



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202-4616

In the Matter of

TAMMY,

Respondent.

Docket No. 05-20-WA

Waiver Proceeding

DECISION DENYING WAIVER

This proceeding concerns a U.S. Department of Education (Department) employee's request for waiver of a salary overpayment of \$403.87.¹ The waiver request arises under 5 U.S.C. § 5584, authorizing the waiver of claims of the United States against debtors as a result of an erroneous payment of pay to a federal employee.² The Department has also promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 *seq.*), and set forth policy governing the overpayment process in its *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (June 2005). Together, these legal authorities prescribe procedures for processing salary overpayments made to current or former federal employees and set standards for waiving those debts. The Handbook, ACS-OM-04, specifically delegated the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).

The undersigned is the authorized waiver official who has been assigned this matter by OHA. 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 Respondent's initial request for waiver and attached documentation. This decision constitutes a final agency decision.

¹ The overpayment is identified as File No. 05LCBWAG2 in the June 3, 2005 notice.

² See General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828 (Act); see also *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005), footnote # 1.

PROCEDURAL HISTORY

On June 3, 2005, the Department's Office of Management (OM) authorized the issuance of an initial notice of salary overpayment and attached Bill of Collection (BoC) identifying that Respondent owed a debt to the Department. The BoC stated that health insurance premiums were not collected from Pay Period 02 of 2005 through Pay Period 09 of 2005.³ The pay periods at issue (Pay Period 02 - Pay Period 09) run from December 26, 2004 through April 16, 2005. For each of the seven pay periods, Respondent's share of her health insurance premium was \$50.71. When added together, (7 x \$50.71), the overpayment totals \$403.87. By letter dated June 22, 2005, Respondent filed a written request for waiver, however, Respondent neglected to submit a copy of the NDL or BoC. On July 7, 2005, at the tribunal's request, Respondent filed a copy of the June 3, 2005, NDL and BoC.

In a July 12, 2005, Order Governing Proceedings, Respondent's request for a waiver was deemed timely and Respondent was ordered to submit a short statement that included an explanation of the circumstances of the overpayment and why Respondent believed a waiver should be granted. The July 12, 2005, Order also directed Respondent to fully identify and explain with reasonable specificity all the facts, documents, and sworn statements, if any, which Respondent believed supported her position. Respondent did not submit anything in response to the tribunal's July 12, 2005, Order.

On October 14, 2005, the tribunal issued an Order Re Further Proceedings directing Respondent to file a short statement in conformance with the tribunal's July 12, 2005, Order. Respondent was further instructed to submit the following documentary evidence:

1. Documentation regarding any unreimbursed medical expenses incurred during Pay Periods 02 through 09 of 2005.
2. Documentation that she had submitted and/or received reimbursement from Blue Cross/Blue Shield for medical expenses incurred during Pay Periods 02 through 09 of 2005.
3. Copies of her leave and earnings statements for Pay Periods 01 through 10 of 2005.
4. Statement regarding when she began her employment at the Department.

Respondent's submission was due on or before October 28, 2005. To date, Respondent has failed to comply with the tribunal's October 14, 2005, Order. Consequently, to her peril, Respondent's initial submission constitutes the complete record upon which the decision in this case is based.⁴

³ It is apparent from the BoC, that the overpayment at issue constitutes an erroneous payment of pay. An erroneous salary overpayment is created by an administrative error in the pay of an employee in regard to the employee's salary. *See* 34 C.F.R. Part 32 (2004). The Department's error was in its failure to deduct health insurance premiums during the period at issue.

⁴ Pursuant to the Handbook, ACS-OM-04, and the tribunal's orders, a debtor bears the burden of demonstrating why a waiver should be granted including the submission of any documentary evidence, which the debtor believes supports his or her request that a waiver be granted.

DISCUSSION

At issue in this case is whether Respondent's arguments and submissions support a request that a portion or the entire overpayment be waived in accordance with standards prescribed by statute and consistent with the case law and regulations promulgated by the Department. Waiver of an erroneous payment of pay is possible only when the debtor demonstrates that he or she is not at fault in accepting or not recognizing an overpayment of salary. Moreover, the debtor must also demonstrate that collection of the debt would be against equity and good conscience, and not in the best interests of the United States.

Fault Standard

The standard for determining whether a debtor is at fault in accepting or not recognizing an overpayment is whether, under the particular circumstances, a reasonable person should have known or suspected that he or she was receiving more than their entitled salary.⁵ An employee who knows or should know that he or she received an erroneous payment is obliged to return that amount, or set aside an equivalent amount for refund to the government when the error is corrected.⁶ Pertinent circumstances such as an employee's actual knowledge of the overpayment as well as whether a review of documents available to the employee would have revealed the salary overpayment, may be taken into consideration in assessing the reasonableness of an employee's failure to recognize an overpayment.⁷ Furthermore, where a reasonable person would have made inquiry, but the employee did not, then he or she is not free from fault.⁸

Respondent argues that she should not be held responsible for the overpayment at issue because she did not request termination of her health insurance coverage and that she diligently attempted to correct the undesired termination of her health insurance coverage. In her June 22, 2005, request for waiver, Respondent states that she requested Blue Cross/Blue Shield (BC/BS) health insurance coverage when she began her tenure at the Department, and was under the impression that such coverage was in place. On April 11, 2005, Respondent states that she attempted to fill a prescription at her pharmacy and was informed that she was not covered.⁹

Respondent indicates that she was not aware that her BC/BS coverage was cancelled until she attempted to fill a prescription in April 2005. According to Respondent, she contacted BC/BS immediately and was informed that Department personnel had terminated her account.

⁵ See *In re Danielle*, Dkt. No. 05-18-WA, U.S. Dep't of Educ. (October 11, 2005).

⁶ See *id.* and 5 U.S.C. § 5584.

⁷ See *id.* and *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

⁸ See *id.* and *In re Vincent L. Brown*, Dkt. No. D 2003-118, U.S. Dep't of Int. (August 5, 2004).

⁹ Respondent states that she paid for this prescription and a second prescription out of her own pocket during this time.

Respondent further states that she contacted her supervisor as well as her regional personnel office, and informed them of her apparent lack of coverage. Respondent asserts that her regional personnel office was unresponsive. Respondent also states that her BC/BS coverage was inadvertently terminated once before, in December 2004, and that she found out about this during a visit to her physician. After this occurrence, Respondent contacted her supervisor and was informed that her insurance was reactivated. Respondent also states that her BC/BS coverage is currently active.

In applying the fault standard to this case, the tribunal concludes that Respondent does not lack fault. As an initial matter, the tribunal notes that it is unclear whether Respondent gained the benefit of health insurance coverage for the period in question.¹⁰ Additionally, when an employee has records at his or her disposal, such as leave and earning statements (LES), the employee has a duty to monitor these records and to correct any errors. Specifically, Respondent had a duty to review her LES statements and other documentation to ensure that her health insurance premiums were being deducted from her pay.¹¹

Although Respondent submitted evidence that she attempted to correct the problem after April 2005, Respondent did not submit copies of her LES statements as directed by the tribunal. The tribunal notes that the Department's LES statements identify the amount of health insurance premiums paid both by the employee and the Department as separately itemized deductions. A review of Respondent's LES statements should have alerted her that health insurance premiums were not being deducted from her pay.¹² Although Respondent attempted to have her health coverage reinstated, she only did so in response to her claims apparently being denied in April and May 2005. The record does not establish that Respondent made any attempt to ascertain why health insurance premiums were not being deducted from her pay for seven pay periods. Consequently, her actions in seeking reinstatement of her BC/BS coverage do not ameliorate her apparent failure to monitor her LES statements and recognize that she was being overpaid.

¹⁰ While in her initial request for waiver Respondent indicates that she was not covered by BC/BS for the period at issue, Respondent failed to submit a statement and/or any documentation regarding whether she was insured, perhaps retroactively, for the period at issue.

¹¹ *See In re [Redacted]*, DOHA Claims Case No. 0032801, (Defense Office of Hearings and Appeals [DOHA]) (April 21, 2000).

¹² Respondent did not submit any documentation or statement explaining why she may have failed to notice that health insurance premiums were not being deducted from her pay. Additionally, Respondent should also have been alerted to the potential problems regarding her health insurance coverage given Respondent's statement that her coverage may have been temporarily in question once before in December 2004. When an employee has reason to suspect a problem with his or her pay, it is reasonable to expect that an employee would more closely monitor documents, such as LES statements, to ensure that the matter was resolved.

Equity and Good Conscience

In reviewing whether collection of a debt would go against equity and good conscience, the tribunal may consider whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment,¹³ which may include whether the debtor suffered any financial harm due to the basis for the overpayment (i.e. loss of an employee's medical insurance and uncovered medical expenses). It is not inequitable, however, for an employee to pay for health insurance coverage, which she elected.¹⁴

Respondent raises an equitable argument that she should not have to pay for health insurance coverage that she did not receive. Respondent, unfortunately, has failed to submit documentation regarding her coverage or lack thereof for the period at issue. Respondent also failed to submit documentation regarding any out-of-pocket expenses she incurred. Therefore, the tribunal is unable to determine whether Respondent ultimately gained the benefit of health insurance coverage for the period at issue; consequently, Respondent also fails to demonstrate that it is inequitable for her to pay the BC/BS premiums for the period in question.

CONCLUSION

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

ORDER

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

So ordered, this 9 day of November 2005.



Greer Hoffman
Waiver Official

¹³ See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005) at 7.

¹⁴ See *In re [Redacted]*, DOHA Claims Case No. 02040401 (Defense Office of Hearings and Appeals [DOHA]) (May 21, 2002).