



UNITED STATES DEPARTMENT OF EDUCATION

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In the Matter of

PAUL,

Respondent

Docket No. 06-55-WA
Waiver Proceeding

DECISION GRANTING 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 **\$1,478.36**. This salary overpayment arose from the failure to deduct the proper amount of an employee's elected health benefit coverage. For the reasons that follow, the tribunal concludes that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

To adjudicate this case, the tribunal is guided by Congress' enactment of 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.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 undersigned is the authorized Waiver

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)).

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

The tribunal bases its findings and conclusions on matters accepted as argument and evidence, including: a copy of a signed and sworn written statement dated November 28, 2006 by Respondent regarding the waiver request, a copy of a statement requesting waiver dated September 17, 2003,⁵ a copy of a notice of debt letter dated September 8, 2003, a copy of a Bill of Collection (BoC) dated August 21, 2003, a copy of a letter addressed to Respondent from Stephen Hawald of the Department's Office of the Chief Information Officer dated September 20, 2000, and copies of a series of email communications occurring on August 1, 2003 between Respondent and Barbara L. Malebranche, Director of the Department's Office of Employee Relations.

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 Under FEHB, an employee may elect to increase coverage from a standard option to a family option by notifying their human resources or payroll office and completing a standard enrollment form, which, in this case, is Standard Form 2809.⁹

Effective August 2000, Respondent elected to expand his health benefit plan option from standard to family coverage. The increase in benefit coverage resulted in a concomitant increase in the costs for which Respondent was expected to pay for coverage through payroll deductions. According to the Department's Human Resources System Team, a BoC was issued because the Department erroneously continued to deduct costs of Respondent's health plan at the rate for a standard option plan rather than a family option plan. This error occurred over the course of 26 pay periods beginning in the 17th pay period of 2002 and ending in the 16th pay period of 2003 when the Department notified Respondent of the error in his payroll deduction.

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. On November 16, 2006, the tribunal issued an order requesting Respondent's submission of argument and evidence supporting his position that the debt in this case should be waived. As noted, *supra*, Respondent complied by filing supporting documentation.

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 See FEHB Handbook, Eligibility for Health Benefits Coverage, at <http://www.opm.gov/insure/handbook/>.

As a preliminary matter, the tribunal must decide whether the fact that an employee receives the benefit of coverage of health insurance should necessarily preclude granting waiver of a debt. This issue must be resolved as a threshold matter because in some waiver cases involving an administrative error in FEHB program payroll deductions, the tribunal has expressed support of the view that in addition to satisfying the traditional waiver standard, the employee also must show that he or she did not obtain the benefit of FEHB coverage during the pay period(s) at issue;¹⁰ hence, providing a degree of imprimatur for a categorical rule that would preclude granting waiver to debtors who obtain the benefit of health coverage. In this proceeding, Respondent neither asserts nor provides evidence indicating he lacked coverage.¹¹ To the contrary, Respondent concedes that he was eligible, entitled, and maintained FEHB coverage throughout the period at issue.¹²

Mindful that waiver cases entail a case-by-case review, the tribunal holds that whatever weight should be accorded the fact that a debtor has acknowledged use of his FEHB coverage, this factor should not be dispositive of whether waiver should be granted, and the tribunal finds nothing in the Waiver Statute that requires a contrary conclusion.¹³

Given the case-by-case analysis that should be accorded cases that involve equitable remedies, it follows that no rule, canon, or principle should be used mechanically to replace a tribunal's individualized judgment.¹⁴ Certainly, a perfunctory or mechanical rule operating to preclude waiver is entirely inappropriate when squared with the Supreme Court's instruction that, in the various contexts in which a tribunal may engage in equitable discretion, "traditional equitable principles do not permit" categorical rules or "broad classifications" to replace the circumstances of the case confronting the tribunal.¹⁵ Accordingly, the tribunal finds that there is no reason to categorically deny a debtor an opportunity to go forward to show why waiver should be granted; it is of no import that the employee obtained the benefit of FEHB coverage since, as is true in all overpayment cases, the debtor necessarily obtains the benefit of the overpayment during the pay period(s) at issue.

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

¹¹ For example, Respondent does not argue that she was denied FEHB coverage while seeking health care.

¹² Under FEHBA, Respondent shares the biweekly cost of health benefits coverage with the Department.

¹³ As the tribunal recognized in *In re Andrew*, Dkt. No. 06-76-WA, U.S. Dep't of Educ. (Nov. 14, 2006), there are circumstances where the employee will not be aware that the deduction for the employee's share of his or her FEHB premium is inaccurate (citing the circumstances of a new employee). Moreover, in *In re Tanya*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 19, 2006), wherein the tribunal considered whether the equities in a waiver case favor an employee, if the employee has obtained the benefit of FEHB coverage during the pay period(s) at issue, the tribunal's decision rejecting waiver did not alter the principle that governs all waiver cases; namely that waiver cases require a case-by-case factual determination. *See, e.g., In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005). Consequently, in some cases - - even where the employee has obtained the benefit of FEHB coverage - - the equities may balance out in favor or in disfavor of the employee.

¹⁴ It should go without noting that even in difficult cases, like the matter at hand, the exercise of equitable discretion cannot be tantamount to decision based on whim; despite the broad scope of equity, equitable principles limit discretion according to legal standards that promote justice and that recognize that like cases should be decided alike. *See, e.g., New York Trust Co. v. Eisner*, 256 U. S. 345 (1921).

¹⁵ *See, e.g., Ebay, Inc. v. MercExchange, LLC*, 547 U.S. __ (2006) (noting the inappropriateness of replacing a multi-factored test with a categorical rule granting (or denying) an equitable remedy).

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.¹⁶

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;¹⁷ (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.¹⁸ 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 latter position.

Respondent argues that a waiver of the debt is warranted because he had no way of discovering the overpayment through his own diligence. According to Respondent, his pay rate was increased (through a Quality Step Increase authorized by his supervisor, Stephen Hawald) at or around the time of his change in health benefit coverage and, therefore, Respondent did not discover that his change in pay reflected an improper amount. In addition, Respondent argues that the erroneous payments were the fault of the Department, and requiring him to repay the debt is tantamount to penalizing him for the errors of others. Respondent also argues that he was unable to mitigate the size of the debt because he neither had a reason to suspect an error in his FEHB deduction, nor a basis easily to detect the error since he was never denied coverage for the costs of his family's health expenses.

The tribunal's analysis begins by rejecting Respondent's argument regarding the proper application of the fault standard. Waiver proceedings usually involve some type of administrative error by the employer-agency since an error is often what leads to the salary overpayment; that is, a mistake in payroll or in the application of a rule or regulation governing pay is the usual vehicle that drives creation of the employee's debt. In this respect, our waiver cases have consistently acknowledged that despite the fact that the an administrative error by the Department causes an employee to be paid at a rate that exceeds the employee's lawful rate of

¹⁶ See, *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

¹⁷ 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).

¹⁸ 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).

pay, the existence of the error cannot, itself, entitle an employee to waiver.¹⁹ No employee has an entitlement to pay that he or she obtains as a result of an overpayment.²⁰

The paradigm for resolving waiver cases involving FEHB coverage under circumstances pertinent to this case is set forth in the decision *In re Catherine*.²¹ *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 waiver 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.

In this case, Respondent argues that the excessive time that elapsed between the occurrence of the erroneous payment and the commencement of this proceeding along with the fact that he had no reason to recognize the occurrence of an overpayment in the 17th pay period of 2002 establishes an equitable basis for granting waiver of the debt. The tribunal agrees. Indeed, in light of the factors identified above, the tribunal is persuaded that the circumstances of this case compel the same result as found in *Catherine*.

Respondent acted consistent with an employee's duty to resolve erroneous salary payments as soon as he knows of the erroneous compensation. At the time of Respondent's effective change in FEHB coverage, Respondent was unaware that his FEHB deductions were lower than the appropriate amount. According to Respondent, he was not alerted to an erroneous salary payment because he received a quality step increase in pay at the time his FEHB coverage changed; hence, the change in benefits did not provide Respondent with notice of the likelihood of a salary overpayment.²² In this light, the tribunal concludes that there is no indication of fault on Respondent's part.

III

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. The Department's waiver cases have adopted a number of factors pertinent to determining whether collection of a claim against an employee is against equity and good conscience or otherwise not in the best interests of the United States, 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

¹⁹ *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 15, 2005).

²⁰ *Id.*

²¹ Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005).

²² As the tribunal has noted, *supra*, the ruling in *In re Tanya*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 19, 2006), does not control the outcome here. 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 were not paid.

the circumstances,²³ and (d) whether the time elapsed between the erroneous payment and discovery of the error and notification of the employee is excessive. These factors are neither exhaustive, nor mutually exclusive; instead, the factors aid the tribunal in assessing under what circumstances, collecting a debt is “beyond the bounds of what is customary or reasonable” or “unjustly excessive.”²⁴

Respondent argues that it is against equity and good conscience to recover the debt because of the excessive time elapsed between the erroneous payment and the commencement of this proceeding. Nearly Four years elapsed while Respondent’s waiver request remained unresolved due to a backlog of cases. In a similar case, *In re Kenneth*,²⁵ the tribunal observed that a five-year period does not come within the precise contours of waiver cases adopting a *per se* rule that an excessive lapse in the time used to resolve a waiver request accrues to the debtor’s detriment.²⁶ Respondent, however, does not rely on a *per se* rule to establish detriment. Instead, Respondent argues that the passage of time has been detrimental to his ability to build a case for waiver because he no longer has access to leave and earnings statements from 2002 and 2003.²⁷ In addition, Respondent argues that the Department’s notice of his right to waiver did not include sufficient information to inform him of the proper standard applicable making an appropriate waiver request. According to Respondent, not until he received the tribunal’s November 16, 2006 Order Governing Proceedings (OGP) did it become apparent what type of evidence a debtor needs to obtain and preserve to make a case for waiver.

In 2003, Respondent received a BoC and a notice of debt, dated September 8, 2003. The notice indicated that an employee may “[r]equest a waiver of the overpayment if the overpayment occurred through administrative error and there is no indication of fraud, misrepresentation, fault, or lack of good faith by” the employee. On the basis of this instruction in 2003, Respondent submitted documentation to support his argument that waiver because the debt arose as a result of an administrative error. Respondent now argues that the waiver standard identified in the tribunal’s OGP differs from the one set forth in the notice, and that applying the “new” standard to him is unfair since he first requested a waiver in 2003, when a different standard was in effect.

Respondent is incorrect. The waiver standard did not changed during the lapse in time for resolving Respondent’s request. The debt notice addressed to Respondent in 2003, however,

²³ See, e.g., *In the Matter of Mrs. Kathryn H. Vandegrift*, 55 Comp. Gen. 1238, B-182, 704 (July 2, 1976). Whether repayment would impose an undo financial burden on Respondent need not be determined by an unassailable and detailed economic analysis; rather, the tribunal need find only that Respondent has shown that the financial burden suffered is reasonably related to repayment of the debt, and that repayment is not otherwise consistent with equity and good conscience.

²⁴ *Aguon v. Office of Personnel Management*, 42 M.S.P.R. 540, 549-50 (1989); see also *Harrison v. Office of Personnel Management*, 57 M.S.P.R. 89, 95 (1993).

²⁵ *In re Kenneth*, Dkt. No. 06-52-WA, U.S. Dep’t of Educ. (December 12, 2006).

²⁶ *Id.* See *In re Jay*, Dkt. No. 05-25-WA, U.S. Dep’t of Educ. (April 18, 2006) (holding that a seven-year time period that elapsed during the pending resolution of Respondent’s waiver case is excessive) and *In re Cheryl*, Dkt. No. 05-28-WA, U.S. Dep’t of Educ. (February 17, 2006) (holding that over seven years - - or nearly eight - - is beyond what would be customary or expected to resolve a waiver request).

²⁷ In an email message addressed to Respondent, Barbara L. Malebranche, Director of Employee Relations, acknowledged the Department’s “keying error” that resulted in the salary overpayment, and suggested that her efforts to obtain a waiver of debt were “not successful.”

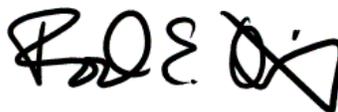
could have confused Respondent by arguably indicating that a basis for obtaining waiver included proof that an overpayment was caused by an administrative error by the Department. As noted *supra*, our waiver cases have clearly established that the fact that the agency erred in making the overpayment neither forms a basis for waiver nor relieves the overpaid person from liability for a debt.²⁸ Even so, Respondent's mistaken reliance on the debt letter's identification of the waiver standard is apparent by his argument and his presentation of evidence.

What is more, the tribunal does not doubt the correctness of Respondent's assessment that his ability to provide supporting documentation for his position was greater four years ago than it is now; Respondent's access to payroll records is adversely affected by the passage time. Even in 2003, when Respondent had ready access to potentially relevant evidence for his case, Respondent's arguments were framed based upon the debt letter's confusing identification of the appropriate waiver standard. Moreover, the tribunal is convinced that even if the Department could assert a basis for the extensive delay in resolving Respondent's waiver request, it is doubtful that such a delay should be deemed reasonable under the circumstances of this case, wherein the delay imposes a direct burden upon Respondent's capacity to present his case. Clearly, the passage of time accrued to Respondent's detriment. As such, the requisites of equity and good conscience in this case favor Respondent. ACCORDINGLY, I find that in the interests of the United States waiver should 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 **\$1, 478.36** is **HEREBY GRANTED.**

So ordered this 20TH day of February 2007.



Rod Dixon
Waiver Official

²⁸ It remains fundamental to the analysis of when waiver may be granted that when an employee fails to review documentary records, including leave and earnings statements, which, if examined, would have shown the overpayment and provided the employee with an opportunity to correct the overpayment, the employee is not free from fault. Moreover, since an overpayment is presumptively in excess of the amount of authorized salary, the issuance of a BoC initiates the government's right to recover an excess amount. *See, In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).