



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

In the Matter of

MILLICENT,

Respondent.

Docket No. 06-06-WA

Waiver Proceeding

DECISION DENYING WAIVER

Respondent, a U.S. Department of Education (Department) employee, requested waiver of a salary overpayment debt arising from the Department's failure to properly deduct Federal Employees Group Life Insurance (FEGLI) premiums from her pay. Based on the reasons articulated in this decision, I find that waiver of this debt is not warranted. Accordingly, Respondent's request for a waiver is denied.

Jurisdiction

Respondent's waiver request arises under 5 U.S.C. § 5584 (Waiver Statute), which authorizes the waiver of claims of the United States against debtors as a result of an erroneous payment of pay to a federal employee.¹ The Department promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 *seq.*) and its *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (June 2005), specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).²

Statutory authority for waiving overpayments regarding unpaid FEGLI deductions also exists under 5 U.S.C. § 8707(d). The broad waiver authority contained in the Waiver Statute has been consistently interpreted as encompassing waiver authority for debts created by a federal agency's failure to properly deduct an employee's FEGLI premiums.³ Thus, OHA has the

¹ See General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828; see also *In re Tanya*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 18, 2006) at 1, n.1.

² Information regarding the Department's salary overpayment process including the Handbook, ACS-OM-04, is available on OHA's website at: www.ed-oha.org/overpayments.

³ See *In re Jerry*, Dkt. No. 05-29-WA, U.S. Dep't of Educ. (February 16, 2006) at 2. See also, 5 C.F.R. § 870.401(i) (1994).

authority to adjudicate all requests for waiver of overpayments at the Department, including those arising from unpaid or underpaid FEGLI premiums.⁴

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 Human Resources office. This decision constitutes a final agency decision.

Procedural History

According to the July 23, 2001 Notice of Debt Letter and attached Bill of Collection (BoC), the overpayment arises from the Department's failure to deduct FEGLI premiums from Respondent's pay from Pay Period 06 of 2001 through Pay Period 13 of 2001. According to the BoC, the \$81.84 overpayment was determined by multiplying Respondent's share of the FEGLI premiums by the number of pay periods these premiums were not deducted (\$10.23 x 8). By letter dated August 3, 2001, Respondent filed a timely request for waiver.

For reasons unknown to the tribunal, Respondent's waiver request remained inactive until her request was transferred to OHA on April 27, 2006. In a May 10, 2006 Order Governing Proceedings, Respondent was afforded an opportunity to file a brief statement and/or otherwise supplement the record. Respondent relied upon her earlier August 3, 2001 submission and did not file an additional response with the tribunal.

Discussion

Waiver is an equitable remedy.⁵ To secure a waiver of an erroneous payment of pay, a debtor must demonstrate that he or she is not at fault in accepting or not recognizing an erroneous payment of pay. The debtor also must demonstrate that collection of the debt would be against equity and good conscience, and not in the best interests of the United States. At issue in this proceeding 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.

Fault Standard

In waiver cases, the fault standard is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. For the most part, if a debtor is aware of an error, he or she cannot reasonably expect to retain the overpayment.⁶ In some extraordinary circumstances, when there is no other indication of fault, a debtor who is aware of an overpayment but promptly offers to repay the debt and/or attempts to pay the debt, may satisfy the fault standard.⁷

⁴ See *id.*

⁵ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

⁶ See *In re Danielle*, Dkt. No. 05-18-WA, U.S. Dep't of Educ. (October 11, 2005).

⁷ See *In re Cheryl*, Dkt. No. 05-28-WA, U.S. Dep't of Educ. (February 17, 2006) (The debtor first sent a check to cover the identified overpayment but the government did not cash her check. Then the debtor agreed to have the

Fault also 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.⁸ 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.⁹ An employee who neither knows nor has reason to know that he or she was erroneously compensated lacks fault under the application of this standard.¹⁰

Respondent requested FEGLI coverage in 2001, a number of years after she began her employment at the Department. In her August 3, 2001 statement, Respondent relates that she underwent a physical examination in order to elect FEGLI insurance, was approved, and then promptly submitted her request to the Department's personnel office. Respondent indicates that she elected coverage effective March 5, 2001. According to Respondent, she noticed that FEGLI deductions were not being taken from her pay and contacted the Department's personnel office in June 2001. Respondent argues that she believed she was not covered by FEGLI from March 2001 until she brought the error to the attention of the personnel office.

In applying the fault standard to this case, the tribunal concludes that Respondent does not lack fault. Respondent admittedly recognized that FEGLI premiums were not deducted from her pay and conscientiously brought this error to the Department's attention. Soon after, the Department corrected the error and issued a BoC to recover Respondent's share of her FEGLI premiums. Generally, a debtor who is aware of an overpayment does not lack fault. Additionally, there are no extraordinary circumstances present in this case that mitigate this general rule. Moreover, an employee who is aware of an overpayment is obliged to return that amount or set aside an equivalent amount for refund to the government when the error is corrected. Finally, while the Department's delay in resolving Respondent's waiver request for nearly five years is unfortunate, this delay alone cannot constitute the sole basis for determining that Respondent is without fault.¹¹

According to her statement, Respondent believed her FEGLI coverage was not effective until the error was corrected and the deduction appeared on her leave and earnings statements beginning in July 2001. While it does not alter the tribunal's determination regarding fault, Respondent appears to be laboring under an understandable misimpression regarding her FEGLI coverage. It is well settled that an employee's coverage is effective the day a FEGLI election form is approved by the agency.¹² Consequently, an employee is entitled to receive the full

overpayment recovered through salary offset, but the government did not initiate the offset. Based on these facts, the tribunal held that the debtor lacked fault.); *see also, In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006) (The debtor promptly reported the overpayment and satisfied the debt identified in the BoC; however, the government miscalculated the debt and subsequently issued and cancelled several BoCs in its attempt to set the correct amount. Citing the rule established in *Cheryl*, the tribunal held that the debtor lacked fault.)

⁸ *See In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

⁹ *See In re Cynthia*, Dkt. No. 05-16-WA, U.S. Dep't of Educ. (October 31, 2005).

¹⁰ *See In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

¹¹ *See In re Catherine, supra*. (To meet the fault standard, the tribunal held that delay must be coupled with some demonstrable harm to a debtor in pursuing his or her waiver request.)

¹² *See In re Jerry, supra*. (Debtor argued that he did not gain the benefit of his FEGLI coverage during the period of time the Department failed to deduct sufficient insurance premiums from his pay. The tribunal noted that if payment were to have been triggered by some unfortunate event during this period, the employee would have received the full

amount of his or her elected FEGLI coverage even though insufficient premium payments were deducted.

Equity and Good Conscience

To secure equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.¹³ There are no rigid rules governing the application of the equity and good conscience standard. The tribunal must balance equity and/or appraise good conscience in light of the particular facts of the case.¹⁴ To that end, the tribunal may consider whether recovery of the claim would be unconscionable under the circumstances. In assessing whether collection of the debt would be unconscionable, the tribunal examines whether collecting a debt is beyond what is customary or reasonable. Such unconscionable 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.¹⁵

Although Respondent has failed to meet the fault standard and, as a result, is not entitled to waiver, the tribunal will briefly consider whether collection of a debt would go against equity and good conscience. Here, the Department has allowed Respondent's waiver request to languish for nearly six years. While this tribunal has held that delay alone cannot constitute the sole basis for meeting the fault standard, excessive delay may render collection of the debt unconscionable.¹⁶ Balanced against the Department's demonstrable failure to timely resolve Respondent's waiver request is the fact that Respondent was covered by FEGLI during the period for which premiums were not deducted and her beneficiary would have received payment if some unfortunate event occurred. The tribunal has held that it is not inequitable to require an employee to pay for a benefit he or she received – in this case, coverage under FEGLI.¹⁷ Therefore, the tribunal also concludes that payment of the debt would not go against equity and good conscience.

amount of life insurance he elected.). *See also, In re Darryl*, Dkt. No. 05-24-OP, U.S. Dep't of Educ. (December 8, 2005).

¹³ *See* 5 U.S.C. § 5584 and *In re Anh-Chau*, Dkt. No. 05-01-WA, U.S. Dep't of Educ. (June 17, 2005).

¹⁴ *See In re Carolyn*, Dkt. No. 06-04-WA, U.S. Dep't of Educ. (June 28, 2006); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (September 14, 2005).

¹⁵ *See In re Jerry*, *supra*, at 6. *See also, In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006).

¹⁶ *See In re Cheryl*, *supra*. (A near eight-year delay in resolving a waiver request is beyond what is customary or expected.); *In re Jay*, *supra*, at 5. ("In the balance of equities, it must be regarded that a seven-year delay in adjudicating a waiver request doubtlessly is detrimental to a debtor's interests.")

¹⁷ *See In re Jerry*, *supra*, at 6.

ORDER

Respondent requested waiver of the entire \$81.84 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 7th day of July 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.

Greer Hoffman
Waiver Official