



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS

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In the Matter of

ANGELA,

Respondent

Docket No. 06-48 –WA

Waiver Proceeding

DECISION GRANTING WAIVER

Respondent, a U.S. Department of Education (Department) employee, requested waiver of a salary overpayment debt arising from the Department's failure to deduct an employee's elected health benefit coverage for two consecutive pay periods in 2000, pay periods 20 and 21. For the reasons that follow, I find the waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

JURISDICTION

Respondent's waiver request arises under 5 U.S.C. § 5584, authorizing 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 delegates the Secretary's waiver authority involving all former and current employees for salary overpayments to the Office of Hearings and Appeals (OHA).² The undersigned is the authorized Waiver Official who has been

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 Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at 1, n. 1. 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).

² Respondent's request for a waiver was filed with the Human Resources Services (HRS) office on November 20, 2000. Cases predating the delegation of OHA's waiver authority were not automatically transferred to OHA. On July 20, 2006, this waiver request for file No. 01LCBCOW2 was transferred to OHA.

assigned to this case³, and jurisdiction is proper because this case clearly involves an erroneous payment of pay subject to waiver under the Waiver Statute at 5 U.S.C.5584.⁴

The resolution of this case is based on the matters accepted as argument and evidence in the proceeding. The record in this case includes Respondent's initial request for waiver and documents compiled by the Department's Human Resources office, includes Federal Personnel Payroll Systems (FPPS) printouts for viewing employee personnel data, reissued leave and earnings statements (LES) covering pay detail for PP20 and PP21 of 2000, a copy of the BoC. In addition to Respondent's initial request for waiver letter November 20, 2000, she filed a supplemental response including a sworn written statement on September 27, 2007, following receipt of the Order Governing Proceedings. Included in her supplemental response were multiple attachments covering transfer documents when she accepted her appointment at the Department (September 10, 2000) and numerous transfer documents including SF50/52 forms, SF-1152 and I-9 Forms, salary data, life insurance, TSP forms, and appointment affidavits were supplied from the losing and gaining agencies, as moved through Human Resources specialist, Mr. Eugene Henry. Also included were copies of five LEAs for PP20, 21, 22,23 and 24 (2000) and a certification showing coverage by the same health provider from February 1997 to present. This decision constitutes a final agency decision.

History

Under the Federal Employees Health Benefits Act of 1959 (FEHBA),⁵ Congress established a comprehensive employer-sponsored group health insurance program (known as the Federal Employees Health Benefits or FEHB) for Federal employees. Under the Act, the Federal government and the employee share responsibility for premiums payable to the employee's health plan.⁶ Under FEHB, employees who transfer from one Federal agency to another without a break in service of more than 3 days may continue enrollment in the FEHB program by notifying their new payroll office of the employee's intent and completing an enrollment form.⁷ To avoid a break in FEHB coverage, the form is filed with appropriate agency officials of the new employer.

In September of 2000, Respondent, a former employee of the United States Department of Justice/Drug Enforcement Agency (DEA), commenced employment with the Department and proof of her transfer to the Department from DEA was tendered with appropriate transfer paperwork, including TSP forms, beneficiary designation forms, and SF-50s showing the appointment to her position with effective dates for that time. All these forms were processed by the Human Resources personnel specialist assigned to

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

⁴ An erroneous salary overpayment is created by an administrative error in an employee's pay. The fact that the agency erred in making an overpayment does not relieve the overpaid employee from liability. See, *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

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

⁶ 5 U.S.C. § 8906.

⁷ (Standard Form 2810) See FEHB Handbook, Eligibility for Health Benefits Coverage, at <http://www.opm.gov/insure/handbook/FEHB09.asp#TRANSFER%BETWEEN%PAYROLL%OFFICES>.

Respondent. Missing from that paperwork was the FEHB form and a check of Respondent's OPF by a representative for Human Resources, confirms that. However, as Respondent explained in both her original response (Jan 2000) and in her supplemental response (September 2006), Mr. Eugene Henry, implemented the correction in the system to deduct for continuation of her health benefits. Moreover, as Respondent pointed out she received assurances from Mr. Henry that she would not owe for the missing deductions over the affected two pay periods (PP 20 and 21, 2000). At the time, proper deductions were \$58.10 per pay period, so two missing deductions equal a debt of \$116.20.

Respondent supplied copies of her leave and earnings statements (LES) for the two-affected pay periods and for the three subsequent ones (PP 22, 23, 24). In doing so, she identifies that there were other mistakes and corrections as evidenced by her LES at the same period as she accepted her employment with the Department, due to incorrect tax and withholding information, and balance of leave discrepancies. She was working with Mr. Henry to adjust these and attention to those matters may have contributed to inattention to the missing health benefits premiums for her first two pay periods. There is no dispute that multiple errors appeared on the LES, including Respondent being incorrectly identified as Single when her marital status was Married. It is not known how many times Respondent had to contact or meet with Mr. Henry to straighten out these matters, but it is readily understandable under the circumstances how the health benefits problem could have been obscured. When Respondent did notice it missing from her LES, she called it to his attention, and received word he would backdate the benefits. She states she relied on his assurances that she would not be responsible for costs resulting from the backdating. As a newly transferred employee it appears she relied fully on representations of the personnel specialist handling all her appointment details. Her reliance was clearly stated in both her initial waiver request and her supplemental response.

Respondent repeatedly states that the overpayment here is a direct result of administrative error performed by Mr. Henry and that she had to take action to correct his error. She asserts she should not be accountable for an overpayment as the direct result of this human resources (HR) person's error. She further notes that he may have been new to the agency or that HR was short staffed at the time, which could have contributed to making the error. In addressing the error, Respondent did make a significant effort to reconstruct the history of her transfer process and submit contemporaneous records from that time and shows the amount of forms processed, reviewed and handled between her and Mr. Henry. Absent Respondent's reconstruction effort, clarifying the situation to any real extent would be extremely difficult given the significant passage of time since the debt originated. This will be an appropriate matter for further review under the equity analysis of this decision.

On November 15, 2000, the Department's Human Resources System Team (Human Resources) authorized its notice and issued a Bill of Collection (BoC) indicating that Respondent owed a debt to the Department in the amount of \$116.82 regarding overpayments for uncollected health benefits deductions occurring in 2000. She

timely requested waiver of the overpayment for the BoC. For reasons unknown, the Department did not carry out an action in response to Respondent's request until July 20, 2006, when Respondent's case was transferred to the Office of Hearings and Appeals for resolution. On August 31, 2006, I issued an Order requesting Respondent's submission of supplemental argument and evidence supporting her position that the debt in this case should be waived. Upon receipt of the Order, Respondent contacted me on September 5, 2006, for clarification. At that time, she stated her shock and disbelief that the matter she thought she had addressed and had received assurances she would not owe for, was an ongoing matter after a six years time and after her good-faith attempts to resolve this matter in 2000. These representations will be accepted as equitable arguments warranting waiver and discussed more fully in the equity portion of this decision.

Discussion

As a preliminary matter, with much of the point of Respondent's focus aimed at the error committed by the Department, some clarification is here needed. All waiver proceedings necessarily involve some type of administrative error by the employer-agency; the error is what leads to the salary overpayment. Our waiver cases have consistently acknowledged that despite the fact an administrative error by the Department causes an employee to be paid in excess, the existence of administrative error does not, itself, entitle the Respondent to a waiver.⁸

Waiver of a debt under 5 U.S.C. §5548 is an equitable remedy. To secure waiver of an erroneous payment of pay, a debtor must show that he or she is not at fault in accepting or not recognizing an overpayment of salary and that collection of the debt would be against equity and good conscience.

The standard for determining whether waiver is appropriate requires a 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* to recover the overpayment.⁹ In applying the first factor to the facts and issues of this case, I find that Respondent shows that there is no indication of fraud, misrepresentation, fault, or lack of good faith.

Fault Standard

Respondent's initial questioning and discovery of the payment error and bringing it promptly to the attention of those able to rectify the missing health benefits deductions duty to resolve erroneous salary payments as soon as she knows of the erroneous compensation and overage for failing to make the proper are viewed in a favorable light. She did all that she could and acted consistently with an employee's deductions. Clearly, the erroneous overage in her salary resulted from an administrative error for which there is no indication of fraud, misrepresentation, or lack of good faith on Respondent's part. This case comes within the ruling of earlier waiver decisions, including *In re Cheryl*, Dkt.

⁸ *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 15, 2005).

⁹ *See In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

No. 05-28-WA, U.S. Dep't of Educ. (February 17, 2006), in finding the initial factor of no indication of fault satisfies the first factor for determining if waiver is appropriate. Moreover, the error occurred during a transfer process from one federal agency to another when multiple forms and paperwork were being exchanged and signed off. Mr. Henry was the personnel clerk for the Department, the gaining agency, and the paperwork which Respondent supplied for transfer forms, the I-9 form, the TSP form, the Designation of Beneficiary Form, all part of the transfer process were handled and signed for by the same personnel specialist, Mr. Henry. Since Respondent was working closely with him, she had a strong basis for supposing that all the paperwork was in and elections for coverage and any deductions were properly made.

Since the same personnel specialist was processing everything for Respondent, there is every reason to think he should have prevented the situation from the outset. In support of the BoC, the Department has supplied a minimum of paperwork, an FPPS sheet showing that Respondent on her appointment date had in place the correct health benefit plan, the same one Respondent shows she has had continuously since February 1, 1997, and copies of the two LES for PP 20 and 21. Respondent, however, has submitted all kinds of transfer paperwork and comparative LES for the three follow-on pay periods after the errors occurred. Through the follow-on LES, it is possible to verify the errors with the tax deductions, the leave balance inaccuracies and the designations Respondent has pointed out were contributing to all the problems she encountered when first transferring into the Department.

Moreover, there appear to be some questions about regularity of process in this case based on data supplied by Respondent. Specifically, she was the only source of information about LES data for pay period #22, the first pay period following the problem two pay periods. At the bottom of that LES appears the notation that health benefits plan change was processed this pay period. On the LES, it shows a correction in the amount of \$116.20 was first made, then withdrawn, to further complicate the matter. This was for the pay period ending October 21, 2000, before issuance of the BoC, and any demand letter on November 15, 2000. It is inexplicable why that amount appears and then appears withdrawn at this juncture. Without possible clarification, by the personnel specialist at the time, this further complicates an assessment of how the health benefits matter was processed. It certainly appears to go against regularity of process for deductions to appear under title of Misc. Offset BAO, and then disappear by a delete (minus) action. This unexplained action may well correspond to the assurances Respondent understood she had from Mr. Henry that she would not be responsible or have to repay the uncollected deductions. But this kind of verification with Mr. Henry is now not possible given the lapse of time since the debt originated, and his apparent separation from the Department as he no longer appears on current Department rolls.

In light of Respondent's prompt actions to rectify the health benefits deductions problem, and taking note of sufficient mitigating circumstances to warrant an exception to the general rule holding an employee accountable for an overpayment evident from records (LES) at her disposal, which would generally indicate a salary overpayment for missing health benefits deductions, the tribunal concludes that Respondent is not at fault.

Due to mitigating circumstances, notably assurances Respondent received from the personnel specialist handling multiple matters for her at the time that she did not have to repay the deductions he was backdating, that a debit of the exact deductions amount appears and then is withdrawn on the same LES, that this contradictory action took place before issuance of any BoC or notice letter for claim of overpayment, that regularity cannot be presumed or reliability of the records Respondent would have had at her disposal to rely on and fully process her waiver request, or to fully respond to the BoC demand, and that multiple corrections were taking place at the time of this Respondent's transfer which added confusion and arguably compromised her ability to track any and all adjustments on her leave and earnings statements, are all significant factors under which this matter must be considered. Every waiver case must be examined in light of its particular facts and circumstances.¹⁰ Clearly, taking Respondent's actions and applying the significant factors around this debt, Respondent cannot be deemed to be at fault.

Equity and Good Conscience

Next, the tribunal must determine whether collection of the debt would be against equity and good conscience. To satisfy the equity and good conscience standards, the debtor must have acted fairly without fraud, deceit and in good faith.¹¹ The tribunal must balance equity concerns in light of the particular facts of the case. There are no rigid rules governing the application of the equity and good conscience standard. The tribunal must balance equity and or apprise good conscience in light of the particular facts of the case.¹² 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 position based on the overpayment; whether the time elapsed between the erroneous payment and discovery of the error and notification of the employee is excessive.

First, the ability to discover an overpayment with multiple actions surrounding the transfer of this employee to the Department taking place and with the several errors she was bringing up for his correction, was clearly challenging and impaired her ability to track everything correctly. Despite this, her actions to correct the overpayment were proactive and reasonable. She shows she made good faith efforts to resolve the matter and believed she had done so. The now significant length of time, which has elapsed since Respondent requested the waiver, has undercut Respondent's ability to prosecute her case to the fullest and causes her to be unable to get verification from the personnel specialist who handled her health benefits matters along with other transfer matters. This amounts to an unfavorable change of position since the person she relied on for correction is unavailable and cannot provide the expected corroboration for the resolution of the matter six years ago. Since collection of debts has been struck down when pursuit of the debt is "beyond the bounds of what is customary or reasonable; ridiculously or

¹⁰ See *In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005) at n.5

¹¹ 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).

¹² See *in re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (September 14, 2005), *In re David*, 05-22-WA..

unjustly excessive....: ¹³ the lengthy delay in resolving this matter, being six years since its initiation, leads to the conclusion that recovery here would be unconscionable. Among pertinent examples are situations where an employee encounters an exceptionally lengthy delay in adjusting a money matter and management fails to respond within a reasonable period regarding an overpayment.¹⁴ Accepting such examples fit the present case, after such delay and after Respondent's belief the matter was long resolved by the sufficiency of her corrective efforts, any recovery now would be unconscionable under the circumstances. Accordingly, waiver of the overpayment here would not be against equity and good conscience.

On the basis of the aforementioned, the tribunal finds that Respondent is without fault for the overpayment, and that it would be against equity and good conscience to deny waiver under the circumstances. Accordingly, waiver of Respondent's debt is warranted.

ORDER

Respondent requested waiver of the entire debt. Having found that the circumstances of this case conform to the threshold factors warranting waiver, Respondent's request for waiver of the \$116.20 overpayment is **GRANTED**.
So Ordered this 3rd day of October 2006.

Nancy S. Hurley
Waiver Official

¹³ See *Aguon v. Office of Personnel Managemetn*, 42 M.S.P.R. 540, 50(1989); See *In re Leo*, Dkt. No. 05-27-WA, U.S. Dep't of Education (December 23, 2005).

¹⁴ See *Aguon, id; In re Leo*, Dkt. No. 05-27-WA, U.S. Dep't of Educ.(December 23, 2005).