



UNITED STATES DEPARTMENT OF EDUCATION

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In the Matter of

MARGUERITE,

Respondent

Docket No. 06-81-WA
Waiver Proceeding

DECISION DENYING WAIVER

At issue in this case is whether an employee of the Department of Education (Department) may obtain waiver of a debt arising from a salary overpayment caused by the Department's failure to deduct a total of **\$1, 381.44** in Federal Employees Group Life Insurance (FEGLI) premiums from an employee's pay. For reasons that follow, the tribunal concludes that waiver of the debt is unwarranted. Accordingly, Respondent's request for waiver is denied.

Congress authorized the waiver of claims of the United States against a debtor as a result of an erroneous payment of pay to a Federal employee,¹ and the Department delegated the waiver authority involving all former and current employees 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 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). The Department'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 pursuant to the Waiver Statute at 5 U.S.C. 5584.⁴

The record before the tribunal constitutes what is accepted in this proceeding as argument and evidence, including: a copy of a signed, sworn, written statement dated January 2, 2007 by Respondent providing a basis for waiver of the salary overpayment, copies of electronic mail communications from Respondent addressed to officials in payroll and human resources, and a copy of a Bill of Collection (BoC) generated by the Department's Debt Management Tracking Application.

DISCUSSION

Due to an administrative error, from the 13th pay period of 2005 through the 20th pay period of 2005, Respondent's premiums for FEGLI coverage did not include the appropriate cost of family coverage. A payroll official processed Respondent's FEGLI application form using a payroll code that resulted in an insufficient premium deducted from Respondent's pay. Notably, there is no dispute that this case involves an erroneous payment of pay. The Department did not deduct the correct amount of premium from Respondent's pay, and Respondent does not contest this fact. Consequently, the central focus of this case is whether Respondent is entitled to waiver of the obligation to repay the cost of her FEGLI coverage for 7 pay periods in 2005.

In a waiver proceeding, the debtor acknowledges the validity of the debt or urges an absence of any reason to recognize the overpayment as an erroneous payment. 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,⁵ 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.⁶ The former factor 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;⁷ (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.⁸

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 In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

⁶ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

⁷ 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).

⁸ 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).

It is fundamental to the analysis of whether waiver of a debt may be granted that when an employee fails to review documentary records, including notices of personnel action, leave and earning statements, and other payroll statements, which, if examined, would show or identify an overpayment and provide the employee with an opportunity to correct the overpayment, the employee is not free of fault.⁹ Applying this standard to the facts in this case, Respondent argues that waiver of the entire debt is warranted because she attempted to cancel her election for FEGLI coverage after becoming frustrated with attempts to resolve errors in the processing of her pay. In Respondent's view, it is unfair to require her to pay for an error she neither caused, nor could convince human resource officials to fix in a timely manner.

Although Respondent's evidence, in the form of various email communications, clearly shows she sought to alert the Department to the errors regarding her FEGLI coverage, the facts and circumstances of this case in all relevant respects are identical to those in *In re Millicent (Millicent)*,¹⁰ wherein the waiver official held that errors in processing FEGLI coverage do not constitute a basis for waiver absent mitigating circumstances.¹¹ In *Millicent*, the waiver official observed that it "is well settled that an employee's [FEGLI] coverage is effective the day a FEGLI election form is approved by the agency."¹² This is so because an employee is "entitled to receive the full amount of his or elected FEGLI coverage even though insufficient premium payments were deducted."¹³ Moreover, this is precisely the type of case where an employee's conscientious attempts to bring an error to the Department's attention is expected to help verify whether an employee's pay is accurate.

Despite the frustrating aspect of attempting to correct administrative errors in pay, the fault standard imposes a duty upon the employee ostensibly to limit the Federal government's exposure to overpayments since it is often the case that an employee is in the best position to recognize a mistake in pay. Fault, as the term is used in the Waiver Statute, is examined in the context of an employee's duty to prevent or discover mistakes and errors in salary payments when doing so is feasible. This duty comports with the employee's unique ability to know of the antecedents that may give rise to changes in pay that could result in erroneous payments. Employees are not only often informed of a personnel action that affects pay before the pay change is implemented (e.g., promotions, pay increases, monetary awards or bonuses), but it is often the employee who initiates a change in status that results in a pay change (e.g., change in FEGLI coverage, health benefit coverage, or a change in a retirement benefit). As such, the employee is uniquely able to scrutinize the subsequent pay change for erroneous under or over payments, and alert the employer to potential errors in pay. More directly, the tribunal's cases repeatedly acknowledge that "in the event that an employee receives an erroneous salary payment, the employee has an independent duty to hold onto the overpayment for future

⁹ See, e.g., *In re Jerry*, Dkt. No. 05-29-WA, U.S. Dep't of Educ. (Feb. 16, 2006).

¹⁰ Dkt. No. 06-06-WA, U.S. Dep't of Educ. (July 7, 2006).

¹¹ *In re Millicent, supra*.

¹² *In re Millicent, supra*; see also *In re Darryl*, Dkt. No. 05-24-OP, U.S. Dep't of Educ. (December 8, 2005).

¹³ *In re Millicent, supra*.

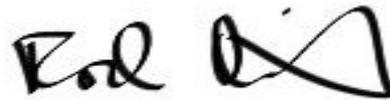
repayment to the government.”¹⁴

In light of the aforementioned, the tribunal finds that Respondent’s arguments and evidence fall short of establishing that she satisfied the requisites of the fault standard.¹⁵ Accordingly, in the interests of the United States, waiver 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 **\$1381.44** is **HEREBY DENIED**

So ordered this 3rd day of April 2008.



Rod Dixon
Waiver Official

¹⁴ *In re Robert*, Dkt. No. 06-77-WA, U.S. Dep’t of Educ. (November 7, 2006) (*see, e.g.*, DOHA Case No. 01092001 (Department of Defense, Office of Hearings & Appeals [DOHA]) (October 29, 2001); DOHA Claims Case No. 99111916 (December 8, 1999).

¹⁵ To the extent that Respondent raises arguments bearing on the equities and justice of collecting the debt, 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 Joanne*, Dkt. No. 06-22-WA, U.S. Dep’t of Educ. (May 1, 2007).