



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

CAROLYN,

Respondent.

Docket No. 11-02-WA

Waiver Proceeding

DECISION DENYING WAIVER

On January 7, 2011, the tribunal received Respondent's request for waiver of a **\$3,257.04** debt. For the reasons that follow, the tribunal concludes that waiver of the debt is not warranted. Accordingly, Respondent's request for waiver is denied.

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.¹ 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 copy of emails between Respondent and the Human Resources (HR) department, copies of health care enrollment and personnel forms, a copy of the Bill of Collection and debt letter, a copy of a statement, dated January 7, 2009, from

¹ 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).

Respondent indicating the (1) circumstances of the overpayment and (2) the reasons why Respondent believes a waiver should be granted, and a copy of an updated statement from Respondent received by the Office of Hearings and Appeals on February 25, 2011.

DISCUSSION

The waiver authority involving all former and current employees of the agency was delegated to the Office of Hearings and Appeals (OHA),² which, thereby, exercises waiver authority on behalf of the Secretary of Education. The undersigned 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

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.⁵

The basis of the debt in this case stems from Respondent's transfer from the Transportation Security Administration (TSA) to the Department on April 16, 2007. When Respondent transferred from one agency to another without a break in service, her health care benefits should have been transferred by the Department's HR office. However, due to an error on the part of HR and a glitch in the HR system, Respondent's health care benefits paperwork was not properly transferred. As such, though Respondent continued to receive health care benefits, no funds were deducted from her payroll checks to cover those benefits. This continued until around August of 2008, when Respondent received a letter from BlueCross BlueShield stating that her insurance coverage had been terminated. Respondent then contacted HR, and the error was discovered.

The Department is owed \$3,257.04 for debt accrued through health benefit payments between April 2007 and August 2008. This was approximately 28 pay periods. In light of the fact that Respondent received health care coverage for over a year without paying any deductible, the Department determined that

² The agency'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 April 2008)).

³ See, 5 U.S.C. § 5584(b) (noting the authority held by the authorized official in waiver cases).

⁴ See, General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (the Waiver Statute); U.S. Government Accountability Office, *Scope of Waiver Authority*, B-307681 (May 2, 2006).

⁵ See, e.g., *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

Respondent's health benefits payments constituted a salary overpayment which must be repaid to the Department unless waived. After receiving the Notice of Debt on December 29, 2008, Respondent sent a waiver request dated January 7, 2009. Respondent did not hear anything further until approximately January of 2011, when she received a reprint of the initial Notice of Debt letter. She then renewed her request for a waiver.

Respondent argues that waiver is warranted because she was unaware of any payment by the Department on her behalf. She also presents evidence that the Department's HR department should have transitioned her health benefits upon her arrival from the TSA, and their failure to do so is the reason the debt exists. Respondent believes that because it was the Department's error, she should not be responsible for the debt. Respondent further cites *In re Catherine*⁶, which established the factors that would support waiver of a debt when failure to deduct an employee's share of the health benefits payment is the factual predicate of the debt. In *Catherine*, the hearing official held that waiver of a health benefits debt is appropriate when the employee's waiver request languishes unresolved for a period long enough to render a "misimpression that the matter was resolved" by the debtor, and that the passage of time is sufficiently extensive that an impediment exists affecting the debtor's ability to pursue the waiver request.

Respondent urges that the approximately two years which passed between her initial waiver request and the reissue of the notice of debt falls within *Catherine*'s requirement that a waiver request languishes unresolved for a period long enough to render a "misimpression that the matter was resolved" by the debtor, and that the passage of time is sufficiently extensive that an impediment exists affecting the debtor's ability to pursue the waiver request. In *Catherine*, the waiver request was unresolved for five years, and in that period the respondent had moved. The tribunal found that she no longer had access to the documentation she needed to proceed in the waiver request, and was greatly disadvantaged. Here, the case was unresolved for less than three years, and Respondent was able to resubmit documentation for her waiver request. She has provided no evidence that her ability to pursue the waiver request has been hindered. The case law has established that to meet the fault standard, a delay in resolution of a case must be coupled with some demonstrable harm to a debtor in pursuing his or her waiver request. *See In re Carmen*, Dkt. No. 06-21-WA, U.S. Dep't of Educ. (December 28, 2006); *In re Millicent*, Dkt. No. 06-06-WA, U.S. Dep't of Educ. (July 7, 2006); *In re Jerry*, Dkt. No. 05-29-WA, U.S. Dep't of Educ. (February 16, 2006). Respondent has failed to demonstrate that harm here.

Respondent explains that because she received a new salary when she transitioned from TSA to the Department, she was unaware of what her health benefits deductions should be, and would therefore be unable to know the total amount each paycheck should contain. She cites several cases in which waivers were granted to respondents who could not have determined an error in payroll from the face of their check. However in those cases, the discrepancy was the difference between a single health care plan and a

⁶ Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005) (*Catherine*).

family health care plan, and a deductible would still appear on the face of the check. *In re Robin*, Dkt. No. 07-114-WA, U.S. Dep't of Educ. (Aug. 4, 2008) (*Robin*). In this case, Respondent could have learned from inspecting her Leave and Earning Statement (LES) that there was no deductible being taken out of her pay for health benefits. Upon realizing this, Respondent should have notified HR, thereby minimizing the damage. The respondent in *Jason*⁷ noticed that the deductions on his LES were not consistent with the programs he had elected, and he alerted the Department to this error. Although the Respondent in this case did alert the Department, she only did so after her health benefits were cancelled. She did not inspect her LES statements and locate an error.

Respondent stated that she did not pay attention to anything on her LES other than her leave hours and pay, because she “did not have cause to be concerned.” She did not notice that her LES disclosed the fact that the Department had failed to deduct her share of her premium for health benefits. In Respondent’s view, although the LES reveals the agency’s error, she should not be held at fault for failing to take notice of the error. One can clearly comprehend the circumstances where it may be easy to fail to notice a mistake in a salary payment - - even when the error is disclosed in a payroll statement. Nonetheless, it is a fundamental principle under the case law interpreting the Waiver Statute that no employee has an entitlement to pay that he or she obtains as a result of an overpayment. *See In re Catherine*. The Waiver Statute also imposes an obligation on employees to dutifully check the accuracy of each LES, and Respondent has admitted that she did not inspect anything other than her pay and leave.

Despite the undeniably frustrating aspect of experiencing payroll errors, 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 as well as the fact that the employee is often in the best position to recognize a mistake in his or her pay.

Respondent could readily determine that an erroneous salary payment occurred in the pay periods between April 2007 and August 2008 because she could identify the error in her LES statements. Hence, Respondent’s salary pay statements provided Respondent with notice of the salary overpayment. More to the point, the mere expectation that a payroll deduction will be made does not overcome the responsibility to check whether the deduction in fact was made. Respondent’s duty as a Federal employee extends to verifying the accuracy of her salary payments, which includes the obligation to question discrepancies or unanticipated balances identified in the LES. Guided by the facts of this case and the analysis herein, I conclude that Respondent is not without fault as that term is defined under waiver standards.

⁷ Dkt. No. 10-01-WA, U.S. Dep't of Educ. (Aug. 24, 2010) (*Jason*).

The tribunal also has held that financial hardship may be considered in determining whether collection of the debt goes against equity and good conscience.⁸ The tribunal also acknowledges that collection of this debt may constitute a financial hardship. Balanced against this factor is the fact that Respondent and her children were covered for the amount of health benefits elected during the period for which the full premiums were not deducted. In this case, Respondent and her family received full health benefits coverage for the period of April 2007 to August 2008. The tribunal has held that it is not inequitable to require an employee to pay for a benefit he or she received – in this case, health benefits coverage.⁹ In weighing all of these factors, the tribunal finds that collection of this debt would not go against equity and good conscience.

As noted above, the tribunal recognizes that collection of this debt may constitute a financial hardship. To that end, the tribunal encourages Respondent and the Department to explore extended repayment options. Specifically, the tribunal notes that an extended voluntary repayment plan may more appropriately take into account Respondent's current financial difficulties.

On the basis of the foregoing, the tribunal makes the following findings: (1) that Respondent transferred to the Department on April 16, 2007 and received health benefits beginning on that date until cancellation of the plan in August 2008, (2) that no premiums were deducted from Respondent's paychecks during this time to pay her share of the health benefits coverage, and (3) that Respondent's waiver request was timely filed. Accordingly, the tribunal finds that in the interests of the United States waiver of Respondent's debt cannot be granted. This decision constitutes a final agency decision.

⁸ See *id.* See also, *In re Shelley*, Dkt. No. 06-25-WA, U.S. Dep't of Educ. (November 28, 2006).

⁹ See *In re Jerry*, *supra*, at 6.

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 **\$3,257.04** is **HEREBY DENIED.**

So ordered this 10th day of August 2011.

/s/ Frank J. Furey
Frank J. Furey
Waiver Official