



## UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS  
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In the Matter of

**ERIC,**

Respondent

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**Docket No. 10-06-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 an erroneous failure to deduct from the employee's salary payments the employee share in his employer-sponsored group health insurance program. The debt total is **\$102.78**. For reasons that follow, I find that waiver of this debt at issue is warranted. Accordingly, Respondent's request for waiver is granted.

The OFFICE OF HEARINGS & APPEALS (OHA)<sup>1</sup> maintains authority and jurisdiction to waive<sup>2</sup> claims of the United States against a former or current employee of the Department.<sup>3</sup> The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.<sup>4</sup> 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

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<sup>1</sup> 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)).

<sup>2</sup> *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.

<sup>3</sup> *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/](http://www.ed-oha.org/overpayments/).

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

good faith by Respondent or anyone else having an interest in obtaining a waiver of the claim.<sup>5</sup> 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 what I have accepted in evidence, including: a copies of written statements by Respondent, dated November 17, 2010, and December 13, 2010, copies of email messages from Respondent sent to human resource officials in the office of Federal Student Aid during the months of September and October 2010, and a copy of a Bill of Collection (BoC) issued by the Department's payroll office on October 18, 2010.

After a review of the record, I find the following facts pertinent to this case. Respondent began his tour of duty for the office of Federal Student Aid (FSA) in the 14<sup>th</sup> pay period of 2010. Respondent works for FSA in its office located in the Commonwealth of Puerto Rico. To obtain information on pay and benefits, Respondent uses websites, telephone communications, and email because FSA does not have human resource officials located in Puerto Rico. Respondent had difficulty processing his selection of health insurance providers using the specified government website, and informed a human resource official of this difficulty by email on September 3, 2010. On October 1, 2010, Respondent processed his selection of health insurance coverage. Respondent's health insurance premium is \$34.26 per pay period. For purposes of the salary overpayment, Respondent's health insurance coverage began in the 18<sup>th</sup> pay period of 2010.

There is no dispute between the parties that this case involves an erroneous payment of pay. During 2010, the Department did not deduct the employee share of Respondent's health insurance premium for pay periods 18, 19, and 20, 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 FEHB premiums for those 3 pay periods.

Under the Federal Employees Health Benefits Act of 1959 (FEHBA),<sup>6</sup> Congress established a comprehensive employer-sponsored group health insurance program (known as the Federal Employees Health Benefits or FEHB) for Federal employees.<sup>7</sup> Under the Act, the Federal government and the employee share responsibility for premiums payable to the employee's health plan.<sup>8</sup> Premiums are paid each pay period and are disclosed as payments and deductions on employee pay statements.

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<sup>5</sup> 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).

<sup>6</sup> Pub. L. No. 86-382, 73 Stat. 709 (codified, as amended, at 5 U.S.C. § 8901).

<sup>7</sup> FEHBA also covers dependents and retirees.

<sup>8</sup> 5 U.S.C. § 8906.

## DISCUSSION

### I.

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.<sup>9</sup>

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;<sup>10</sup> (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.<sup>11</sup> Given the aforementioned considerations, 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.

Despite the undeniably frustrating aspect of experiencing payroll errors it is commonplace that salary overpayments often, if not usually, 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. The application of the fault standard, therefore, operates to impose a statutory duty on the employee/debtor to seek correction of the erroneous payment regardless of the government's mistake. In this respect, it is axiomatic 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 government's error cannot, itself, entitle an employee to waiver.<sup>12</sup> This follows because no employee has an entitlement to pay that he or she obtains as a result of an overpayment.<sup>13</sup>

Fault is examined in the context of an employee's duty to prevent or discover mistakes

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

<sup>10</sup> 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.*

<sup>11</sup> 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).

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

<sup>13</sup> *Id.*

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 as well as the fact that the employee is often in the best position to recognize a mistake in his or her pay. 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.

Applying this standard to the facts in this case, Respondent argues that waiver of the entire debt is warranted because he was unable to properly process his selection of health insurance until October 1, 2010. The evidence shows, as Respondent contends, that, as a new employee, he noted his problem in selecting and processing health insurance coverage in September and, in doing so, received assistance from the Department. This ultimately resulted in the proper processing of his health insurance on October 1, 2010. Although it is clear that Respondent desired to obtain health insurance as soon as possible, there is no evidence showing that Respondent failed to disclose to a supervisor or human resource official material facts in his possession that he should have known to be material to processing his request for health insurance. Moreover, it is not apparent how Respondent could have been more diligent in processing his health insurance.

In light of the aforementioned, the tribunal is mindful that although in the typical case of an erroneous failure to deduct an employee's health insurance premium, the employee's Leave and Earning Statements (LES), if examined carefully, would show or identify an error in pay. But, in this case, it is doubtful that the LES would have conspicuously disclosed the fact that the Department failed to deduct Respondent's premium. As a new employee, Respondent is not likely to have recognized an unanticipated increase in pay - - as a result of the failure to make an anticipated deduction - - or, perhaps, even been aware of the precise amount of the deduction until he selected the type and scope of health insurance coverage. Indeed, as Respondent argues, it is unclear, should the need arise, how he would have been able to use employer-sponsored health insurance during the 18<sup>th</sup>, 19<sup>th</sup>, or 20<sup>th</sup> pay periods since these pay periods occur prior to Respondent's selection of the type and scope of health insurance coverage. This serves to underscore why the tribunal is persuaded that the facts in this case balance equity in favor of Respondent. I find no basis from the evidence in the record to conclude that Respondent did not act fairly, without fraud or deceit, and in good faith with regard to all matters concerning this debt. Therefore, I find that Respondent has demonstrated that it is against equity and fairness for the Federal government to recover the debt in this case.<sup>14</sup> Accordingly, Respondent's request for

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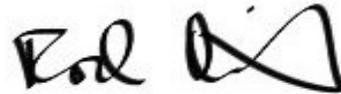
<sup>14</sup> There are no rigid rules governing the application of equity. I must balance equity and appraise good conscience in light of the particular facts of this case; in doing so, I must balance the competing interests in the recovery of all debts owed to the United States against Respondent's 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

waiver is 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 **\$102.78** is **HEREBY GRANTED**.

So ordered this 31<sup>st</sup> day of March 2011.

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

Rod Dixon  
Waiver Official

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debt would impose an undue financial burden.