



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

In the Matter of

CATHERINE,

Respondent.

Docket No. 05-26-WA

Waiver Proceeding

DECISION GRANTING WAIVER

Respondent, a U.S. Department of Education (Department) employee, filed a request for waiver of a salary overpayment of \$50.89.¹ 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 promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 *seq.*) and set forth its 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, and documents compiled by the Department's HRS office. This decision constitutes a final agency decision.

¹ Pursuant to 5 U.S.C. § 5514(a)(3), an agency may make deductions from the current pay of an employee for a debt that amounts to \$50 or less without affording the employee an opportunity to challenge the existence of the debt prior to its collection. Here, the overpayment at issue is properly before the tribunal, although the amount at issue barely rises above the threshold amount.

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

According to the original November 3, 1999 Bill of Collection (BoC), and the reissued January 3, 2000 Notice of Debt Letter (NDL), the overpayment stems from the Department's payment of Respondent's share of her health insurance premium (\$50.89) for Pay Period 19 of 1999 (August 29, 1999 – September 11, 1999). By letter dated January 13, 2000, Respondent filed a written Request for Waiver in the above-captioned proceeding in response to the reissued January 3, 2000 NDL.³ In an October 27, 2005 Order Governing Proceedings, Respondent's request for a waiver was deemed timely and Respondent was afforded an opportunity to supplement the record.⁴ On November 7, 2005, Respondent filed a statement with the tribunal.

DISCUSSION

Waiver of a debt under 5 U.S.C. § 5584 is an equitable remedy.⁵ To secure waiver of an erroneous payment of pay,⁶ a debtor must demonstrate that he or she is not at fault in accepting or not recognizing an overpayment of salary. The debtor also must show that collection of the debt would be against equity and good conscience, and not in the best interests of the United States.

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 his or her entitled salary.⁷ 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.⁸ Furthermore, where a reasonable person would have made inquiry, but the employee did not, then he or she is not free from fault.⁹

³ On November 13, 2001, HRS sent Respondent a third notice regarding this overpayment although it had not acted on her pending waiver request.

⁴ Respondent's request for a waiver was originally filed with the Human Resources Services (HRS) office on January 13, 2000. On October 27, 2005, Respondent's request for a waiver was transferred to OHA. Because Respondent no longer had copies of the BoC and the NDL, copies were sent to her via facsimile on November 1, 2005.

⁵ See *In the Matter of Phyllis J. Wright*, 1996 WL 490014 (Comp.Gen.), B- 272,194 (August 27, 1996) ("Because of its equitable nature, waiver must depend on the particular facts involved, since by statute, 'an indication of ... fault, or lack of good faith on the part of an employee or any other person having an interest in obtaining a waiver of the claim' precludes waiver.")

⁶ An erroneous payment of pay (i.e. a 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 fact that an administrative error created an overpayment does not relieve the overpaid person from liability. See *In re Robert*, Dkt No. 05-07-WA, U.S. Dep't of Educ. (July 8, 2005), footnote # 12. Here, the administrative error stems from the Department's apparent failure to collect Respondent's share of her health insurance premium for one pay period.

⁷ See *In re Danielle*, Dkt. No. 05-18-WA, U.S. Dep't of Educ. (October 11, 2005).

⁸ See *id.* and 5 U.S.C. § 5584.

⁹ See *id.* and *In re Robert* at 4.

In her January 13, 2000 letter, Respondent states that she sent in a personal check to cover her health insurance premium for Pay Period 21 of 1999 (September 26, 1999 – October 9, 1999). Respondent asserts that because the Department did not pay her share of the health insurance premium for Pay Period 21 of 1999, the amount she paid for this pay period should be applied to the debt accrued for Pay Period 19 of 1999.¹⁰ Respondent also paid her share of the health insurance premiums for Pay Periods 17 and 18 of 1999 (August 1, 1999 – August 28, 1999) by personal check.¹¹

In her November 7, 2005 statement, Respondent asserts that she has no additional information or statement to submit in her defense. Respondent explains that because she had not heard anything further from the Department's HRS office since 2001, she assumed the documentation she submitted was sufficient and that the matter was resolved. Respondent further argues that because the Department failed to act on her waiver request and the alleged overpayment for nearly five years, she is presently disadvantaged in prosecuting her request for a waiver due to the significant delay. According to Respondent, not only has her recollection regarding the circumstances of the overpayment dimmed, but also as a result of her moving to another state, she is no longer able to locate any other documentation regarding this matter.

Health benefits coverage for an employee currently enrolled in a federal employee health benefits plan will continue for a maximum of 365 days unless the employee cancels his or her benefits in writing.¹² An employee is responsible for payment of his or her share of the enrollment costs for every pay period during which enrollment continues.¹³ For the period at issue in this case, the Department's policy stated an employee may at his or her discretion make direct payments to the agency or may reimburse the agency when he or she returns to duty after a period of non-pay status.¹⁴

In 2003, the Department issued new guidance regarding health benefits coverage for employees in non-pay status.¹⁵ Current Department policy similarly gives an employee in a non-

¹⁰ Respondent's Leave and Earnings Statement (LES) for Pay Period 21 of 1999 indicates that she did not earn any salary for this pay period. Respondent paid \$50.89 by personal check dated December 7, 1999, to cover her share of the health insurance premium for this pay period. Respondent's LES does not indicate that the Department advanced Respondent's share of her health insurance premium for this pay period although the Department sent Respondent a BoC dated November 3, 1999 for her share of the health insurance premium for Pay Period 21 of 1999 it "advanced" on her behalf.

¹¹ Respondent did not earn sufficient salary to cover her share of the health insurance premiums for these two pay periods. Respondent paid \$101.78 by personal check dated October 2, 1999.

¹² See 5 C.F.R. § 890.303(e) (1999).

¹³ See 5 C.F.R. § 890.502(b) (1999).

¹⁴ See Personnel Manual Instruction (PMI), Non-Pay: Absence without Leave (AWOL) and Leave without Pay (LWOP), PMI 630-8, U.S. Dep't of Educ. (May 11, 1981).

¹⁵ See ACS Departmental Directive, Health Benefits Coverage for Employees in Non-Pay Status, U.S. Dep't of Educ. (August 29, 2003) (Directive).

pay status several options regarding continuation of his or her health insurance coverage.¹⁶ An employee may cancel enrollment, or continue enrollment and either reimburse the Department by separate payment or defer payment until he or she returns to work.¹⁷

In applying the fault standard to this case, the tribunal concludes that Respondent does lack fault. As an initial matter, the tribunal notes the unique circumstances of this case. Here, the Department allowed Respondent's waiver request to languish for over five years. In that time, Respondent was under the misimpression that the matter was resolved due to the Department's failure to act on her waiver request or submitted documentation. Moreover, due to the passage of time and the relocation of Respondent's primary residence, the tribunal is persuaded that she is now at a significant disadvantage in pursuing her waiver request.

Respondent's argument regarding her payment of the health insurance premium for Pay Period 21 of 1999 does not, however, necessarily demonstrate that the money she reimbursed the Department for this pay period should be applied to the debt generated during Pay Period 19 of 1999.¹⁸ Respondent owed \$50.89 for her share of the health insurance premium for Pay Period 21 of 1999 regardless of whether the Department advanced this sum on her behalf or waited to pay the insurer until receipt of her payment by personal check.

Given the aforementioned factors, Respondent cannot be held accountable at this point for the consequences of the Department's failure to timely process her waiver request. Moreover, Respondent cannot reasonably be expected to have known this matter was not resolved and that the overpayment still existed given the five years of inactivity in this case.

The tribunal next must consider whether collection of a debt would go against equity and good conscience. To secure equity and good conscience, the debtor must have acted fairly without fraud or deceit, and in good faith.¹⁹ In waiver proceedings generally, there has not been abundant guidance on how to balance equity and/or appraise good conscience.²⁰ Factors weighed by the tribunal include the following: whether recovery of the claim would be unconscionable under the circumstances; whether the debtor has relinquished a valuable right or changed his or her position based on the overpayment; and whether collection of the debt would impose an undue financial burden. The tribunal has held that if the if the circumstances in any case are as

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ To demonstrate that the Department received \$50.89 more in reimbursement than it was entitled to receive, Respondent would need to show that the Department did not advance her share of the health insurance premium for Pay Period 21 of 1999 and also later offset her salary for this amount. Although the evidence shows that the Department cashed Respondent's check, the record remains incomplete as to whether the Department later offset Respondent's salary for her share of the health insurance premium for Pay Period 21 of 1999.

¹⁹ *See* 5 U.S.C. § 5584 and *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005) at 7.

²⁰ *See generally, In re Veronce and In re Cynthia*, Dkt. No. 05-6-WA, U.S. Dep't of Educ. (September 14, 2005).

consistent with honesty and good faith as with dishonesty, the inference of honesty is required to be drawn.²¹

Respondent raises an equitable argument that her ability to pursue her request for waiver has been compromised by the Department's inaction. The tribunal is persuaded that the Department's significant delay in resolving Respondent's waiver request harmed her ability to pursue her appeal. The tribunal is further persuaded that the harm from the delay was compounded by the fact that during the delay Respondent moved, and as a result, can no longer locate evidence to support her position that waiver is warranted. Moreover, the debtor's conduct in reimbursing the agency for health insurance premiums for other pay periods contemporaneous with Pay Period 19 of 1999 demonstrates her good faith attempt to pay for her health insurance coverage while she was in a non-pay status. Therefore, the tribunal finds that collection of the debt would be against equity and good conscience.

ORDER

Respondent requested waiver of the entire debt. Having found that the circumstances of this case do conform to the threshold factors warranting waiver, Respondent's request for waiver of the \$50.89 overpayment is **GRANTED**.

So ordered, this 12 day of December 2005.

A handwritten signature in black ink that reads "Greer Hoffman". The signature is written in a cursive style with a large, sweeping flourish at the end.

Greer Hoffman
Waiver Official

²¹ See *In re Veronce* at 7.