



UNITED STATES DEPARTMENT OF EDUCATION

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

TELEPHONE (202) 619-9700

FACSIMILE (202) 619-9726

In the Matter of

JOANNE,

Respondent

Docket No. 06-22-WA
Waiver Proceeding

DECISION DENYING WAIVER

The question presented by this case is whether an employee of the Department of Education (Department) should be granted waiver of a debt arising from an erroneous salary payment in the amount of **\$403.05**. This salary overpayment arose from the failure to deduct the employee's share of her elected health benefit coverage. For the reasons that follow, the tribunal concludes that waiver of the debt is not warranted. Accordingly, Respondent's request for waiver is denied.

By enactment of the General Accounting Office Act of 1996 (the Waiver Statute), Congress authorized 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 delegated waiver authority involving all former and current employees of the Department to the OFFICE OF HEARINGS & APPEALS (OHA),² which, thereby, exercises waiver authority on behalf of the Secretary. The

¹ General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (the Waiver Statute). The law of debt collection is extensive. *See, e.g., 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); *see also* 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), and government-wide regulations issued by the Office of Personnel Management (OPM) (5 C.F.R. Part 550, Subpart K). The Department of Education's overpayment procedures may be found on the Office of Hearings & Appeals website at: www.ed-oha.org/overpayments/.

² The Department's policy is set forth in the U.S. Department of Education, Administrative Communications System Departmental Handbook, HANDBOOK FOR PROCESSING SALARY OVERPAYMENTS (ACS-OM-04, June 2005 (revised Dec. 2006)).

undersigned is the authorized Waiver Official who has been assigned this matter by OHA.³ Jurisdiction is proper under the Waiver Statute at 5 U.S.C. 5584.⁴

In adjudicating this case, the tribunal bases its findings and conclusions on matters accepted as argument and evidence, including: a copy of a written statement dated November 20, 2001 by Respondent requesting waiver of the salary overpayment,⁵ a copy of a notice of debt letter dated November 9, 2001, and a copy of a Bill of Collection (BoC) dated March 7, 2001.

DISCUSSION

I

Under the Federal Employees Health Benefits Act of 1959 (FEHBA),⁶ Congress established a comprehensive employer-sponsored group health insurance program (known as the Federal Employees Health Benefits or FEHB) for Federal employees.⁷ Under the Act, the Federal government and the employee share responsibility for premiums payable to the employee's health plan.⁸ Respondent's share of her premium was \$134.35 per pay period for the three pay periods at issue in this case. Due to an administrative error, payroll officials failed to deduct any amount covering Respondent's share of her FEHB premiums beginning in the 2nd pay period and extending thru the 4th pay period of 2000. As a result of the error, the Department's Human Resources Systems Team issued a BoC and debt collection letter seeking recovery of \$403.05.

In *In re Paul (Paul)*,⁹ the tribunal acknowledged that in some waiver cases involving an administrative error in FEHB program payroll deductions, our cases expressed approval of the view that in addition to satisfying the traditional waiver standard (identified in section II, below), an employee also must show that he or she did not obtain the benefit of FEHB coverage during the pay period(s) at issue.¹⁰ This additional factor was developed, in part, due to the unique circumstances of a debt based upon a payroll benefit. Instead of applying this additional factor, *Paul* departed from the line of cases applying the additional factor because of concerns that the additional factor created a categorical rule that effectively would preclude granting a waiver to debtors simply because the debtor obtained the benefit of health coverage. Contrary to supporting the categorical rule that may have exceeded the precise bounds of the waiver standard, *Paul* reaffirmed the principle that waiver cases entail a case-by-case review under the precise standards of the Waiver statute. As such, according to *Paul*, whatever weight should be

³ See, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

⁴ Under waiver decisions issued by the Comptroller General interpreting 5 U.S.C. § 5584, "pay" has been held to include "nonpay" or nonsalary compensation, which covers recruitment bonuses, accrual of annual leave, health and life insurance premiums, retention allowances, and all forms of remuneration in addition to salary. See, U.S. Government Accountability Office, *Scope of Waiver Authority*, B-307681 (May 2, 2006).

⁵ For reasons unknown, the Department took no dispositive action on Respondent's case until on July 20, 2006, when Respondent's case was transferred to the Office of Hearings & Appeals for resolution.

⁶ Pub. L. No. 86-382, 73 Stat. 709 (codified, as amended, at 5 U.S.C. § 8901).

⁷ FEHBA also covers dependents and retirees.

⁸ 5 U.S.C. § 8906.

⁹ Dkt. No. 06-55-WA, U.S. Dep't of Educ. (Feb. 20, 2007).

¹⁰ *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (Nov. 9, 2005).

accorded the fact that a debtor has acknowledged use of his FEHB coverage, that factor alone cannot be dispositive of whether waiver should be granted. The tribunal held that when mindful of the case-by-case analysis that should be accorded cases involving equitable remedies, it should follow that no rule, canon, or principle may be used mechanically or perfunctorily to replace a hearing official's individualized judgment and faithful adherence to the statutory standard. In keeping with that holding, I find that in this case it is no bar to obtaining a waiver that the employee obtained the benefit of FEHB coverage. As is true in all overpayment cases, the debtor necessarily obtains the benefit of the overpayment during the pay period(s) at issue.¹¹ Accordingly, Respondent may seek waiver of the debt in this case notwithstanding that Respondent obtained the benefit of FEHB coverage during the period at issue.¹²

II

Determining whether waiver is appropriate requires consideration of 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.¹³

Fault, as the term is used in the Waiver Statute, is examined in light of the following considerations: (a) whether there is an indication of fraud; (b) whether the erroneous payment resulted from an employee's incorrect, but, not fraudulent, statement that the employee under the circumstances should have known was incorrect;¹⁴ (c) whether the erroneous payment resulted from an employee's failure to disclose to a supervisor or official material facts in the employee's possession that the employee should have known to be material; or (d) whether the employee accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.¹⁵ Waiver may be granted only if a debtor succeeds in showing that he or she can satisfy the requisites of the fault standard. To meet the standard, the debtor must either acknowledge the validity of the debt or urge the absence of any reason to recognize the salary payment at issue as an overpayment. Respondent takes the former position.

Respondent argues that a waiver of the debt is warranted because she did not know that the Department failed to deduct her share of the premium for her health benefit coverage. In

¹¹ This is not to say that an employee may not prove the converse in making a case for waiver. The Department's waiver cases allow employees to prove that they have not been able to obtain the benefit of FEHB coverage by showing, for example, that a health insurer has denied a request for payment of a medical expense. More directly, evidence that a claim has been denied could go toward showing that the debt is not owed, and an employee is free to make such a showing in a Pre-Offset hearing before an administrative law judge.

¹² Respondent neither asserts nor provides evidence indicating she lacked or was denied FEHB coverage while seeking health care.

¹³ See, *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

¹⁴ Broadly stated, under the fault standard, the scope of Respondent's duty extends to include the obligations to: (1) verify bank statements and/or electronic fund transfers of salary payments, (2) question discrepancies or unanticipated balances from salary payments, and (3) set funds aside for repayment when appropriately recognizing a salary overpayment. See, *In re William*, Dkt. No. 05-11-WA, U.S. Dep't of Educ. (October 19, 2005).

¹⁵ See generally, *Guidelines for Determining Requests* U.S. Department of the Treasury Directive 34-01 (2000), available at <http://www.treasury.gov/regs/td34-01.htm>; Standards for Waiver, 4 C.F.R. § 91.5 (2000).

addition, Respondent argues that the erroneous payments were the fault of the Department, and requiring her to repay a debt created as a result of the errors of others is unfair. Respondent also argues that the size of the debt reflects the Department's failure to discover the errors over the course of three pay periods, and that this excessive amount of time should not accrue to her detriment by requiring her to repay deductions for each of the three pay periods.

Waiver proceedings usually involve some type of administrative error by the employer-agency, since a mistake in payroll or in the application of a rule or regulation governing pay is the usual vehicle that drives creation of the salary overpayment. As such, our waiver cases have consistently acknowledged that despite the fact that an administrative error by the Department causes an employee to be paid at a rate that exceeds the employee's lawful rate of pay, the existence of the error cannot, itself, entitle an employee to waiver.¹⁶ Consequently, although it is understandable why Respondent would be frustrated by the Department's error, to prevail in a waiver proceeding, Respondent must do more than identify who made the error.

The paradigm for resolving waiver cases involving FEHB coverage under circumstances pertinent to this case is set forth in two distinct lines of cases identified by the principal cases: *In re Tanya*¹⁷ and *In re Catherine*.¹⁸ *Catherine* established the factors that would support waiver of a debt when failure to deduct an employee's share of the FEHB payment is the factual predicate of the debt. In *Catherine*, the hearing official held that waiver of a FEHB debt is appropriate when the employee's waiver request languishes unresolved for a period long enough to render a "misimpression that the matter was resolved" by the debtor, and that the passage of time is sufficiently extensive that an impediment exists affecting the debtor's ability to pursue the waiver request.

Tanya sets out a different path for FEHB cases by holding that where the evidence demonstrates that an employee recognized that the correct share of FEHB premiums were not deducted from her pay the employee is not without fault and, therefore, a waiver of the overpayment cannot be granted. Applying the facts of this case to the precedent established by *Catherine* and *Tanya*, this case fits squarely within the holding of *Tanya*.

Respondent indicates that she did not notice that her Leave and Earning Statement (LES) disclosed the fact that the Department had failed to deduct her share of her premium for FEHB coverage. In Respondent's view, although the LES reveals the agency's error, she should not be held at fault for failing to take notice of the error. One can clearly comprehend the circumstances where it may be easy to fail to notice a mistake in a salary payment - - even when the error is disclosed in a payroll statement. Nonetheless, it is a fundamental principle under the case law interpreting the Waiver Statute that no employee has an entitlement to pay that he or she obtains as a result of an overpayment.¹⁹ The Waiver Statute imposes an obligation on employees to dutifully check the accuracy of each salary payment.

¹⁶ *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 15, 2005).

¹⁷ Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 19, 2006).

¹⁸ Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005) (*Catherine*).

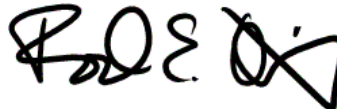
¹⁹ *Id.*

Unlike the employee in *Catherine*, Respondent could readily determine that an erroneous salary payment occurred in the 2nd, 3rd, and 4th pay periods of 2000 because she could identify the error in her LES statements. Hence, Respondent's salary pay statements provided Respondent with notice of the salary overpayment. More to the point, the mere expectation that a payroll deduction will be made does not overcome the responsibility to check whether the deduction in fact was made. Respondent's duty as a Federal employee extends to verifying the accuracy of her salary payments, which includes the obligation to question discrepancies or unanticipated balances identified in the LES. In this light, the tribunal is persuaded that the circumstances of this case compel the same result as found in *Tanya*.²⁰ Guided by the facts of this case and the analysis herein, I conclude that Respondent is not without fault as that term is defined under waiver standards.²¹ Accordingly, I find that in the interests of the United States waiver of Respondent's debt cannot be granted. This decision constitutes a final agency decision.

ORDER

Pursuant to the authority of 5 U.S.C. § 5584, Respondent's request for waiver of the entire debt to the United States Department of Education in the amount of **\$403.05** is **HEREBY DENIED**.

So ordered this 1st day of May 2007.



Rod Dixon
Waiver Official

²⁰ *Tanya* controls the outcome here because, like this case, in *Tanya*, the employee did not meet the fault standard because the evidence demonstrated - - by her concession - - that she recognized that the correct share of her FEHB deductions was not paid.

²¹ Respondent raises several arguments bearing on the equities and justice of collecting the debt, but, unfortunately, these arguments are simply beside the point when it is determined that an individual knew or should have known that an error in salary payments existed. See, e.g., *In re Dawn*, Dkt. No. 06-61-WA, U.S. Dep't of Educ. (Dec. 12, 2006).