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

In the Matter of

SUZANNE,

Docket No. 06-56-WA
Waiver Proceeding

Respondent.

DECISION GRANTING PARTIAL WAIVER

Respondent, a U.S. Department of Education (Department) employee, requested waiver of a $1,319.59 salary overpayment debt arising from the Department's failure to deduct the full amount of her health insurance premiums for 28 pay periods. Based on the reasons articulated in this decision, the tribunal finds that waiver of this debt in the amount of $1220.70 is warranted. Accordingly, Respondent's request for a waiver is granted in part.

Jurisdiction

Respondent's waiver request arises under 5 U.S.C. § 5584 (the Waiver Statute), authorizing 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)[2], specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).[3]

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, her supplemental statement, and documents compiled by the Department's Human Resources office. This decision constitutes a final agency decision.

[1] *See* General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), October 19, 1996, 110 Stat. 3828; s*ee also In re Tanya*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 18, 2006) at 1, note 1.
[2] The Handbook, ACS-OM-04, was revised and reissued by the Department on March 30, 2007.
[3] 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.

Procedural History

According to the March 1, 2001 Notice of Debt Letter and attached Bill of Collection (BoC), the $1,319.59 overpayment arises from the Department's failure to deduct Respondent's full Respondent's share of her health insurance premiums from Pay Period 2 of 2000 through Pay Period 3 of 2001. According to the BoC, Respondent switched her health insurance from individual to family coverage but only the premiums for individual coverage were deducted.

Respondent filed her request for waiver and attachments on March 12, 2001.[4] In a November 17, 2006 Order Governing Proceedings, Respondent's request for a waiver was deemed timely and Respondent was afforded an opportunity to supplement the record. On November 20, 2006, Respondent filed a short statement that also inquired about the waiver process. The tribunal then requested that Respondent confirm whether or not she wished to file any additional statement. On January 8, 2007, Respondent stated that she did not wish to amplify her previous statements.

Discussion

A salary overpayment is created by an administrative error in the pay of an employee in regard to the employee's salary. [5] The fact that an administrative error created an overpayment does not relieve the overpaid employee from liability.[6] Instead, an employee who does not contest the validity of the debt may request that the debt be waived or forgiven.

Waiver is an equitable remedy available only when there is no indication of fraud, misrepresentation, fault, or lack of good faith by the debtor.[7] 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

The fault standard is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. Fault is determined by assessing whether a reasonable person should have known or suspected that he or she was receiving more than his or her entitled salary.[8] In assessing the reasonableness of a debtor's failure to recognize an overpayment, the tribunal may consider the employee's position and grade level, newness to federal employment, and whether an employee has records at his or her disposal, which, if reviewed, would indicate a

[4] Respondent's request for a waiver was originally filed with the Department's Human Resources office on December 30, 2003. On July 20, 2006, Respondent's request for a waiver was transferred to OHA.
[5] *See* 34 C.F.R. Part 32 (2004).
[6] *See In re Robert*, Dkt No. 05-07-WA, U.S. Dep't of Educ. (July 8, 2005), n. 12.
[7] *See In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).
[8] *See In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

salary overpayment.[9] Thus, every waiver case must be examined in light of its particular facts and circumstances.[10]

Respondent states that she first requested a change in her health insurance from individual to family coverage in December 1999. Respondent maintains that she noticed that the premiums were not deducted from her pay and contacted the Department four or five times to report the error. Respondent asserts that the first time she contacted the Department she was told to wait until the next pay period. After waiting until the next pay period, Respondent states that she again contacted the Department by leaving several voice mail messages reporting the error. Respondent asserts that her telephone calls were not returned and she continued to leave messages; whereupon, her need for family coverage abated. Respondent argues that she assumed the change in coverage was not processed; otherwise, she would have formally cancelled her requested change. Respondent explains that she first requested family coverage due to her husband's job loss. After waiting those three pay periods, her husband found new employment and she no longer needed the family health insurance coverage.

To support her claim that she was unaware that her requested change in her health insurance had been processed, Respondent argues that she did not submit any health insurance claims for her husband from December 1999 to January 2001. On January 17, 2001, Respondent states that her husband again lost his employer-provided health insurance and that she contacted the Department's Human Resources office to switch her coverage to family coverage. Respondent asserts that the Human Resources office did not return any of her telephone calls. Respondent claims she learned of the error at issue in this case when she contacted the Department's payroll contractor about switching her health insurance coverage. At that time, she found out that she had been signed up for family coverage since December 1999.

In her November 20, 2006 statement, Respondent reiterates that she believed her requested change in coverage had not been processed, that no claims were submitted on her husband's behalf, and that she never received an additional insurance card for her husband. Respondent also argues that she is not sure where she placed the 2001 paperwork regarding this debt.

In applying the fault standard to this case, the tribunal concludes that Respondent is not at fault. As an initial matter, there is no evidence of fraud, misrepresentation or lack of good faith by the debtor. The tribunal is persuaded that Respondent diligently reported the error when it first occurred and that the Department's continued failure to deduct family health insurance premiums led to her reasonable belief that her requested change in coverage had not been processed. Moreover, the Department's failure to respond to Respondent's repeated inquiries exacerbated its original error.

In light of the foregoing facts, this case comes within the clear ruling of *In re Shelley*.[11] In *Shelley*, the employee similarly requested a change from individual to family coverage upon her

[9] *See In re Veronce*, Dkt. No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).
[10] *See id.*at 5.
[11] Dkt. No. 06-25-WA, U.S. Dep't of Educ. (November 28, 2006).

husband's job loss. A few days later, the employee's husband found a new job and she was told she did not have to formally cancel her requested change because it had not been processed. The employee in *Shelley* believed her change had been cancelled and she did not submit any claims on her husband's behalf. The hearing official found that the employee's failure to recognize that an overpayment occurred was reasonable.

Much like the employee in *Shelley*, the Department's inaction and its failure to respond to Respondent's repeated inquiries led her to believe her requested change in coverage had not been processed. Moreover, Respondent's conduct was consistent with her reasonable belief that she was not enrolled in family health insurance coverage in that she did not submit any health insurance claims on her husband's behalf during the period at issue. Further, her husband was covered under his own employer's health insurance plan. Thus, the tribunal is convinced that Respondent's belief that she continued to be enrolled as an individual in her health insurance plan was genuine. Finally, the tribunal notes that Respondent's waiver request has languished for nearly five years and that Respondent has indicated that she no longer has or is unable to locate documents relevant to this matter.[12]

Equity and Good Conscience

The tribunal next must consider whether collection of a debt would go against 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] Beyond this framework, 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] 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 or her position based on the overpayment; whether recovery of the claim would impose an undue financial burden on the debtor; whether the time elapsed between the erroneous payment and the agency's discovery of the error and subsequent employee notification is excessive, and whether the cost collection the claim equals or exceeds the amount of the claim.[15]

In past cases involving the Department's failure to deduct health insurance premiums, the tribunal has found that the employee's receipt of a benefit – health insurance coverage – is a factor in determining whether collection of the debt goes against equity and good conscience.[16] It is not, however, a rule that must be rigidly applied in all waiver cases involving unpaid health insurance premiums if the particular circumstances do not warrant its application.[17] As articulated

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[12] *See In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005) (In a health benefits case, when the employee's waiver request languishes for over five years, leading to the employee's misimpression that the matter was resolved and when such a delay leaves the employee at a significant disadvantage in pursuing her waiver request, waiver of the debt is appropriate.)

[13] *See* 5 U.S.C. § 5584 and *In re Veronce, supra.*

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

[15] *See id*.

[16] *See In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005); *In re Andrew*, Dkt. No. 06-76-WA, U.S. Dep't of Educ. (November 14, 2006)

[17] *See In re Catherine*, *supra*; *In re Shelley*, *supra*.

by the hearing official in the decision *In re Paul*[18], "[g]iven the case-by-case analysis that should be accorded cases that involve equitable remedies, it follows that no rule … should be used mechanically to replace a tribunal's individualized judgment."

The record in this case reflects that Respondent acted in good faith, without any indication of misrepresentation or malfeasance. She repeatedly contacted the Department's Human Resources office to report that deductions were not being made and the Department failed to adequately respond to her inquiries. When her need for family coverage ended after three pay periods, Respondent let the matter drop because she genuinely believed her requested change had not been processed. The record also reflects that she remained unaware that her husband was included in her health insurance coverage and did not submit claims for his medical expenses.

Nearly five years elapsed while Respondent's waiver request was pending due to a backlog of cases. In the interim, Respondent apparently mislaid or no longer has all of the relevant documentation in her possession. A delay of five years does not automatically establish that the passage of time accrued to Respondent's detriment; it is, however, excessive and goes beyond what would be customary or expected in a waiver case.[19] If a delay impinges on a debtor's ability to pursue his or her waiver request, waiver may be appropriate given the impact on an individual's recollection of events and/or the availability or accessibility of relevant documentation.[20] Here, Respondent's inability to locate all of the relevant documentation places her at a disadvantage in pursuing her waiver request.

In her March 12, 2001 statement, Respondent stated that she would pay any portion of this overpayment that accrued after January 17, 2001, the date she again requested a change from individual to family coverage. The overpayment at issue in this case stretched from January 16, 2000 through February 24, 2001 (Pay Period 2 of 2000 – Pay Period 3 of 2001). Therefore, the portion of the overpayment that accrued after January 17, 2001 spans the last two full pay periods (Pay Periods 2 and 3 of 2001) of this time period. Given Respondent's acknowledgment that her husband was covered under her health insurance as of this date based on her requested change in coverage and her offer to repay this portion of the overpayment, the tribunal finds that it would not be inequitable to require Respondent to pay the premiums for family coverage for these two pay periods.[21] Finally, Respondent's aforementioned offer to pay this portion of the debt also indicates her good faith. Based on all of these factors, the tribunal finds that recovery of the debt that accrued prior to January 17, 2001 would go against equity and good conscience.

ORDER

[18] Dkt. No. 06-55-WA, U.S. Dep't of Educ. (February 20, 2007).

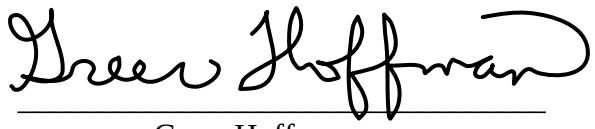
[19] *See In re Jay*, Dkt. No. 05-25-WA, U.S. Dep't of Educ. (April 18, 2006) (A seven-year delay in resolving a waiver request was excessive); *In re Cheryl*, Dkt. No. 05-28-WA, U.S. Dep't of Educ. (February 17, 2006) (Nearly eight years elapsed before the employee's waiver request was resolved.)

[20] *See In re Catherine, supra. See also, In re Paul, supra* (Respondent's ability to provide documentation including the lack of accessibility to historical payroll records was impacted by the five-year delay.)

[21] The portion of the debt attributable to Pay Periods 2 and 3 of 2001 is $98.89, the difference between the costs for individual and family coverage under Respondent's health insurance plan for these two pay periods.

Pursuant to my authority under the Waiver Statute, 5 U.S.C. § 5584, Respondent's request for waiver in the amount of $1,220.70 is **GRANTED**.

So ordered, this 26th day of April 2007.



Greer Hoffman
Waiver Official