

**UNITED STATES DEPARTMENT OF EDUCATION**

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In the Matter of  
**ROBERT,**

**Docket No. 05-04-WA**  
Waiver Proceeding

Respondent

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**DECISION DENYING WAIVER**

This case emerges out of a request arising under a statute—the General Accounting Office Act of 1996 – authorizing the waiver of claims of the United States against debtors as a result of erroneous payment of pay to a federal employee.<sup>1</sup> The legal authorities pertinent to this waiver request draw from the aforementioned statute, the Department’s implementing regulations at 34 C.F.R. Part 32 (§ 32.1 *et seq.*), and the policy set forth in the U.S. Department of Education (Department) *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (June 2005).<sup>2</sup> Together, these legal authorities prescribe procedures for handling debts, authorizing deductions from wages of federal employees to pay debts to the United States for such things as salary overpayments, and setting standards for waiving those debts when appropriate.<sup>3</sup>

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<sup>1</sup> General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (5 U.S.C. § 5584); see also *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep’t of Educ. (June 14, 2005) at 1 & n.1 (setting forth the statutory framework governing debt collection by salary and administrative offset).

<sup>2</sup> See also government-wide regulations issued by the Office of Personnel Management (OPM) (5 C.F.R. Part 550, Subpart K) (OPM’s Subpart K regulations provide the standard followed by federal agencies when promulgating agency-specific regulations implementing 5 U.S.C. § 5514).

<sup>3</sup> When the Department issues a notice proposing a salary offset to satisfy an overpayment, the employee/debtor has the opportunity to request a hearing concerning the existence and correct amount of the overpayment, request a proceeding concerning the waiver of the debt in whole or in part, or request an opportunity to pursue both a waiver proceeding and a hearing. In addition to regulations promulgated by the Department, standards prescribed by the Department of Justice and the Department of Treasury govern administrative debt collection efforts those standards are widely known as the Federal Claims Collection Standards (FCCS). See 31 U.S.C. § 3711 (2000) and 31 C.F.R. ch. IX, Parts 900—904 (2000). Agencies are required to : (1) adopt the FCCS; or (2) prescribe agency regulations for collecting such debts by administrative offset, which are consistent with the FCCS, 31 U.S.C. § 3716.

The Handbook, ACS-OM-04, specifically delegated waiver authority involving all former and current employees of the Department to the Office of Hearings and Appeals (OHA), which, thereby, exercises waiver authority on behalf of the Secretary. The undersigned is the authorized waiver official who has been assigned this matter by OHA.<sup>4</sup> The resolution of this case is based on the matters accepted as argument, evidence, and/or documentation in this proceeding when considered as a whole, including the written statement and attached submissions of Respondent, the Department's Bill of Collection (BoC), and a telephonic confirmation by the BoC preparer, a Denver payroll representative, of Respondent's health premium deductions for pay periods 17-21, and pay periods 22--26, 1 and 2. This decision constitutes a final agency decision.

For reasons that follow, the circumstances of this case do not conform to the threshold factors warranting waiver. Therefore, Respondent's request for waiver is denied.

#### Procedural History

In the case at bar, on January 24, 2005, the United States Department of Education, Office of Management (OM), Human Resources Systems Team authorized the issuance of an initial notice of salary overpayment identifying that Respondent owed a debt to the Department in the amount of \$319.90.<sup>5</sup> The notice authorized the Department to initiate an offset of pay from the salary of Respondent for the incorrect collection of health benefit premium over five pay periods at the rate of \$63.98 per pay period (PP). The Bill of Collection (BoC) issued to Respondent states the basis of the overpayment was due to: "Employee changed health insurance plans to 105 from 104. Deduction of \$112.88 should have been deducted from July 25, 2004 (Pay Period 17). Incorrect premium collected thru Oct. 02 (PP. 21).  $\$63.98 \times 5 \text{ PP} = \$319.90$ . Employee owes \$319.90."

In response to the January 24, 2005 notice of overpayment, Respondent filed a timely waiver request of the overpayment on February 4, 2005, and submitted a statement and documents supporting the request with this filing. Respondent's initial filing with OHA was received on February 15, 2005. Respondent did not supply a copy of the BoC. A copy of the January 24, 2005 letter from the Department identifying the overpayment and the BoC, upon which it was based, was requested by the waiver official and received from Linda Barnes, the Department's Office of Human Resource representative on March 2, 2005. This was necessary to establish timeliness of the waiver request since Respondent did not include it with his February 4, 2005 filing.

An Order Governing Proceedings (OGP) was issued on March 3, 2005, allowing Respondent the opportunity to, among other things, fully identify and explain any facts

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<sup>4</sup> See, 5 U.S.C. 5584(b) (designating the exercise of authority held by the authorized official in waiver cases).

<sup>5</sup> Collection of health benefits premium overpayments is an established debt practice subject to waiver cases, as present. Specifically, the total amount of an employee's debt for the erroneous overpayment of pay and allowances includes both the amount the employee received directly and other amounts disbursed on his behalf for such items as Medicare, health benefits, savings, life insurance, retirement, and Federal and state tax withholding. See, DOHA Claims Case No. 98020429 (May 14, 1998).

and submit any documents which support his position by March 18, 2005. Following receipt of the OGP, Respondent called this office on March 11, 2004 to ask what, if anything further, he was required to do.<sup>6</sup>

Respondent's initial and sole submissions were delivered with his February 4, 2005, waiver/ hearing request. Respondent states he was requesting a change in his health benefits plan from family to a self only plan due to his wife's starting employment with separate health benefits, which eliminated his need to continue his Blue Cross/Blue Shield family health plan coverage. To support this change in health benefits plans, Respondent submits a copy of a fax transmitting a required form (Form 2809) entitled Health Benefits Election Form showing the change to Plan 104 (self only) (Attachment A) and a fax from Paula Garner, a Department representative for Health Benefits, notifying him that: "Your form has been processed effective 07-25-04. Your change will be reflected on your check effective August 17, 2004." (Attachment B).

Respondent submitted one earnings and leave statement for Pay Period #17 showing the deduction of \$48.90 for health benefits, the deduction amount he expected to see as dropped from \$112.88 to \$48.90, with the change for the period ending August 7, 2004. (Attachment C) There are no other earnings and leave statements to reflect the other 4 pay periods through pay period 21, upon which the overpayment claim is based. Respondent did not supply any other earnings and leave statements for the pay periods through the remainder of 2004.

After Respondent submitted his request to change health insurance plans and submitted Form 2809,<sup>7</sup> as required, he received an e-mail confirmation from Paula Garner, a Department representative for health benefits. Her email indicated that his form had been processed effective July 25, 2004, and this change would be reflected on his check effective August 17, 2004. During the period at issue, the cost of family coverage in BlueCross/Blue Shield is \$112.88 and the cost of self only coverage is \$48.90. Consequently, Respondent's request, if proper, would result in a lower deduction from his salary. After receiving Respondent's request, the Department, in pay period 17, deducted \$48.90 instead of \$112.88 and did so for five consecutive pay periods. Thereafter, the Department then determined that these deductions were erroneous because it found instead that Respondent owed a salary overpayment of \$319.90 for 5 pay periods.

Respondent uses correct plan codes when completing Form #2809. In fact, Respondent correctly lists in the enrollment section B that he elects to enroll in Blue Cross/Blue Shield Plan Code 104; and at Part C, he correctly lists his present plan as Code 105, for the change in enrollment. At Part D, which asks for an Event Code that

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<sup>6</sup> Despite Respondent's contact and inquiry with an OHA waiver representative on March 11, 2005, in which he was advised he might consider if he wanted to supplement the record, to add or clarify anything, in light of the OGP, Respondent submitted nothing further.

<sup>7</sup> Form 2809 is an OPM form entitled "Health Benefits Election Form." under the Federal Employees Health Benefits Program. Form 2809 contains certain instructions about the need to complete Parts A and G, and Parts B, C, D, E, and F as applicable.

permits the change, that is left blank; yet the date of (the blank or unspecified event) is given as 7/19/04. Respondent says that is the date of his wife's employment when she was entitled to new (separate) insurance coverage under her employment. He obtained a new health insurance card, which reflects a self only plan, under enrollment code 104, when his health provider, Blue Cross/Blue Shield, issued him his new health insurance card, on July 25, 2004. Based on filling out the required form, following Departmental instructions, and gaining a new insurance card (Code 104), Respondent believed the change was done and his wife was no longer covered and no longer entitled to receive medical services or to be reimbursed by this provider. However, what benefit entitlements continued or did not during the 5 pay periods is not a matter of inquiry in this waiver proceeding. Respondent insists his health benefits change was made correctly, allowing him to pay the lower premium for a self only plan.

### Discussion

The overpayment for which the Department seeks to collect from Respondent arises from the lowered health benefit premium deductions it collected from Respondent over 5 pay periods (PP 17—PP 21) when the Department should have continued collected at the higher premium, and not allowed the health benefits change Respondent was seeking. The Department calculates the deficient payments over those 5 pay periods, in its Bill of Collection (BoC). The Department finds Respondent's payment of \$48.90 caused a shortage per pay period of \$63.98. This shortage is the cost differential between the higher family premium (\$112.88) and the lower self premium (\$48.90). Multiplying this shortage by 5 yields \$319.90, the amount the Department seeks to collect.

### Fault Standard

A waiver proceeding is a narrowly focused proceeding: at issue is whether Respondent's arguments and submissions support a request that a portion or the entire overpayment be waived in accordance with the standards prescribed by statute and consistent with the case law and regulations promulgated by the Department. In a waiver proceeding, the debtor acknowledges the validity of the debt; consequently, issues regarding the existence or accuracy of debt are not before the tribunal. To the extent that Respondent's arguments or defense raise issues concerning the validity of the debt, they will not—because they cannot—be addressed in this proceeding. Respondent's argument that there was no overpayment because the Department withheld less from his paycheck with the change in health plan that the Department approved and processed goes to the accuracy of the debt and that is not for resolution here.

The standard for determining whether a waiver is appropriate considers, first, two threshold matters; namely, whether the overpayment to the Respondent constitutes an *erroneous payment of pay* and secondly, whether the Respondent *lacks fault*.<sup>8</sup> See *In re Richard*, Dkt. No. 04-04-WA (June 14, 2005). As discussed in *Richard*, a waiver of claims against a debtor is possible only where there is no indication of fraud,

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<sup>8</sup> See, *In re Richard*, Dkt. No. 04-04-WA (June 14, 2004) at n. 8, explaining the fact that the agency erred in making the overpayment does not relieve the overpaid person from liability.

misrepresentation, fault, or lack of good faith on the part of the Respondent, or any other persons having an interest in obtaining a waiver.

An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to the employee's salary. Moreover, it is clearly established that erroneous overpayment of pay and allowances includes both the amount the employee received directly and other amounts disbursed on his behalf for such items as health benefits, as here.<sup>9</sup>

The receipt of health benefits is premised upon payment of necessary premiums. An employee bears the responsibility of ensuring that the coverage he elects is supported by the required premium deduction, or an overpayment will result. Similarly, any change Respondent institutes in the coverage is his obligation to monitor and correct if he notices problems in the execution of coverage changes.

In determining whether Respondent does not lack fault, pertinent circumstances such as position, grade level, education, and training may be taken into consideration. In this respect, fault can derive from an act or failure to act. We can attribute that Respondent as a GS-13, Step 09 with a long history of federal service (per Service Comp Date 11/75) as reflected on his earnings and leave statement, would be familiar with the need to submit complete forms, like Form 2809, and not leave blank a Section (Section D) which justifies the proposed change on the Health Benefits Election Form, to correctly process a coverage change.

In this case, Respondent's failure to act to accurately and fully complete the necessary Form 2809 is the turning point. Without inclusion of the Event Code that permits change, required by that Section, or any notation on the Form listing the basis for the change we have an incomplete submission. In addition, Respondent's accompanying fax of Form 2809 with cover sheet contains no Event Code, or gives no basis for the proposed change since the cover sheet reflects a partial message and is illegible and undecipherable, after the words, "Per our conversation, I am faxing form 2809 to change my health insurance coverage from – [remainder is unreadable]" so there is no clarifying information there. Nor, does Ms. Garner's email back to Respondent supply the missing Event Code information.

Arguably a higher duty attached to Respondent's actions in seeking to make the change because he was attempting to do so in a non-Open Season period.<sup>10</sup> The timing of the change is important, as there is a need to satisfy a Qualifying Life Event (QLE) at that time, outside of open season.<sup>11</sup> During this period, Respondent had a duty to identify a qualifying life event (QLE) under the Table of Permissible Changes, which he did not do

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<sup>9</sup> See, DOHA Claims Case No. 98020429 (May 14, 1998) at n.5, *supra*.

<sup>10</sup> OPM provides an annual open season from the Monday of the second full workweek in November through the Monday of the second full workweek in December. Open season election generally will take effect the following January 1. See Federal Health Benefits Handbook (FEHB) for discussion of Annual Open Season, p. 22.

<sup>11</sup> Whether Respondent could meet the QLE criteria is beyond the purview of a waiver proceeding and no inquiry is appropriate in this decision.

at Section D. In particular, it is reasonable to assume a longtime federal employee would know it is necessary to properly complete a form to validly process a change in his self-interest and one beneficial to his paycheck by lowering an existing deduction. By the fact he was attempting the change in summer, a longtime federal employee would presumably know he was out of the Open Season period. Because he choose to do this at a non-Open Season time, in August 2004, he incurred a higher duty of care to supply all necessary information to effect the change he was seeking. The actions of a third party, Ms. Garner, do not correct this deficiency, eliminate it, or mitigate Respondent's failure to comply with this requirement.<sup>12</sup>

In applying the fault standard to this case, the tribunal concludes that Respondent does not lack fault. While the lower health benefits deduction (\$48.90) appeared on Respondent's PP 17, and that was expected and would not signify error to him, that lower amount only continued until PP 21, whereupon it suddenly ceased.<sup>13</sup> The cessation of that deduction would give a reasonable person, and arguably, one of Respondent's higher-grade level and long federal tenure, reason to know that an adjustment of premiums (and possibly benefits) was made, as corrective action. This fluctuation in premiums, and switchback to the higher one corresponds to the Department finding an error in salary payments. This would put an employee on notice that he had a duty to inquire about the accuracy of the salary payments when the lower deduction was abruptly stopped and the higher substituted forthwith. Respondent has shown neither that he met this duty, nor that he subsequently challenged the higher premiums as incorrect. This is inexplicable when Respondent continues to insist the Department allowed his benefits change, as sought. Moreover, the collection of the higher premium deductions as of PP 22, illustrates that had Respondent made an ongoing careful review of his earnings and leave statements, this would likely shed light upon the erroneous salary overpayments made in this case.

Finally, the equitable interests favoring waiver do not reach an employee who does not inquire into the validity or accuracy of his pay or attempt to bring the matter to the attention of an appropriate official when the circumstances clearly warrant doing so. Employees are expected to among other things, question discrepancies or unanticipated balances from salary payments. This Respondent did not do, and the tribunal concludes that Respondent is not without fault for the overpayment and, as such, waiver of his debt is not warranted under the circumstances of this case.

## CONCLUSION

The tribunal finds that Respondent should have known that an error in salary payment existed; as such, waiver cannot be granted in this case.

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<sup>12</sup> While the Department made/ certified the change, it abruptly ended the allowed change after 5 pay periods, recognizing the error made. Respondent is silent on the abrupt ending of the change.

<sup>13</sup> Per clarification from Darlene Bentley, Lead Technician of Payroll Operations Branch in Denver, and one of the signers of the BOC, she confirmed that Respondent was being charged for family coverage at the higher rate [\$112.88] for the following pay periods, Nos. 22, 23, 24, 25, 26 and 1 and 2, up to the 2005 benefits year.

## ORDER

Respondent requested waiver of the entire debt. Having found that circumstances of this case do not conform to the threshold factors warranting waiver, Respondent's request for waiver is DENIED.

Inasmuch as Respondent has also requested an offset hearing, that hearing will proceed upon notice from the Administrative Law Judge. In the interim, all collection efforts remain stayed on the salary overpayment.

So ordered this 23rd day of June 2005.

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Nancy S. Hurley  
Waiver Official

