



UNITED STATES DEPARTMENT OF EDUCATION

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November 15, 2005

In the Matter of
DARRYL,

Docket No. 05-23-WA
Waiver Proceeding

Respondent

DECISION DENYING WAIVER

This proceeding is based on a U.S. Department of Education (Department) employee's request for waiver of a salary overpayment of \$ 637.50.¹ 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 promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 *et. 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 handling debts, authorizing deductions from wages of federal employees and/or former employees to pay debts to the United States for such things as salary overpayments, and setting standards for waiving those debts.³ 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 statements and attached documentation, the Department's Bill of Collection (BoC), SF-50s, Notification of Personnel Action forms, documents generated by the Federal Personnel Payroll System (FPPS), and one LES submitted

¹ The overpayment is identified as File No. 05LCBIS1 in the August 30, 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 Education (June 14, 2005) (footnote#1).

³ When the Department issues a notice informing the employee/former employee of a salary overpayment, the alleged debtor has the opportunity to request a hearing concerning the existence and correct amount of the overpayment and/or modification of the repayment schedule due to financial hardship, to request a waiver of the debt in whole or in part, or to request an opportunity to pursue both proceedings.

by Respondent with qualifying “cover” message submitted by Respondent.⁴ 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

On August 30, 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 the overpayment arose from: personnel correction to FEGLI options effective 6/29/05 pay period 200315. Employee FEGLI benefits changed from 90 (Basic & additional option with 3X pay) to X0 Basic & additional option with 5X pay & standard option). Employee owes additional coverage for the standard selection for FEGLI. Bill is for pay period 200315 through 200516. Per audit and RCMP report⁵ employee owes \$637.56. By letter dated September 13, 2005, Respondent filed a written request for waiver.

In a September 15, 2005, Order Governing Proceedings, Respondent’s request for a waiver was deemed timely. On September 29, 2005, Respondent filed a statement and documents supporting his waiver request. Subsequently, the tribunal contacted Respondent directing him to conform his filing to sworn statement criteria. Respondent was allowed additional time to do that and to submit supplemental affidavits on or before November 3, 2005. No additional affidavits were received and the record is now closed. These submissions constitute the complete record upon which the decision in this case is based.

DISCUSSION

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 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 the debt are not before the tribunal. A waiver of claims of the United States against a debtor arising out of erroneous payments of pay is possible only when the collection of the erroneous payment would be against equity and good conscience, and not in the best interests of the United States. In addition, only when there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of Respondent, or any other persons having an interest in obtaining a waiver may waiver be granted.

⁴ Collection of life insurance overpayments (FEGLI premium overpayments) is an established debt practice subject to waiver cases. *See, In the Matter of Ruth Chandler*, 1995 WL 390081 (Comp. Gen.), B-261481 (June 30, 1995).

⁵ RCMP stands for Recomputation for prior pay periods. Computations for affected pay periods (PP)15/2003 to 16/2005, show the recalculations of FEGLI amounts from old to new (higher) rate and the dollar value of underdeductions when the correct (x0) FEGLI Code is substituted. Figures are based on audits covering PPs from 2003-2005. Other impacts are increased basic FEGLI salary levels and higher FEGLI cost with age increases (per 5-years).

The standard for determining whether a waiver is appropriate in salary overpayment cases considers, first, two threshold matters; namely, whether the overpayment to Respondent constitutes an *erroneous payment of pay*⁶ and, secondly, whether Respondent lacks fault⁷.

Respondent does not dispute the validity of the debt. The payment error, the erroneous failure to deduct higher FEGLI payments is set forth on the first audit page attached to the BoC. This shows the underpaid amounts per pay periods (PP) as follows: \$136.08 for PPs 0315 – 0402; \$142.80 for PPs 0403 – 0416; and \$358.68 for PPs 0417 – 0516, totaling \$637.56 as the amount owed. Respondent's election of increased FEGLI coverage, applying for Option B at the highest level appears in the record with his completed Form 2817 signed and dated 06/17/03.⁸

Respondent asserts in his September 28, 2005, narrative response that he expected the increase of FEGLI he sought was to take effect in September 2003. Without any contrary indication, he assumed the changes had been made. In the fall 2004, he was first alerted to the fact his changed FEGLI request had not been processed by payroll specialist, Ms. Joyce Boykin, but then expected the matter to be properly and speedily handled. He was told the delay occurred because the paperwork had been left/misplaced at someone's desk who never processed it. The apparent delay was compounded by the paperwork not being processed once again when Employee Relations supervisor, Ms. Barbara Malebranche, later advised him of the continuing problem in April 2005. Respondent recalls she further advised him that since his FEGLI increase request had not been completed, there were monetary charges attached to the 2-year delay and he would be responsible for refunding what had not been paid (during that time) into FEGLI. In July 2005, he received confirmation the FEGLI change request was made retroactive to June 29, 2003, under signature of Ms, Boykin. When he learned of the amount owed, he admits he was shocked and amazed at the amount the Department wanted him to reimburse them. He claims that his online LES does not show changes in FEGLI so he never knew the changes were not done. He strongly argues that poor performance and the mishandling of the process, which caused the delay and the growing overpayment is entirely the fault of personnel/ Human Resources. He contends they, not he, should assume responsibility for repaying any debt to the Department.

Supporting documents with the BoC are multiple Notification of Personnel Actions, SF-50s, with the earliest showing Respondent's FEGLI change (chg) with effective date of 06/29/03

⁶ 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).

⁷ The fact the Department may have erred in making the overpayment (or as here causing the delay resulting in assessment of an overpayment) does not relieve the overpaid person from liability. More precisely, although erroneous salary overpayments usually arise as a result of mistakes by those with the responsibility for making salary payments, the overpayment, nevertheless, is in excess of the amount authorized; therefore, the government has the right to recover the excess amount.

⁸ FEGLI Standard Form 2817 shows Respondent's LIFE INSURANCE ELECTION form signed and dated 06/17/03 showing election of Option A and Option B (with 5X multiple of annual basic salary); which form was received and signed by the Employee Relations Office, Human Resources Group, on same date. By signing this, Respondent agreed to authorize deductions to pay the full cost. Prior to Form 2817, he made his initial Request with the Department for FEGLI Insurance on SF Form 2822, as approved on May 28, 2003.

listing the FEGLI election as Basic plus Optional (5X) plus Standard showing correction of applicable codes (rates) for FEGLI payments.⁹

Respondent did submit one Leave & Earnings Statement (LES) dated 09/17/2005 for a pay period following the affected waiver period. An examination of that LES shows as FEGLI Deductions: FEGLI Regular at \$113.05 and FEGLI Optional at \$39.50 with FEGLI benefits paid by gov't as \$6.53. Respondent submits the LES and observes that the earnings statements never indicate change like the personnel notification action does. He contends that it is only when personnel forwards the record of change in the personnel record [SF-50] that it becomes official. However, Respondent is in error when he says that the action only becomes official when he receives it or it goes into the (official) personnel record. Each SF-50 has an effective date imposed in the top right hand corner at #4. A salary action is effective when put in the system, not when delivered. SF-50s are often delayed but the actions they initiate are not.

Whether an employee is at fault in accepting or not recognizing an overpayment, or here under the particular circumstances of this case where an employee's life insurance premiums were erroneously deducted from his salary resulting in a debt to the government, rests on the reasonable person standard and if a reasonable person should have known or suspected he was receiving more than his entitled salary.¹⁰ An employee who knows or should have known that he received an erroneous payment is obliged to set aside an equivalent amount for refund to the government when the error is corrected.

While this employee's FEGLI election has a tortured history of inaction and lack of follow-through by Human Resources personnel, and frustrating as that situation may be, the entire blame is not on the Department. In any event, with his election of the coverage he had a duty to monitor for the attendant changes in salary deductions. Without showing that Respondent really did monitor for the changes, he cannot be held to be without fault. As stated in another FEGLI waiver case, In the Matter of Ruth Chandler, *supra*, an employee who has received documents that on their face indicate that premiums are being deducted for coverage lower than that elected by the employee is on notice of the error, and the employee will be held at least partially at fault for failing to seek corrective action.¹¹ As Respondent received multiple SF-50s between 01/11/04 and 02/06/05 which carried corrective language about the FEGLI code, missing from the initial SF-50 dated 06/29/03, Respondent was on notice that a change in salary was likely. On the SF-50s, under First Action Section at 5-D, "Correction" was listed for the Nature of the Action. Respondent's FEGLI coverage had definitely changed since the FEGLI

⁹ The SF-50s show repeated corrections of item number 028 from 90 to X0 on 1/11/04, on 1/09/05 and on 02/06/0. All the SF-50s are signed by Joyce Boykin, Supervisor Personnel Management Specialist and carry the same approval date of 06/17/03,

¹⁰ Generally, where an employee has documentary records, such as SF-50 and L&E statements, and fails to review those documents for accuracy or otherwise fails to take corrective action, he is not without fault and waiver will be denied. *See, John H. Young, Jr.*, B-253640 (Nov. 4, 1993) and *Gordon Field, M.D.*, B-224910 (June 22, 1987).

¹¹ 1995 WL 390081 (Comp. Gen.), B-261484 (June 30, 1995) where employee was held to be at fault. The employee had the primary responsibility of examining her leave and earnings statements and promptly bringing errors to the attention of Air Force officials. Since she did not do so, we cannot find that she is free of fault in the matter, ...waiver cannot be granted.; *See also*, Thomas G. Stevens, B-237234, Jan. 18, 1990.

Action on 06/29/03. Because a dollar amount change in FEGLI is not obvious from the SF-50 by itself, Respondent's way to monitor the dollar effect even on receipt of unrelated personnel actions on SF-50s, was to turn to and inspect his LES. When he did not see a change in the LES deductions for FEGLI, this would have been significant and led him to question why his increase in coverage did not appear to be activated. Yet, Respondent is silent on what his LES showed for the affected 2-year period and does not produce them for the record.

At a minimum, he should have expected to pay more to have that optional coverage in place. Arguably, he would have been on high alert to watch for changes in his LES once notified in the fall of 2004 that the process was incomplete. But he does not show that he initiated any contact with payroll, with the contact person he knew in Ms. Boykin, to clarify his LES Deductions for FEGLI (Optional) immediately following the start of a new effective coverage date. He could have initiated his own inquiry before more time elapsed. When a repeated processing failure occurs, as here, Respondent had greater need to monitor his LES more closely.

Respondent claims that he never even had the benefit of the higher coverage and charges that this was a serious lack, attributable to the ineptness of Human Resources personnel. Respondent opines that had he been killed in an automobile accident or died of cancer his survivors would not have known of the change in FEGLI because there was not official paperwork to verify the coverage. However, the circumstances of this case show otherwise. Included in existing paperwork was a fully executed SF-2817 Life Insurance Election Form which Respondent signed and dated (6/17/03) with language stating this election supersedes all previous elections. This along with his SF-50s would be part of his Official Personnel File (OPF) and would be relied on for any Agency determination on his insurance coverage. Notwithstanding Respondent's assertions, there is no basis in the record to determine that the election would not have been honored. So Respondent's belief that he would have had no extended coverage for lack of premium payments (higher deductions) is a serious misconception.

Actually, whether the correct premiums were paid or not is not determinative of what FEGLI benefits would be paid out if there had been a death. The same argument was raised in a 2003 Defense Office of Hearings and Appeals (DOHA) case.¹² There, the Court noted that the employee had the benefit of the life insurance coverage for the period in question, regardless of whether he subjectively believed he was not receiving that coverage. Prior decisions indicate that it is not inequitable for an employee to pay for coverage which he elected. Contrary to any belief, his beneficiary would have received the life insurance if he had died during the period after he elected coverage, even though no premium payments were deducted from his salary. Likewise, in another case where it was questioned whether the employee enjoyed beneficial coverage during the period when deductions were not made, it was held that if the employee had died during the period in question, his beneficiary would have received life insurance proceeds (minus the unpaid premiums)¹³.

¹² DOHA Claims Case No. 03101402 (October 20, 2003).

¹³ DOHA Claims Case No. 99040701 (April 20, 1999), in which the issue was whether the employee reasonably believed that he had terminated his coverage, and a cursory review of the successive SF-50s, including one which provided details of the transfer, continued to indicate that he still had basic coverage.

Because Respondent received several SF-50s during the affected period with all but the initial FEGLI one carrying correction language about substituting one FEGLI code for another, he had notice that he should exercise due diligence about his increased FEGLI coverage and expect to be paying a higher cost for it. Certainly he did not control the action of others who time and again said they would process the paperwork, but failed to do that. He is not faulted for others' poor performance; yet, he never acted proactively to do what he needed to do to effectively monitor his requested FEGLI change. His failure to take corrective action about the continuing coverage, shows he must be found to be partially at fault.

Finally, the equitable interests favoring waiver do not reach an employee who does not inquire into the validity or accuracy of his pay¹⁴ 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 in their salary payments. If an employee does not monitor his leave and earnings statements and other finance and personnel documents, he is considered at least partially at fault for payroll errors which could have been halted by his diligence, and waiver of the resulting debt is not appropriate.¹⁵ Respondent remains liable for the proper premiums and the resulting overpayment. It is not inequitable for employees who receive insurance coverage to be required to pay for the benefit that they receive.¹⁶ Accordingly, it is not against equity and good conscience to require this Respondent to pay his debt.

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 circumstances of this case do not conform to the threshold factors warranting waiver, Respondent's request for waiver is **DENIED**.

So ordered, this 15th day of November 2005.

Nancy S. Hurley
Waiver Official

¹⁴ If Respondent carefully monitored his LES, he would expect to see some changes in the FEGLI Optional Deductions with the upgrade he sought. Respondent does not discuss or supply those LES documents.

¹⁵ DOHA Claims Case No. 98120401 (March 4, 1999) and DOHA Case No.98112018 (January 11, 1999).

¹⁶ See, *Guss*, B-248887 (Oct. 2, 1992), *Willey*, B-204975 (Jan. 5, 1982) and *Smith*, B-188948 (June 15, 1977), as reviewed in DOHA Claims Case No. 99040701 (April 20, 1999) on FEGLI life insurance matters; See also, DOHA Claims Case No. 98120401 (March 4, 1999) on health insurance coverage, finding it not inequitable to require employee to pay the debt for benefit of health insurance coverage when his premiums were not being deducted.