



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

JASON,

Respondent

Docket No. 10-01-WA
Waiver Proceeding

DECISION GRANTING WAIVER

At issue in this case is whether an employee of the Department of Education (Department) should be granted waiver of a debt arising from an overpayment of salary occurring as a result of the Department's failure to properly deduct a total of **\$390.45** in Federal Employees Group Life Insurance (FEGLI) premiums from his pay. For reasons that follow, I find that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

The OFFICE OF HEARINGS & APPEALS (OHA)¹ maintains authority and jurisdiction to waive² claims of the United States against a former or current employee of the Department.³

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 *Waiver* is defined as "the cancellation, remission, forgiveness, or non-recovery of a debt allegedly owed by an employee as [provided] by 5 U.S.C. 5584...or any other law." 5 C.F.R. § 550.1103.

³ *See also*, General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (codified at 5 U.S.C. 5584) (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/.

The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁴ In a waiver proceeding, the debtor acknowledges the validity of the debt, but argues that he or she should not be required to repay the debt on the basis of equitable circumstances connected to the debt as well as because there is no indication of fraud, misrepresentation, fault, or lack of good faith by Respondent or anyone else having an interest in obtaining a waiver of the claim.⁵ In the submission requesting waiver, the debtor is expected to: (1) explain the circumstances of the overpayment, (2) state why a waiver should be granted, (3) indicate what steps, if any, the debtor took to bring the matter to the attention of the appropriate official or supervisor and the agency's response, and (4) identify all the facts and documents that support the debtor's position that a waiver should be granted.

The record in this case comprises Respondent's brief, dated May 27, 2010, and what I have accepted in evidence, including: a copy of a written statement by Respondent, a copy of a Notice of Personnel Action approved April 25, 2008, a copy of a Notice of Personnel Action approved March 23, 2010, a copy of a Life Insurance Election form with an effective date of April 13, 2008 processed by the U.S. Department of Transportation, copies of a series of email messages between Respondent and human resource officials occurring in 2008 and 2010, and a copy of a Bill of Collection (BoC) issued on May 3, 2010.

DISCUSSION

I.

Under the Federal Employees' Group Life Insurance (FEGLI), most Federal employees, including part-time employees, are eligible for basic life insurance coverage. The payroll office deducts premiums from an employee's pay to cover the employee's share of the cost of basic insurance. Employees may also elect optional coverage by completing a standard form (SF-2817); employees pay the full cost of optional insurance.

After a review of the record, I find the following facts pertinent to this case. After the birth of his son while employed by the U.S. Department of Transportation (DOT), on April 10, 2008, Respondent completed SF-2817 to effect an election to expand his life insurance coverage from "basic" to "family" coverage and to increase the total dollar amount of coverage. On April 27, 2008, Respondent commenced employment with the U.S. Department of Education (Department). Upon returning to Washington, D.C. after completing training in criminal investigations in Glynco, Georgia, Respondent sought assistance from human resources concerning a payroll deduction error in his pay; notably, Respondent had discovered that his pay did not reflect deductions for FEGLI premiums consistent with his election at DOT to expand the scope and amount of his life insurance coverage.⁶

⁴ See, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

⁵ 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).

⁶ When a Federal employee moves from one Federal agency to another the existing FEGLI coverage follows the employee to the new agency.

Following up on Respondent's inquiry, in September 2008, the Department discovered that it had not received Respondent's official personnel folder from DOT, and, therefore, was unable to verify Respondent's election to have expanded FEGLI coverage. As a result, the Department did not authorize additional payroll deductions to reflect Respondent's accurate share of his FEGLI premium. Even when the Department obtained Respondent's official personnel folder from DOT, the folder did not contain a completed SF-2817 showing Respondent's election to expand his FEGLI coverage. Therefore, beginning in April 2008 throughout most of 2009, the Department deducted insufficient premiums from Respondent's pay for his FEGLI coverage.

During October 2009, the Office of Personnel Management informed Respondent that his electronic official personnel folder (eOPF) had been recently updated; in response, Respondent checked his eOPF and discovered a copy of the SF-2817 that he had completed at DOT. Respondent submitted the SF-2817 to the Department's human resources, and the Department issued a Notice of Personnel Action updating Respondent's payroll to reflect the proper deductions of FEGLI premiums. This action also resulted in issuance of a notice to collect FEGLI premiums from Respondent that had not been deducted in 2008 and 2009.

There is no dispute that Respondent owes the Department \$390.45, however, Respondent argues that the circumstances of this case warrant waiver of the debt. The standard for determining whether waiver of a debt is appropriate requires a consideration of two factors; namely, (1) whether there is no indication of fraud, misrepresentation, fault,⁷ 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.⁸ Respondent must satisfy both factors to obtain a waiver.

The resolution of this matter begins with an analysis of the fault standard. 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 accordance with 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;⁹ (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

⁷ In this respect, since fault can derive from an act or a failure to act, fault does not require a deliberate intent to deceive.

⁸ See *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005).

⁹ 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.*

accepted the erroneous salary payment, notwithstanding that the employee knew or should have known the payment to be erroneous.¹⁰

In support of his request for waiver, Respondent argues that he should be granted a waiver because he followed due diligence in alerting the Department to the erroneous premium deductions. Respondent also argues that it is doubtful that the Department would have compensated his beneficiaries, should that had been necessary during the time period of the overpayments, since the Department did not have a copy of his SF-2817. Essentially, Respondent argues that his proper FEGLI coverage was not effective until the error was corrected.¹¹

Salary overpayments often, if not always, involve some type of administrative error by the agency; indeed, an error or mistake in payroll or in the application of a rule or regulation governing pay is the usual vehicle that drives creation of an overpayment. In this regard, the application of the fault standard operates to impose a statutory duty on the employee/debtor to seek correction of the erroneous payment regardless of the government's mistake. Hence, our waiver cases have consistently recognized that despite the fact that an administrative error by the government may cause an employee to be paid at a rate that exceeds the employee's lawful rate of pay, the error cannot, itself, entitle an employee to waiver.¹² This follows because no employee has an entitlement to pay that he or she obtains as a result of an overpayment.¹³

Despite the frustrating aspect of repeatedly 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

¹⁰ 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).

¹¹ Respondent's position notwithstanding, an employee's FEGLI coverage is effective the day a FEGLI election form is approved by the Federal employer. 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." *In re Millicent (Millicent)*, Dkt. No. 06-06-WA, U.S. Dep't of Educ. (July 7, 2006). See also *In re Jerry (Jerry)*, Dkt. No. 05-29-WA, U.S. Dep't of Educ. (February 16, 2006); *In re Darryl*, Dkt. No. 05-24-OP, U.S. Dep't of Educ. (December 8, 2005); 5 C.F.R. § 870.401(i). In *Jerry*, the debtor argued that he did not gain the benefit of his FEGLI coverage during the period of time the Department failed to deduct sufficient insurance premiums from his pay. The tribunal recognized that the plain language of section 870.401(i) makes it apparent that if FEGLI coverage were triggered by some unfortunate event during the period of insufficient payments, the employee still would have received the full benefit of the life insurance he elected.

¹² *In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 15, 2005).

¹³ *Id.*

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.

It is clear from the facts of this case, however, that the erroneous payments did not result from a failure on the part of the employee to disclose material facts in his possession pertinent to the erroneous deductions. To determine whether proper FEGLI deductions are being made, an employee may check with human resource officials, check for indications of deductions on the Leave and Earning Statement (LES), or check their most recent Standard Form 50, *Notification of Personnel Action*.¹⁴ Notably, once Respondent recognized the error in his FEGLI deduction, he contacted human resources to inform appropriate officials of the errors.

Respondent contacted human resources twice in September 2008 to inform the officials that he had elected expanded FEGLI coverage while employed by DOT and expected that coverage to transfer to the Department. In response he was informed that the Department had no record of his election of expanded FEGLI coverage from DOT. Respondent followed up two weeks later once DOT had transfer his personnel records to the Department, but was informed that the records did not contain documentation of his expanded coverage. Subsequently, the Department informed Respondent that he would be required to undergo a physical exam before he could obtain expanded FEGLI coverage. Not until October 2009, did Respondent obtain evidence of his April 2008 election of expanded FEGLI coverage, which he discovered by checking his newly established eOPF from OPM. This information was provided to the Department. Unfortunately, due to a staffing change, human resources did not act on Respondent's 2008 SF-2817 until Respondent subsequently made an additional inquiry in March 2010. On March 23, 2010, the Department issued a Standard Form 50, *Notification of Personnel Action* correcting Respondent's FEGLI coverage.

These facts illustrate why payroll errors in FEGLI deductions constitute 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. Respondent's persistent efforts constitute conduct that is consistent with an employee's duty to resolve an erroneous salary payment as soon as he knows of the error. Accordingly, I find that Respondent has established that he satisfied the requisites of the fault standard. By all indications, there is ample evidence that Respondent did not shirk his obligation to ensure the accuracy of his pay.

II.

The remaining question is whether Respondent has demonstrated that it is against equity and good conscience for the Federal government to recover the debt in this case. To secure a favorable ruling on the equity standard, Respondent must show that he has acted fairly, without

¹⁴ On that form, in block 27, there is a 2-character code that represents your current coverage and a definition of the code. For example, if block 27 shows "C0 - Basic only," that means you have Basic life only with no optional coverage. See The FEGLI Handbook, the *SF50s Equivalents of Insurance Codes* at: <http://www.opm.gov/forms/pdfimage/sf50.pdf>

fraud or deceit, and in good faith with regard to all matters concerning the overpayment. In addition, although there are no rigid rules governing the application of equity, I must balance equity and appraise good conscience in light of the particular facts of this case; in doing so, I must balance the competing interests in the recovery of debts owed to the United States against Respondent's asserted interests in the forgiveness of a debt owed to the United States. Factors weighed in this balancing of interests include the following: whether the debt is substantial; 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; and whether collection of the debt would impose an undue financial burden.

Respondent argues that he should be granted a waiver because he followed due diligence in alerting the Department to the erroneous premium deductions. Respondent also argues that the time it took to correct his FEGLI coverage imposed an emotional burden on him since his job in law enforcement and the recent birth of his son enhanced his anxiety regarding whether he had protected the potential future needs of his family with the expanded family FEGLI coverage he elected. I find Respondent's circumstance compelling regarding why the time it has taken to correct this error imposed an emotional burden on Respondent. Moreover, I find that the total debt amount is not substantial.

As noted *supra*, Respondent was diligent in alerting the Department to the premium deduction errors. Indeed, Respondent not only alerted the Department to the erroneous deductions, but expressed a sense of urgency in requesting that the corrections be made without haste in light of the recent birth of his son.¹⁵ It seems doubtful that Respondent could have done more to inform officials of the error.

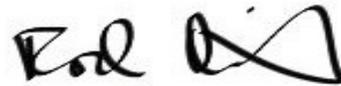
Although by operation of law Respondent was covered by FEGLI during the period for which premiums were not deducted and, therefore, Respondent's beneficiary would have received payment, if some unfortunate event had occurred, the delay in resolving the error clearly compounded Respondent's fear that his elected coverage under FEGLI would not have been provided to his family. More directly, the Department had provided Respondent with multiple indications that in the Department's view, he had not properly elected expanded FEGLI coverage. On this basis, Respondent persisted in attempting to correct the erroneous coverage, but also sought private options for life insurance coverage. I am persuaded that in light of these peculiar facts, it is against equity and good conscience for the Federal government to recover the debt in this case. Accordingly, the tribunal finds that in the interests of the United States waiver should be granted. This decision constitutes a final agency decision.

¹⁵ Although diligence in alerting the Department to errors in pay is accounted for under the fault standard, I consider Respondent's diligence a factor under equity because of Respondent's circumstances.

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 **\$390.45** is **HEREBY GRANTED**.

So ordered this 24th day of August 2010.

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

Rod Dixon
Waiver Official