



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

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In the Matter of

**JERRY,**

Respondent.

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**Docket No. 05-29-WA**

Waiver Proceeding

**DECISION ON WAIVER**

This proceeding concerns a U.S. Department of Education (Department) employee's (Respondent) request for waiver of a salary overpayment due to the failure to properly deduct Federal Employees Group Life Insurance (FEGLI) premiums from his pay. The overpayment totals \$689.58.<sup>1</sup> Based on the reasons articulated in this decision, Respondent's request for a waiver is denied.

**JURISDICTION**

Respondent's waiver request arises under 5 U.S.C. § 5584 (Waiver Statute), authorizing the waiver of claims of the United States against debtors as a result of an erroneous payment of pay to a federal employee.<sup>2</sup> 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).<sup>3</sup>

Statutory authority for waiving overpayments regarding unpaid FEGLI deductions also exists under 5 U.S.C. § 8707(d) (FEGLI Statute). The FEGLI statute grants a federal agency the

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<sup>1</sup> The overpayment is identified as File No. 01LCBCAK21 in the February 6, 2001 Notice.

<sup>2</sup> See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005), footnote # 1.

<sup>3</sup> Respondent's request for a waiver was filed with the Human Resources Services (HRS) office on February 22, 2001. Cases predating the delegation of OHA's waiver authority were not automatically transferred to OHA. On October 27, 2005, the request for a waiver filed by the above-captioned Respondent was transferred to OHA's jurisdiction.

authority to waive the collection of unpaid FEGLI deductions, utilizing the same standard articulated under the Waiver Statute; namely, when an a federal agency fails to deduct the proper amount of FEGLI premiums, the debt may be waived if the employee is without fault and recovery would be against equity and good conscience.<sup>4</sup> The broad waiver authority contained in the Waiver Statute has been consistently interpreted as “encompassing the waiver of erroneous underwithholding of FEGLI premiums.”<sup>5</sup> Additionally, FEGLI regulations state that an agency’s determination regarding waiver of an overpayment caused by the agency’s failure to properly withhold life insurance premiums shall be made in accordance with the Waiver Statute.<sup>6</sup> The primary import of the FEGLI statute and regulations’ waiver provisions has been to ensure that when an agency waives the collection of unpaid insurance deductions, the agency submits an amount equal to the sum of the unpaid deductions, and any applicable agency contributions, to the Office of Personnel Management (OPM) for deposit in the FEGLI fund.<sup>7</sup> OHA has the authority to adjudicate all requests for waiver of overpayments at the Department, including those arising from unpaid or underpaid FEGLI premiums.

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, Respondent’s subsequent statement and attachments and documentary submissions, and documents compiled by the Department’s HRS office. This decision constitutes a final agency decision.

### **PROCEDURAL HISTORY**

According to the February 6, 2001 Notice of Debt Letter and attached Bill of Collection (BoC), the overpayment arises from the Department’s failure to deduct the appropriate amount of FEGLI premiums from Respondent’s pay from Pay Period 16 of 1994 through Pay Period 17 of 1996. Specifically, Respondent elected enrollment in FEGLI’s additional optional coverage for five times his annual basic pay but only premiums for basic coverage were deducted. According to the BoC, the \$689.58 overpayment was determined by calculating the portion of the premiums not charged Respondent for the additional optional coverage for the pay periods at issue.<sup>8</sup> By letter dated February 22, 2001, Respondent filed a request for waiver.<sup>9</sup> In a November 1, 2005 Order Governing Proceedings, Respondent’s request for a waiver was deemed timely and Respondent was afforded an opportunity to supplement the record. Respondent failed to file a response with the tribunal.<sup>10</sup> On December 20, 2005, Respondent filed a short statement and

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<sup>4</sup> See *In re Hollis W. Bowers*, 1986 WL 65109 (Comp. Gen.), 65 Comp. Gen. 216, B-219, 122 (January 22, 1986).

<sup>5</sup> See *id.*

<sup>6</sup> See 5 C.F.R. § 870.401(i) (1994).

<sup>7</sup> See 5 U.S.C. § 8707 and 5 C.F.R. § 870.401(h) and (i) (1994). See also *In re Hollis W. Bowers*, 1986 WL 65109 (Comp. Gen.), 65 Comp. Gen. 216, B-219, 122 (January 22, 1986).

<sup>8</sup> As the cost of Respondent’s FEGLI premiums incrementally increased over the 54 pay periods at issue, the amount of the premiums not deducted from Respondent’s pay ranged from \$12.07 per pay period to \$13.47 per pay period.

<sup>9</sup> As indicated in Footnote # 3, Respondent’s February 22, 2001, waiver request remained inactive until his request was transferred to OHA on October 27, 2005.

<sup>10</sup> On November 18, 2005, the tribunal resent the Order Governing Proceedings to Respondent.

attached documentation in support of his waiver request.<sup>11</sup> On January 30, 2005, at the tribunal's request, Respondent filed copies of two leave and earnings statements (LES) from the beginning of his tenure at the Department.<sup>12</sup>

## **BACKGROUND**

Respondent joined the Department on July 17, 1994 as an Institutional Review Specialist, at a GS-7, step 10 salary.<sup>13</sup> On July 18, 1994, Respondent completed a FEGLI Life Insurance Election Form and selected the option for additional optional coverage (Option B) at five times his basic pay.<sup>14</sup> Respondent's FEGLI Life Insurance Election Form was effective July 18, 1994. The Notification of Personnel Action Form (SF-50) initiating Respondent's hiring at the Department, also effective July 18, 1994, listed his FEGLI coverage as basic.<sup>15</sup>

According to Respondent, he did not receive a copy of the July 18, 1994 SF-50 until approximately six months after he joined the Department.<sup>16</sup> Respondent asserts that although he noticed an error regarding his retirement coverage – unrelated to the salary overpayment at issue in this case, he failed to notice that his FEGLI coverage was listed as basic. Respondent states that he did not become aware of the error regarding his FEGLI coverage for another six months, or approximately one year after he joined the Department. Respondent states that the Department's personnel specialist was unsure how to correct either the retirement or life insurance errors, and so, the failure to deduct the Respondent's FEGLI premiums for his additional optional coverage continued uncorrected. According to Respondent, in 1996, the Department began correcting its error regarding his retirement coverage and, at that time, also recognized its failure to deduct premiums for his additional optional FEGLI coverage. Respondent states that he was asked to complete another FEGLI Life Insurance Election Form.<sup>17</sup> Respondent argues that if he were covered under FEGLI, the Department would not have asked him to complete another life insurance election form.

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<sup>11</sup> In his filing, Respondent also affirmatively stated he wished to pursue an offset hearing if his request for waiver was unsuccessful.

<sup>12</sup> The two LES statements are from Pay Periods 25 and 26 of 1994.

<sup>13</sup> Respondent was previously employed as an OPM investigator at a GS-11, step 9 salary.

<sup>14</sup> Respondent was enrolled in FEGLI's additional optional coverage at five times his basic pay at his previous federal employment. *See* Attachments to Respondent's December 20, 2005 statement (May 3, 1994 SF-50 detailing his involuntary separation from OPM.)

<sup>15</sup> The SF-50 also lists Respondent's retirement coverage as being under the Federal Employment Retirement System (FERS). In his previous federal employment, Respondent was covered under the Civil Service Retirement System (CSRS). *See id.*

<sup>16</sup> The tribunal accepts as true Respondent's assertion that he did not receive a copy of the July 18, 1994 SF-50 for approximately six months.

<sup>17</sup> *See* Attachments to Respondent's December 20, 2005 statement (September 12, 1999 FEGLI Life Insurance Election form). The tribunal notes that the September 12, 1999 FEGLI Life Insurance Election Form occurs three years after the period at issue. The record remains unclear as to why Respondent was asked to complete another FEGLI form in 1999; however, the date occurs three years after Respondent indicates the Department became aware of its error regarding his FEGLI premiums.

On November 18, 1996, the Department issued an SF-50 correcting Respondent's FEGLI coverage from Basic to Basic plus Additional Optional Coverage at five times his basic pay.<sup>18</sup> In the November 18, 1996 SF-50's remarks section, it states that the Department will seek to collect the deficiency in withholding FEGLI premiums back to the July 18, 1994 effective date of the employee's FEGLI coverage.

Respondent argues that due to the passage of time, he assumed that the Department had reviewed and accepted his previous submission and that the matter was resolved. Respondent also argues that he was not overpaid because he believes his family would not have received the additional optional benefit had a FEGLI claim been filed from Pay Period 16 of 1994 through Pay Period 17 of 1996.

## 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. Waiver of an erroneous payment of pay<sup>19</sup> 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.

In waiver cases, the fault standard is a broad one, not limited to proven overt or bad acts and/or omissions by a debtor.<sup>20</sup> Fault is determined by assessing whether, under the particular circumstances, a reasonable person should have known or suspected that he or she was receiving an overpayment of salary.<sup>21</sup> If an employee has records at his or her disposal, which, if reviewed, would indicate a salary overpayment, and the employee fails to review those documents, the employee is not without fault.<sup>22</sup> Specifically, "...if [an SF-50].. clearly reveal[s] an underdeduction of FEGLI premiums, the employee is on notice of the error."<sup>23</sup> 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.<sup>24</sup>

When Respondent received a copy of the July 18, 1994 SF-50 listing his FEGLI coverage as basic, he should have been on notice that an error was made and that the necessary FEGLI premium deductions were not being made. Thus, once Respondent admittedly received a copy of

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<sup>18</sup> The Department also corrected Respondent's retirement classification. In an August 31, 1997, SF-50, Respondent's retirement election was reclassified from FERS to CSRS.

<sup>19</sup> It is apparent from the BoC that the overpayment 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 the proper amount of FEGLI premiums during the period at issue.

<sup>20</sup> See *In the Matter of Gordon Field, M.D.*, 1987 WL 102486 (Comp. Gen.), B-224, 910 (June 22, 1987).

<sup>21</sup> See *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

<sup>22</sup> See *In re Cynthia*, Dkt. No. 05-16-WA, U.S. Dep't of Educ. (October 31, 2005).

<sup>23</sup> See *In the Matter of Gordon Field, M.D.*, 1987 WL 102486 (Comp. Gen.), B-224, 910 (June 22, 1987). See also *In the Matter of Ruth Chandler*, 1995 WL 390081 (Comp. Gen.) B-261, 484 (June 30, 1995).

<sup>24</sup> See *In re Danielle*, Dkt. No. 05-18-WA, U.S. Dep't of Educ. (October 11, 2005).

the aforementioned SF-50, he was not free from fault in recognizing the salary overpayment. Although Respondent states that he did not notice the FEGLI error, he had the documentation in his possession that clearly indicated an error.

The tribunal must also examine whether Respondent knew or should have known that FEGLI deductions for his additional optional coverage were not being made prior to his receipt of the July 18, 1994 SF-50. At the tribunal's request, Respondent submitted two LES statements from 1994. On these LES statements, a \$5.45 deduction for basic life insurance is shown. The LES statements also reveal that no premiums were deducted for Respondent's additional optional life insurance.<sup>25</sup> 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. The tribunal also notes that Respondent was previously enrolled in FEGLI at the same level of additional optional coverage (i.e. five times his basic pay), and therefore should have recognized that the \$5.45 was not a reasonable premium for the large amount of FEGLI coverage he requested.<sup>26</sup>

Respondent argues that his beneficiaries would not have received the additional optional coverage in the unfortunate event a FEGLI claim was triggered during the period at issue. It is well settled that an employee's beneficiary is entitled to receive the full amount of life insurance the employee elected even though insufficient premium payments were deducted.<sup>27</sup> Moreover, additional optional coverage under FEGLI can be cancelled only by change in the employee's status that makes him or her ineligible or upon the employee's written cancellation.<sup>28</sup>

The Department's delay in reviewing Respondent's waiver request for nearly five years is unfortunate, however, this delay alone cannot constitute the sole basis for determining that Respondent is without fault. The tribunal has found that the delay must be coupled with some demonstrable harm to a debtor in pursuing his or her waiver request.<sup>29</sup> In the instant proceeding, Respondent has not demonstrated that his ability to pursue his waiver request has been compromised by the Department's delay. The tribunal notes that Respondent's submissions indicate that his recollection of the events surrounding the overpayment is intact and that he maintained documentation pertinent to the overpayment at issue in this case. The tribunal further notes that the November 18, 1996 SF-50 explicitly informed Respondent that the Department would seek collection for the unpaid portion of his FEGLI premiums.

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<sup>25</sup> The LES statements contain a separate field category in the deductions section for FEGLI premiums for optional insurance. On Respondent's LES statements, these fields remain blank (i.e. no deduction was withheld for Respondent's optional FEGLI insurance).

<sup>26</sup> The tribunal recognizes that Respondent joined the Department at a base salary \$13,061 less than his salary at OPM, however, this difference in salary, while it would result in a slightly lesser FEGLI premium for the additional optional coverage, does not account for the wide disparity in FEGLI premiums Respondent should have expected to see on his LES statements.

<sup>27</sup> See *In the Matter of Gordon Field, M.D.*, 1987 WL 102486 (Comp. Gen.), B-224, 910 (June 22, 1987).

<sup>28</sup> See *In the Matter of Frederick D. Crawford*, 1983 WL 26237 (Comp. Gen.), 62 Comp. Gen. 68 (August 3, 1983), *In re Darryl*, Dkt. No. 05-24-OP, U.S. Dep't of Educ. (December 8, 2005), and 5 C.F.R. § 873.205 (1994).

<sup>29</sup> See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

Although Respondent has failed to meet the fault standard, the tribunal will briefly consider whether collection of a debt would go against equity and good conscience. In making this determination, the tribunal must balance equity and/or appraise good conscience in light of the particular facts of the case.<sup>30</sup> To that end, the tribunal may consider whether collecting the debt would be unconscionable. In assessing whether collection of the debt would be unconscionable, the tribunal examines whether collecting a debt is “beyond the bounds of what is customary or reasonable; ridiculously or unjustly excessive.”<sup>31</sup> 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 also held that in some circumstances collection of the debt may be beyond what is customary and reasonable.<sup>32</sup> Such circumstances include an agency’s failure to respond in a reasonable amount of time to a debtor’s challenge of an overpayment and an agency’s gross negligence in handling an overpayment case.<sup>33</sup>

In the instant case, the Department allowed five years to elapse from the time it identified the salary overpayment in Respondent’s November 18, 1996 SF-50 and February 6, 2001, when it finally sent out a BoC. Then, the Department allowed Respondent’s waiver request to remain unresolved for another five years. Balanced against the Department’s demonstrable failure to timely resolve Respondent’s overpayment is the fact that Respondent’s beneficiaries would have received the benefit of his FEGLI additional optional coverage if such payment had triggered by an unfortunate event. Respondent received and continues to receive the benefit of his FEGLI additional optional insurance coverage. Consequently, Respondent is obliged to pay the premiums for that coverage.<sup>34</sup> Therefore, it is not inequitable to require an employee to pay for a benefit that said employee received – whether the benefit concerns health insurance coverage or, in this case, the security of the coverage guaranteed by FEGLI.<sup>35</sup>

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<sup>30</sup> See *In re David*, Dkt. No. 05-22-WA, U.S. Dep’t of Educ. (December 14, 2005). See generally, *In re Veronce and In re Cynthia*, Dkt. No. 05-6-WA, U.S. Dep’t of Educ. (September 14, 2005).

<sup>31</sup> See *In re Cynthia*, Dkt. No. 05-16-WA, U.S. Dep’t of Educ. (September 14, 2005), citing *Aguon v. Office of Personnel Management*, 42 M.S.P.R. 540, 550 (1989).

<sup>32</sup> See *In re David*, Dkt. No. 05-22-WA, U.S. Dep’t of Educ. (December 14, 2005)

<sup>33</sup> See *id.*

<sup>34</sup> See *In re Darryl*, Dkt. No. 05-24-OP, U.S. Dep’t of Educ. (December 8, 2005).

<sup>35</sup> See *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep’t of Educ. (November 9, 2005).

**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**.<sup>36</sup>

So ordered, this 16 day of February 2006.

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.

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Greer Hoffman  
Waiver Official

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<sup>36</sup> Respondent's offset hearing request is pending. Therefore, collection of the overpayment remains stayed.