



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

ROBIN,

Respondent

Docket No. 07-114-WA
Waiver Proceeding

DECISION GRANTING WAIVER

At issue in this case is whether an employee of the Department of Education (Department) may obtain waiver of a debt arising from salary overpayments resulting from the failure to deduct a total of **\$494.34** in health insurance premiums from an employee's pay. For reasons that follow, the tribunal concludes that waiver of the entire debt is warranted. Accordingly, Respondent's request for waiver is granted.

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 to the OFFICE OF HEARINGS & APPEALS (OHA),² which, thereby, exercises waiver authority on behalf of the Secretary. The undersigned

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). *See also, 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 March 2007)).

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

The record before the tribunal constitutes what is accepted in this proceeding as argument and evidence, including: a copy of a signed, written statement by Respondent, dated September 15, 1999, providing Respondent's position why waiver of the salary overpayment is warranted, copies of Federal Personnel Payroll System data sheets documenting payment dates and amounts pertinent to Respondent's health care benefit, a copy of a notice of debt letter dated August 31, 1999, and a copy of a Bill of Collection (BoC) dated August 23, 1999.⁵

DISCUSSION

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 When an employer fails to deduct from an employee's pay the employee's share of her FEHB premium or the correct amount of an employee's share of her FEHB premium, an overpayment is created.

In 1999, Respondent was hired by the Department after a tour of duty with the Army Corps of Engineers (Corps). While employed with the Corps Respondent elected family coverage for health insurance. Respondent intended to carry over the same level of coverage at the Department, but due to an administrative error, Respondent paid a lower costing coverage identified as single coverage. Due to the error, payroll officials deducted an amount for single coverage rather than family coverage for Respondent's share of FEHB premiums beginning in the 3rd pay period and extending thru the 16th pay period of 1999. As a result, the Department's Human Resources Systems Team issued a BoC and debt collection letter seeking recovery of \$494.34.

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,⁹ or lack of good faith on the part

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 agency took no dispositive action on Respondent's request until on June 21, 2007, when Respondent's case was docketed by the Office of Hearings & Appeals.

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

of the employee, and (2) whether the employee can show that it is against equity and good conscience for the Federal government to recover the overpayment.¹⁰ Whether an employee lacks fault under the Waiver Statute depends upon the tribunal's determination of whether the employee failed to review documentary records, including notices of personnel action, leave and earning statements, and other payroll records, which, if examined, would show or identify an overpayment and provide the debtor with an opportunity to correct the overpayment.¹¹ In a waiver proceeding, the employee must carry the burden of showing that he or she is free of fault.

Respondent argues that a waiver of the debt is warranted because she did not know that the Department failed to deduct the correct amount of her share of the premium for her health benefit coverage. In addition, Respondent argues that she had no reasonable basis to determine that her pay was inaccurate since the error occurred in her first pay period and continued throughout her initial year of employment with the Department until the error was discovered by payroll officials. According to Respondent, she requested that her enrollment in the health care plan used while at the Corps be transferred to the Department without any change in coverage and, on this basis, assumed that human resource officials had directed payroll officials to deduct the appropriate premium amount.

To resolve this case, the tribunal is guided by the waiver decision *In re Catherine* (*Catherine*).¹² In *Catherine*, the hearing official acknowledged that even where an employee enjoys the benefit unpaid FEHB coverage, waiver of a FEHB debt may be appropriate. In keeping with the circumstances laid out in *Catherine*, the tribunal notes that Respondent's circumstance resembles those circumstances in which an employee's regular review of payroll statements would not show or identify a readily apparent overpayment.

What is more, although the Waiver Statute imposes an obligation on employees to dutifully check the accuracy of each salary payment, this duty does not arise when it is impertinent. At the time of Respondent's commencement of employment with the Department, she had no expectation of a change in FEHB coverage or a change in the deduction taken as her share of the premium payment for her coverage. Consequently, Respondent's payroll statements would neither alert her to an erroneous salary payment, nor put her on notice of the likelihood of a salary overpayment.¹³ Indeed, the error resulting in the overpayments first occurred in Respondent's initial salary payment beginning her tour of duty with the Department. Therefore, the tribunal is convinced that these circumstances support the conclusion that Respondent should not be held at fault for failing to take notice of the Department's administrative error. Accordingly, the tribunal concludes that there is no indication of fault on Respondent's part.

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

¹⁰ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

¹¹ See, e.g., *In re Jerry*, Dkt. No. 05-29-WA, U.S. Dep't of Educ. (Feb. 16, 2006).

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

¹³ Notably, this case is unlike the circumstances in *In re Tanya*, Dkt. No. 05-34-WA, U.S. Dep't of Educ. (April 19, 2006); in *Tanya*, the employee did not meet the fault standard because the evidence demonstrated - - by the employee's concession - - that she recognized that the correct share of her FEHB deductions were not paid.

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 the circumstances, 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."¹⁴

The tribunal concludes 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. Coming within a hair of the expiration of the pertinent statute of limitations, nearly nine years elapsed while Respondent's waiver request remained unresolved. This excessive passage of time is sufficiently long enough to presume that the delay had accrued to Respondent's detriment; the harm or detriment is likely to include an adverse impact on Respondent's ability to further pursue her waiver request due to fading memories and a lack of access to payroll records, financial statements, and other documentation bearing on the equities of repayment.

The tribunal is also convinced that Respondent's waiver request has languished unresolved long enough to render a misimpression by the employee that the matter had been resolved. In this regard, the tribunal is mindful that waiver requests are administrative appeals that should be adjudicated in an expeditious manner.¹⁵ The Department's *Salary Overpayment Handbook* advises that waiver requests be resolved within 60-days of receipt of the request. Notwithstanding that a number of circumstances could require extending the time period beyond 60-days, enlarging the time period from 60-days to 60-months, without explanation or justification, undermines the fairness that the proceeding is presumed to provide. Even if the Department could assert a basis for the extensive delay in resolving Respondent's waiver request, it is doubtful that a delay amounting to nearly nine years could be deemed reasonable. Moreover, many of the traditional factors of equity under gird the notion of fairness, which includes the timely commencement of due process because of concerns that over time memories fade, evidence is lost, and an a burden is imposed upon an individual's capacity to pursue her legal interests. As such, the tribunal is persuaded that the balance of equities in this case favor Respondent.

ACCORDINGLY, in the interests of the United States, waiver should be granted. This decision constitutes a final agency decision.

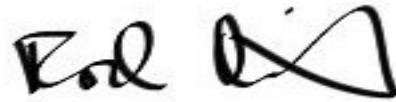
¹⁴ *Aguon v. Office of Personnel Management*, 42 M.S.P.R. 540, 549-50 (1989); see also *Harrison v. Office of Personnel Management*, 57 M.S.P.R. 89, 95 (1993).

¹⁵ See *In re Kenneth*, Dkt. No. 06-52-WA, U.S. Dep't of Educ. (December 12, 2006).

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 **\$494.34** is **HEREBY GRANTED.**

So ordered this 4TH day of August 2008.

A handwritten signature in black ink, appearing to read "Rod Dixon", written in a cursive style.

Rod Dixon
Waiver Official