



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

LESLIE,

Respondent

Docket No. 07-295-WA
Waiver Proceeding

DECISION ON WAIVER REQUEST

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 make payroll deductions totaling **\$1,098.71** of the employee's share of premiums for her elected health benefit coverage. The employee acknowledges that the debt is owed to the Federal government, but requests that repayment of the debt be waived. For reasons that follow, the tribunal concludes that waiver of a portion of the debt is warranted. Accordingly, Respondent's request for waiver is granted in part.

The Department delegated its statutory authority to waive the claims of the United States against a former or current employee-debtor to the OFFICE OF HEARINGS & APPEALS (OHA),¹ which, thereby, exercises waiver authority on behalf of the Secretary.² The undersigned is the

¹ 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)).

² See also, 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/.

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 written statement dated November 15, 2007 establishing Respondent's reasons for waiver of the salary overpayment, copies of communications from Respondent addressed to officials in payroll and human resources concerning Respondent's health insurance, copies of Respondent's payroll records from 2007, a copy of a Notice of Personnel Action approving Respondent's name change dated July 11, 2006, a copy of a letter addressed to J. Carolyn Adams, Executive Officer of the Office of General Counsel from Respondent dated April 10, 2007, a copy of a memo and an email from J. Carolyn Adams to Eudora Covington dated April 12, 2007 and August 15, 2007, respectively, a copy of an email sent to J. Carolyn Adams dated April 27, 2007 from Eudora Covington, a copy of a Bill of Collection (BoC) issued on September 13, 2007, and a copy of a Notice of Debt Letter sent to Respondent, dated September 17, 2007.

DISCUSSION

I

After review of the evidence, the following facts are found pertinent to this case. 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.⁶ Under the Act, the Federal government and the employee share responsibility for premiums payable to the employee's health plan.⁷ Premiums are paid each pay period and are disclosed as payments and deductions on employee pay statements. Respondent's share of her premium ranged from \$57.03 to \$58.07 per pay period for the pay periods at issue.⁸ Due to an administrative error in coding Respondent's health benefit coverage while processing a name change for Respondent, Respondent's payments for health benefit coverage was inadvertently canceled. Although Respondent's access to her elected health care benefit never ceased, the personnel action resulted in the Department's cancellation of deductions of Respondent's share of her FEHB premiums beginning in the 16th pay period; this error extended thru the 8th pay period of 2007. To correct the error, the Department's Human Resources Systems Team authorized issuance of a BoC and debt collection letter seeking recovery of \$1,098.71 from Respondent.

Respondent discovered the error. Upon discovery that no deductions were being made

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

⁶ FEHBA also covers dependents and retirees.

⁷ 5 U.S.C. § 8906.

⁸ Respondent's rate changed in 2007.

for her health insurance, Respondent immediately notified the appropriate official, who resumed the FEHB deductions. There is no dispute between the parties that this case involves an erroneous payment of pay. The Department did not deduct the employee share of Respondent's health insurance premium, 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 her FEHB premiums for 13 pay periods.

II

Broadly stated, 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.⁹

Although *fault* is often used in a conventional sense to refer to blunder, mistake or responsibility, *fault*, as the term is used in the Waiver Statute and in factor (1) above, has specialized and particular meaning. Rather than its conventional use, fault 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;¹⁰ (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.¹¹ Given the aforementioned considerations, it should be apparent that the application of the fault standard is critical to the ultimate determination of whether to grant or deny waiver. More precisely, waiver may be granted only if a debtor succeeds in showing that he or she can satisfy the fault standard.

Applying this standard to the facts in this case, Respondent argues that waiver of the entire debt is warranted because she was unaware of the payroll error, and once she discovered the error, she alerted the Department to the mistake. Indeed, the evidence shows, as Respondent contends, that she brought the error to the Department's attention and, in doing so, helped the Department resolve an overpayment.

The Department's waiver cases have recognized that the fault standard implicitly imposes a responsibility on the employee to expose overpayments and prevent or discover

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

¹⁰ 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). As such, in a waiver proceeding, 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. *Id.*

¹¹ 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).

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 give rise to changes in pay that may result in erroneous payments. Employees are not only the best informed in this regard, but are often informed of the personnel action that affects pay *before* the pay change is implemented (e.g., promotions, pay increases, monetary awards or bonuses); this is so because 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 is the case here. As such, the employee is uniquely able to scrutinize subsequent pay changes for erroneous under *or* over payments, and alert the employer to potential errors. Although in this case Respondent alerted the Department to the payroll error, it is not apparent why Respondent was not more diligent in discovering the payroll error. Respondent discovered the 2006 error in March of 2007.

A review of documentary records, including a notice of personnel action, leave and earning statements, and other payroll statements, which, if examined carefully, would have shown or identified the error in pay. Respondent's Leave and Earning Statements (LES), for example, should have conspicuously disclosed the fact that the Department failed to deduct Respondent's share of her premium. The uncollected premium caused Respondent to be overpaid at least \$50.00 per pay period. This is a rather conspicuous unanticipated increase in pay that should have alerted Respondent in 2006 to take reasonable steps to inquire with human resource officials to check the accuracy of Respondent's biweekly pay. Although Respondent asserts that she "did not notice the error until March 27th [2007] at which time [she] immediately contacted the Executive Officer (J. Carolyn Adams) for the office," Respondent does not indicate that there was an impediment to access to her earnings statements prior to March of 2007, and the tribunal finds no reason to make such an inference from the record.

In this light, the tribunal must weigh Respondent's eventual diligence in alerting the Department to the error once discovered against the lack of urgency and haste exhibited in failing to alert the Department to the error sooner. In the balance, Respondent's circumstances persuade the tribunal that her eventual diligence weighs more heavily than her lack of haste. As such, the tribunal concludes that Respondent succeeds in showing that she satisfies the fault standard. What is more, the tribunal is convinced that this is not a case wherein the erroneous payment resulted from an employee's failure to disclose to a supervisor or official material facts in the employee's possession. Nor is the tribunal convinced that this is a case wherein the employee accepted an erroneous salary payment, notwithstanding that she knew the payment to be erroneous.

Indeed, the record reveals that Respondent sought a mere name change and had not contemplated that the nature of such a change could have any impact upon the deductions of her premium for health insurance. Similarly, the tribunal is persuaded that the error is of a type that renders it unreasonable, if not nearly implausible, to anticipate that a name change in an employee's personnel records would impact an employee's salary payments. More precisely, Respondent had less than modest cause to be watchful for a change in her salary payments in connection to a mere implementation of a name change in personnel records.

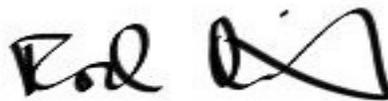
The tribunal is also mindful that the Department indicates that the payroll error was

expected to cause a cancellation of Respondent's health insurance, though it did not. It is unclear, but this may have been due to an additional error; what is clear is that the resulting hardship from a loss of health insurance is likely to have been quite alarming, and that potential harm serves to underscore why the tribunal is persuaded that the facts in this case make it apparent that the balance of equities clearly favors Respondent. As such, the tribunal finds that Respondent should be granted some form of equitable relief, notwithstanding that Respondent was not more diligent in discovering the payroll error in a timelier manner. Accordingly, in the interests of equity and good conscience, Respondent's request for waiver is granted, in part. 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 is **HEREBY GRANTED, in part**, in the amount of **\$549.36**.

So ordered this 13th day of November 2008.

A handwritten signature in black ink, appearing to read "Rod Dixon", written over a horizontal line.

Rod Dixon
Waiver Official