



## UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS  
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In the Matter of  
**DINEO,**

**Docket No. 06-07-WA**  
Waiver Proceeding

Respondent

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### DECISION GRANTING WAIVER

At issue in this case is whether Respondent, a former employee of the U.S. Department of Education (Department), should be granted waiver of a debt based on an overpayment of salary arising from the Department's failure to withhold or collect the employee's share of a health care premium for one pay period in 1998. For the reasons that follow, I find that waiver of this debt is warranted. Accordingly, Respondent's request for waiver is granted.

#### DISCUSSION

##### I.

The pertinent statutory authority for waiver of a salary overpayment is set forth under the General Accounting Office Act of 1996 (the 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.<sup>1</sup> The Department's *Salary Overpayment Handbook*, ACS-OM-04, specifically delegates waiver authority involving all former and current employees of the Department to the Office of Hearings and Appeals (OHA), which, thereby, exercises waiver authority on behalf of the Secretary. The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.<sup>2</sup> Jurisdiction is proper under the Waiver Statute at 5 U.S.C.

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<sup>1</sup> General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (the Waiver Statute); *see also In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at 1 & n. 1 (setting forth, more fully, the statutory framework governing all salary overpayment debt collection) and 5 U.S.C. § 5514 and 31 U.S.C. § 3716 (these statutory sections constitute significant provisions of the Debt Collection Improvement Act of 1996, Pub.L. No. 104-134, April 26, 1996, 110 Stat. 1321). *See also* government-wide regulations issued by the Office of Personnel Management (OPM) (5 C.F.R. Part 550, Subpart K) and overpayment procedures on the Office of Hearings & Appeals website at: [www.ed-oha.org/overpayments/](http://www.ed-oha.org/overpayments/)

<sup>2</sup> *See*, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

5584.<sup>3</sup> In addition, regulations governing contributions and withholdings of health care premiums promulgated by the Office of Personnel Management (OPM) explicitly provide that in cases where an overpayment is “caused by failure to properly withhold employee health benefits contributions” by the agency, the debt is subject to waiver under 5 U.S.C. § 5584.<sup>4</sup>

The resolution of this case is based on the matters accepted as argument and evidence. The record in this case includes a copy of a May 10, 2000 report of investigation completed by the Department’s Human Resources Systems Team, the submission of a written statement dated April 4, 2000 by Respondent, a copy of notices of debt letters dated November 24, 1999, and January 5, 2000, and a copy of a Bill of Collection (BoC) dated November 9, 1999.

## II.

Under the Federal Employees Health Benefits Act of 1959 (FEHBA),<sup>5</sup> Congress established a comprehensive employer-sponsored group health insurance program (known as the Federal Employees Health Benefits or FEHB) for Federal employees.<sup>6</sup> Under the Act, the Federal government and the employee share responsibility for premiums payable to the employee’s health plan.<sup>7</sup> Under FEHB, employees who enter leave without pay (LWOP) status may elect to continue health benefits coverage or terminate it.<sup>8</sup> If an employee elects to continue coverage, the employee may pay their health benefit premium directly to their employer or agree to have unpaid premiums arising during LWOP status to be repaid through payroll deductions upon return to pay status.<sup>9</sup> If an employee terminates FEHB coverage, he or she must do so in writing.<sup>10</sup>

The facts in this case are undisputed. Notwithstanding that Respondent continued health benefit coverage during the 16<sup>th</sup> Pay Period of 1998 (Pay Period 98-16) while on LWOP status, an unpaid health benefit accrued in the amount of \$19.56. Thereafter, the Department’s Human Resources Systems Team (Human Resources) authorized issuance of a BoC indicating that Respondent owed a debt to the Department in the amount of \$19.56. Respondent timely requested waiver of the overpayment.

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<sup>3</sup> Under the waiver decisions issued by the Comptroller General interpreting 5 U.S.C. § 5584, “pay” has been held to include “nonpay” or nonsalary compensation such as health and life insurance premiums, retention allowances, recruitment bonuses, accrual of annual leave, and all forms of remuneration in addition to salary. *See*, U.S. Government Accountability Office, *Scope of Waiver Authority*, B-307681 (May 2, 2006).

<sup>4</sup> 5 C.F.R. § 890.502(c)(2).

<sup>5</sup> Pub. L. No. 86-382, 73 Stat. 709 (codified, as amended, at 5 U.S.C. § 8901).

<sup>6</sup> FEHBA also covers dependents and retirees.

<sup>7</sup> 5 U.S.C. § 8906. An agency that fails to withhold the appropriate “health benefits contribution from an individual’s pay” ultimately must submit the proper amount “to OPM [Office of Personnel Management] for deposit in the Employees Health Benefits Fund.” 5 C.F.R. § 890.502(c). As such, an agency has the authority to “recover the[se] debts from whatever other sources it normally has available for recovery of a debt to the United States.” 5 C.F.R. § 890.502(b)(2)(ii).

<sup>8</sup> 5 C.F.R. § 890.502(b).

<sup>9</sup> 5 C.F.R. § 890.502(b)(2).

<sup>10</sup> 5 C.F.R. § 890.502(b). What is more, terminations of enrollment are “retroactive to the end of the last pay period in which a premium was withheld from pay.” 5 C.F.R. § 890.502(b)(5).

### III.

Respondent argues that a waiver of the debt is warranted because during Pay Period 98-16 she was in the process of transferring duty stations from the Department's Atlanta, Georgia office to headquarters in Washington, DC. In other words, according to Respondent, under the circumstances of her move from Atlanta to Washington, she was too distracted to have noticed any unanticipated matters related to a cause of a salary overpayment. Respondent also argues that she has been a "faithful civil servant of the U.S. Department of Education for the three and a half years" she worked at the Department.

The standard for determining whether waiver is appropriate requires a consideration of only two factors; namely, (1) whether there is no indication of fraud, misrepresentation, fault, or lack of good faith on the part of Respondent, and (2) whether Respondent can show that it is against *equity and good conscience* for the Federal government to recover the overpayment.<sup>11</sup> Measured against these factors, the Department's waiver cases have consistently recognized that regardless of the amount of debt or of the good faith of the employee, "[n]o employee has an entitlement to pay that he or she obtains as a result of an overpayment."<sup>12</sup> Of course, this would include nonpay compensation.

Guided by the facts and issues that are pertinent to this case, I find that there is no misrepresentation, fraud, fault, or lack of good faith on Respondent's part. Respondent was permitted to temporarily change her pay status to LWOP. Once an employee enters LWOP status, the agency must determine how that status affects the employee's nonpay compensation, including health care premiums; the Department failed to carry out this obligation when the agency did not collect Respondent's contribution to her health care premium or otherwise ensure that arrangements were in place to deduct the unpaid premium when Respondent returned to pay status. As such, there is no basis to conclude that the debt arose as a result of bad faith, misrepresentation or fraudulent intent or conduct on the part of Respondent.

In addition, Respondent's duty to know or duty to inquire about the accuracy of her salary payment in a case involving a health care premium overpayment is counterbalanced by an employee's election to terminate coverage and the related obligation of the "employing office [to] provide the employee written notice of the options and consequences" of coverage of health benefits when an employee enters LWOP status.<sup>13</sup> The record is silent as to these corresponding duties; consequently, I am unable to determine whether the mandatory notice was provided. The mandatory notice to the employee not only informs the employee of the consequences of LWOP status regarding her health benefits, but serves both to trigger the employee's obligation to elect a method of payment for her health benefit as well as inform the employee of a potential salary overpayment, if a premium is owed and unpaid when the employee returns to pay status. Consequently, it follows that where notice of the consequences of payment of health care premiums while on LWOP status is not provided or there is no indication that notice was provided, there can be no basis to conclude that Respondent had a reason to recognize the

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<sup>11</sup> See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

<sup>12</sup> *In re Tanya*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 19, 2006).

<sup>13</sup> 5 C.F.R. § 890.502(b)(1).

Department's error as an erroneous salary payment. In light of the fact that the pertinent LWOP status lasted a single pay period during which Respondent was moving, effective notice may have been improbable, notwithstanding that notice is a statutory obligation.

Further, without the statutory notice, it is doubtful that access to an earning statement showing that no pay was earned during a leave without pay is likely also to trigger an awareness that the absence of a health benefit premium deduction resulted in an overpayment in the mind of an employee who is in the midst of moving.<sup>14</sup> Accordingly, since there is no otherwise indication of fault, I find that Respondent satisfies the initial factor for determining whether waiver is appropriate. Respondent had no reason to recognize that an erroneous salary payment existed and, as such, had no duty under the fault standard to seek corrective action of the overpayment.

Having found no fault or lack of good faith on Respondent's part, the remaining question is whether it is against equity and good conscience for the Federal government to recover Respondent's debt. Our waiver decisions have adopted a number of factors pertinent to determining whether collection of a salary overpayment is against equity and good conscience, including the following: (a) whether recovery of the claim would be unconscionable under the circumstances; (b) whether, because of the erroneous payment, the employee either has relinquished a valuable right or changed positions for the worse, regardless of the employee's financial circumstances; (c) whether recovery of the claim would impose an undue financial burden upon the debtor under the circumstances, (d) whether the time elapsed between the erroneous payment and discovery of the error and notification of the employee is excessive or affects the magnitude of the debt, (e) whether an agency's response to inquiries regarding an overpayment is unreasonably excessive, (f) whether an agency's handling an overpayment case demonstrates gross negligence, and (g) whether the cost of collecting the claim equals or exceeds the amount of the claim.<sup>15</sup>

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<sup>14</sup> Although in *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (Nov. 9, 2005), the tribunal concluded that the employee did not satisfy the fault standard with regard to a debt arising from unpaid health benefit premiums, the facts of that case distinguish it from this one. In *Tammy*, the Department erroneously failed to withhold health benefit premiums for seven pay periods and for each pay period the employee was in pay status. Here, Respondent was in nonpay status and the error occurred in a single pay period. In this regard, it is unremarkable to conclude that the employee, here, unlike the one in *Tammy*, would not be alerted to the Department's error.

<sup>15</sup> See, e.g., *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005); *In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (October 19, 2005); *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005), and U.S. Dep't of Energy Order 533.1, *Collection from Current and Former Employees for Indebtedness to the United States*, (September 26, 2003), at <http://www.directives.doe.gov/pdfs/doe/doetext/neword/533/o5331.html>. The aforementioned factors notwithstanding, when reading meaning into the phrase "equity and good conscience" one necessarily draws upon precepts of fairness and justice rather than confining judgment to rigid rules of uncommon meaning. See, e.g., *Perrin v. United States*, 444 U.S. 37 (1979) and *Gilles v. Department of Human Resources Development*, 11 Cal.3d 313 (1974).

In the case at bar, Respondent states that it is against equity and good conscience to recover the debt because she has completed three years of faithful service to the Department. In addition, Respondent argues that it is against equity and good conscience to collect the debt because the debt arose as a result of the Department's error. To underscore the fundamental unfairness that should be accorded the collection of the debt in this case, Respondent calls attention to the fact that the debt arose at a time when she could not have known of the debt because she was in LWOP status and in the process of moving from Atlanta to Washington. On the basis of Respondent's latter argument, the amount of the debt, the seven year period it has taken to resolve Respondent's waiver request, and the findings noted *infra* concerning the manner in which the debt arose, I find that the facts tip the balance in favor of Respondent and against recovery of the debt.<sup>16</sup>

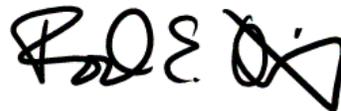
### CONCLUSION

Respondent requested waiver of the entire debt. In light of the foregoing, the tribunal finds: (1) that Respondent had no reason to recognize that an erroneous salary payment existed and, as such, had no duty under the fault standard to seek corrective action of the overpayment, and (2) that the collection of the debt arising from the Department's failure to collect or withhold Respondent's health benefit premium is against equity and good conscience, and is otherwise not in the best interests of the United States. Accordingly, Respondent's request for waiver of the entire debt is granted. This decision constitutes a final agency decision.

### ORDER

Under the authority of 5 U.S.C. § 5584, Respondent's entire debt to the Department in the amount of \$19.56 is **HEREBY WAIVED**.

So ordered this 1<sup>st</sup> day of August 2006.



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Rod Dixon  
Waiver Official

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<sup>16</sup> See, *In re Cynthia*, Dkt. No. 05-16-WA, U.S. Dep't of Educ. (October 31, 2005) (setting forth the factors of unconscionability that support a determination that the collection of the debt would be against "equity and good conscience").