



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS

In the Matter of

Docket No. 15-61-WA

E,

Waiver Proceedings

Respondent.

DECISION DENYING WAIVER

On November 5, 2015, Respondent, a Department employee, requested a waiver of a debt in the above-captioned proceedings in response to receipt of a debt letter providing notice that the Payroll Operations Division of the Department of the Interior identified overpayment of salary to Respondent in the amount of **\$442.10**. Respondent asserts that the overpayment arose from the Department's failure to collect sufficient deductions for the additional Federal Employees Group Life Insurance (FEGLI) coverage Respondent elected for himself and his family.

On November 10, 2015, an Order Governing Proceedings was issued, and after Respondent failed to timely respond, on December 3, 2015 an Order to Show Cause was issued, providing Respondent until December 18, 2015 to respond. On December 17, 2015, Respondent filed a sworn statement with supporting documentation. On December 21, 2015, an order was issued, providing Respondent with a final opportunity to "submit any further additional documentation in support of his waiver request" by January 25, 2016, and directing Respondent that on that date the file would be closed and I would "weigh the evidence presented to determine if Respondent has shown that a waiver is warranted in this matter." Respondent has filed no response to this final order. To clarify a final point, however, on January 28, 2016, I requested, and was provided, copies of Respondent's Leave and Earning Statements from Pay Periods 5 and 6 of 2007 and Pay Period 2 of 2016.

Therefore, before this Tribunal, therefore, are the following documents:

- (1) Respondent's request for a waiver, dated November 5, 2015;
- (2) Respondent's sworn statement, dated December 17, 2015;
- (3) A copy of the debt letter, dated October 7, 2015, from the Department of the Interior;
- (4) A copy of Respondent's Life Insurance Election Form, dated February 14, 2007;
- (5) 57 SF-50 forms, approved between January 30, 2007 and July 28, 2015;
- (6) An email chain, dated between July 8, 2015 and September 15, 2015, between Respondent and a Department Human Resources Employee.
- (7) Respondent's Leave and Earnings Statements from Pay Periods 5 and 6 of 2007; and

(8) Respondent's Leave and Earnings Statement from Pay Period 2 2016.

Reviewing these documents, this Tribunal concludes that Respondent has failed to meet the "fault standard" and, therefore, his request for a waiver must be denied.

In a waiver proceeding, the validity of the debt is assumed, but the Respondent argues that he or she should not be required to repay because of equitable considerations as well as because there is no indication of fraud, misrepresentation, fault, or lack of good faith by Respondent or anyone else having an interest in obtaining the waiver.¹

When requesting a waiver, Respondent is expected to: (1) explain the circumstances of the overpayment; (2) state why a waiver should be granted; (3) indicate what steps, if any, Respondent took to bring the matter to the attention of the appropriate official or supervisor and the agency's response; and (4) identify all the facts and documents that support Respondent's position that a waiver should be granted.

JURISDICTION

The waiver authority involving former and current employees of the Department was delegated to OHA,² which, thereby, exercises authority and jurisdiction on behalf of the Secretary of Education to waive³ claims of the United States against a former or current employee of the Department.⁴ Similarly, 5 U.S.C. § 8707(d) provides authority to waive overpayments directly arising from a failure to collect sufficient FEGLI deductions. The

¹ Under waiver decisions issued by the Comptroller General interpreting 5 U.S.C. § 5584, "pay" has been held to include "nonpay" or nonsalary compensation, which covers recruitment bonuses, accrual of annual leave, health and life insurance premiums, retention allowances, and all forms of remuneration in addition to salary. *See In re T*, Dkt. No. 13-40-WA (Dec. 5, 2013) at 2 n.5.

² The Department's policy is set forth in the U.S. Department of Education, Administrative Communications System Departmental Handbook, HANDBOOK FOR PROCESSING SALARY OVERPAYMENTS (ACS-OM-04, revised Jan. 2012).

³ *Waiver* is defined as "the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee to an agency as [provided] by 5 U.S.C. 5584 . . . or any other law." 5 C.F.R. § 550.1103 (2014).

⁴ *See* General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828 (codified at 5 U.S.C. § 5584) (the Waiver Statute). The law of debt collection is extensive. *See, e.g., In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at 1 & n. 1 (setting forth, more fully, the statutory framework governing salary overpayment debt collection; *see also* 5 U.S.C. § 5514 (2012) and 31 U.S.C. § 3716 (2012) (these statutory sections constitute significant provisions of the Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, April 26, 1996, 110 Stat. 1321). The Department's overpayment procedures may be found on the OHA website at: <http://oha.ed.gov/overpayments.html>.

undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁵ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. § 5584.

PROCEDURAL HISTORY

In May of 2015, Respondent was being sent on a work trip and his wife asked him to confirm that his insurance coverage was in place. Respondent states that when he was hired by the U.S. Department of Education in February of 2007 he filled out the FEGLI and chose all available coverages for himself and his dependents at the maximum multiples. In May or June of 2015,⁶ Respondent checked his paycheck and noticed that insufficient deductions were taken from his pay for the additional life insurance coverage he elected. In response, Respondent looked back at the Notice of Personnel Actions (SF-50s) from when he was hired and found that an error had been made in processing his life insurance coverage, resulting in only basic coverage, not the additional coverage for himself and his family he elected. Respondent indicates that May of 2015 was the first time he learned of this error. Respondent states that after discovering the error, he contacted HR and a human resources specialist initiated the correction which resulted in \$442.10 of overpayments. After receiving notice of the debt arising from the overpayment, on November 5, 2015, this Tribunal received Respondent's waiver request. After Respondent submitted his filings and the information requested by this Tribunal was received, the record was closed on January 28, 2016.

Respondent first argues that he is not at fault for the overpayment. Specifically, he states that when he contacted HR about his FEGLI status in 2015, the HR department found that the error was on their side. Additionally, Respondent asserts that he acted in good faith in completing the form when he was initially hired in 2007 and by contacting the HR department once he learned of the error in 2015. Respondent also states that because he was new to federal employment and had no need to use the life insurance from 2007 to 2015, it did not occur to him to check his FEGLI coverages. Respondent contends that he was not aware of the problem prior to May 2015 and had no reason to think HR would make this mistake.

Respondent also asserts that requiring repayment of the overpayments would be inequitable as it would result in an undue financial hardship. Specifically, Respondent has stated he is currently supporting himself and four dependents on his income alone, and repaying this debt would be a hardship for his family.

⁵ See 5 U.S.C. § 5584(b) (2012) (noting the authority held by the authorized official in waiver cases).

⁶ Respondent's sworn statement indicates he learned of the error in May 2015, while his request for a waiver indicates he first learned of the error in June 2015. His fact, however, does not change the analysis of when he should have known of the overpayment, the factor which dictates the outcome of this matter.

DISCUSSION

It is well established that “no employee has a right to pay that he or she obtains as a result of overpayments.”⁷ Waiver of an erroneous salary payment is an equitable remedy available only when there is no indication of fraud, misrepresentation, fault, or lack of good faith by the debtor (fault standard).⁸ Additionally, for a waiver to be granted, the debtor must also demonstrate that collection of the debt would be against equity and good conscience or not in the best interests of the United States (equity standard).

In waiver cases, the fault standard has specialized and particular meaning. “[F]ault is examined in light of the following considerations: (a) whether there is an indication of fraud; (b) whether the erroneous payment resulted from an employee’s incorrect, but not fraudulent, statement that the employee under the circumstances should have known was incorrect; (c) whether the erroneous payment resulted from an employee’s failure to disclose to a supervisor or official material facts in the employee’s possession that the employee should have known to be material; or (d) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.”⁹ The rule has consistently been that an employee is required to check his or her leave and earnings statement (LES) and an employee should know of an overpayment if there is an indication of the overpayment on the employee’s LES.¹⁰

As a starting point, there is no indication that the overpayments at issue in this matter resulted from Respondent’s fraud, actions, statements, or failures to disclose information. And, there is no indication that Respondent actually knew of the overpayments until he checked his LES in 2015 around the time he was leaving for his trip. Respondent’s request for a waiver, however, cannot be granted, because the LES statements Respondent received throughout the time Respondent received the overpayment indicated to Respondent that he was receiving the overpayments of salary.

Most Department employees are eligible for basic life insurance coverage under the FEGLI, for which the payroll office deducts a premium from the employee’s pay to cover the employee’s share of the costs of the basic coverage.¹¹ An employee may elect additional coverage for himself or herself and his or her family, but if the employee makes that election, an additional deduction for the expenses related to the additional coverage would be taken from the employee’s pay.¹² In this case, the overpayment arose from the fact that Respondent elected to receive additional coverage, but for over eight years the Department only deducted the costs

⁷ *In re Danae*, Dkt. No. 13-28-WA, U.S. Dep’t of Educ. (Oct. 24, 2013) at 4; *In re Carolyn*, Dkt. No. 11-02-WA, U.S. Dep’t of Educ. (Aug. 11, 2011) at 4.

⁸ *See In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep’t of Educ. (Dec. 12, 2005).

⁹ *See In re Robert*, Dkt. No. 09-10-WA, U.S. Dep’t of Educ. (Nov. 19, 2009) at 3.

¹⁰ *See In Re Danae*, Dkt. No. 13-28-WA, U.S. Dep’t of Educ. (Oct. 24, 2013) at 3, 4; *In re Lester*, Dkt. No. 11-47-WA, U.S. Dep’t of Educ. (Dec. 27, 2012) at 4; *In re April*, Dkt. No. 12-23-WA, U.S. Dep’t of Educ. (July 11, 2012) at 7.

¹¹ *In re Jason*, Dkt. No. 10-01-WA, U.S. Dep’t of Educ. (Aug. 24, 2010) at 2.

¹² *Id.*

associated with basic coverage and failed to deduct the costs associated with the additional coverage.

In many ways, this case is very similar to *In re Jerry*.¹³ Like Respondent in this matter, the employee in *In re Jerry* elected additional life insurance coverage, but because of an error in processing, deductions were only taken for basic, not the additional, life insurance. In that matter, however, this Tribunal denied the employees request for a waiver, noting that the employee should have known of the overpayments throughout the time the Department failed to properly deduct the costs of the additional coverage. Specifically, this Tribunal noted that in addition to an SF-50 received by the employee shortly after he began unemployment that listed his FEGLI coverage as “basic,” the employee was put on notice of the error based on two LES statements which showed a deduction for basic coverage, but did not show deductions for additional coverage. This Tribunal, therefore, determined:

A review of Respondent’s LES statements reveals that Respondent should have known that an error existed and that premiums for the additional optional FEGLI coverage he requested were not being deducted from his pay. Therefore, because Respondent was on notice from his LES statements that premiums were not being deducted for his additional optional FEGLI coverage and he failed to examine his LES statements, he is not without fault.¹⁴

At my request, the Department’s human resources office submitted two of Respondent’s LES statements from 2007 and Respondent submitted his most recent LES statement from 2016. A comparison of the two statements shows that, while Respondent’s most recent LES statement lists deductions for “FEGLI – Optional,” “FEGLI-Family,” “FEGLI-Additional,” and “FEGLI-Regular,” Respondent’s two LES statements from pay periods 5 and 6 in 2007, only show deductions for “FEGLI-REG.” Respondent has an obligation to check his LES statements. And, like the employee in *In re Jerry*, Respondent was on notice of the overpayments from the fact that, unlike his current LES statements, there were no deductions on his prior LES statements for FEGLI coverage beyond basic coverage. Because Respondent was on notice of the error throughout the time he received the overpayments, he, like the employee in *In re Jerry*, is not without “fault,” and his request for a waiver must be denied.¹⁵ This decision constituted a final agency decision.

¹³ Dkt. No. 05-29-WA, U.S. Dep’t of Educ. (Feb. 16, 2006)

¹⁴ *Id.* at 5.

¹⁵ Because Respondent has failed to pass the fault standard, and his waiver request must, therefore, be denied, it is not necessary to determine whether repayment is inequitable.

ORDER

Pursuant to the authority of 5 U.S.C. § 5584 (2012), Respondent's request for waiver of the entire debt to the United States Department of Education in the amount of **\$442.10** is **HEREBY DENIED**.

So ordered this 5th day of February 2016.

Daniel J. McGinn-Shapiro
Waiver Official