any Petition for Review or statement in opposition shall also be served on the opposing party(s), and on the HUD Office of Hearings and Appeals.

**Finality of decision.** The agency decision becomes final as indicated in 24 C.F.R. § 26.26(m).

**Judicial review of final decision.** After exhausting all available administrative remedies, any party adversely affected by a final decision may seek judicial review of that decision in a United States Court of Appeals. A party must file a written petition in that court within 20 days of the issuance of the Secretary's final decision.