



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
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In the Matter of

SUE,

Docket No. 12-36-WA

Respondent

Waiver Proceeding

DECISION GRANTING WAIVER

At issue in this case is whether a former employee of the Department of Education (Department) should be granted waiver of a debt arising from an overpayment occurring as a result of a failure to deduct from an employee's pay the premium for participation in the employer-sponsored group health insurance program. The debt covering 18 pay periods totals \$1,181.90.¹ 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)² maintains authority and jurisdiction to waive³ claims of the United States against a former or current employee of the Department.⁴

¹ Respondent received a bill of collection (BoC) identified as BoC #21640896227.

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, revised January 2012).

³ 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.

⁴ 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: oha.ed.gov/overpayments/.

The undersigned is the authorized Waiver Official who has been assigned this matter by OHA.⁵ 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 debt.⁶ 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: copies of written statements by Respondent explaining the circumstances of the overpayment and asserting why a waiver should be granted, copies of email messages between Respondent and various officials in the Department's Human Capital and Client Services (HCCS) office, and a copy of the bill of collection (BoC) and notice of debt letter.

DISCUSSION

I.

Respondent was a career employee with the Department when she accepted a schedule C appointment with the U.S. Department of Labor. After briefly serving at the Department of Labor, on September 12, 2011, Respondent returned to the Department. There was no break in service to the Federal government by Respondent who transferred back to the Department. As a result of Respondent's transfer, she was informed that, along with other benefits, her health insurance had transferred with her; thus, precluding the need to complete additional forms to maintain coverage of health insurance. On May 30, 2012, Respondent attempted to use her health insurance for the first time after her transfer back to the Department. On that date, Respondent's expected health insurance provider, Kaiser Permanente, informed Respondent that her insurance coverage "had been deactivated." When Respondent informed HCCS of the response from Kaiser Permanente, HCCS discovered that due to an error in processing Respondent's transfer, no deductions had been made to cover the employee share of premiums for health insurance. This was corrected by HCCS, but a BoC was issued for the missing premiums. In this proceeding, Respondent seeks waiver of her obligation to pay the missing premiums.

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

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

⁶ 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).

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.⁷

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 case law, 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;⁸ (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.⁹ 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 cannot be granted, if a debtor fails in showing that he or she can satisfy the fault standard.¹⁰

Under the Federal Employees Health Benefits Act of 1959 (FEHBA),¹¹ Congress established a comprehensive employer-sponsored group health insurance program (known as the Federal Employees Health Benefits or FEHB) for Federal employees.¹² Under the Act, the Federal government and the employee share responsibility for premiums payable to the employee's health plan.¹³ Premiums are paid each pay period and are disclosed as payments and deductions on employee pay statements.

In waiver cases involving an administrative error in FEHB program payroll deductions, in addition to satisfying the fault standard, a debtor also must show that he or she did not obtain the benefit of FEHB coverage during the pay period(s) at issue.¹⁴ This follows because notwithstanding the failure to deduct the pertinent premium the debtor is lawfully entitled to obtain the benefit of health coverage.¹⁵

⁷ See, *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (Dec. 14, 2005).

⁸ 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.*

⁹ 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).

¹⁰ See, e.g., *In re Megan*, Dkt. No. 11-89-WA, U.S. Dep't of Educ. (April 24, 2012).

¹¹ Pub. L. No. 86-382, 73 Stat. 709 (codified, as amended, at 5 U.S.C. § 8901).

¹² FEHBA also covers dependents and retirees.

¹³ 5 U.S.C. § 8906.

¹⁴ *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (Nov. 9, 2005) (the circumstances in which there is an exception to this additional requirement are not pertinent in this case).

¹⁵ This is not to say that an employee may not prove the converse in making a case for waiver. The Department's waiver cases allow employees to prove that they have not been able to obtain the benefit of FEHB coverage by showing, for example, that a health insurer has denied a request for payment of a medical expense.

Respondent argues that a waiver of the debt is warranted because she did not know that the Department failed to deduct her share of the premium for her health benefit coverage. In addition, Respondent argues that the erroneous payments were the fault of the Department, and requiring her to repay a debt created as a result of the errors of others is unfair. Respondent also argues that the size of the debt reflects the Department's failure to discover the errors over the course of 18 pay periods, and that this excessive amount of time should not accrue to her detriment. I find Respondent's arguments persuasive; hence, Respondent's arguments satisfy the fault standard.

First, Respondent was entitled to rely on the affirmative indications from HCCS that the Department would transfer her health insurance coverage without any further intervention by Respondent. In addition, I am persuaded by Respondent that she was not able to obtain the benefit of FEHB coverage, and that her health insurance provider's deactivation of her coverage was the triggering event that alerted Respondent of the need to engage HCCS to assist her uncover the source of the problem. The fact that Respondent attempted to obtain the benefit of health insurance coverage and was turned away by her health insurance provider reinforces the seriousness of the payroll error and its potential adverse impact on Respondent.

Furthermore, this case comes squarely within the paradigm set out by our case, *In re Catherine*,¹⁶ which establishes the application of the fault standard to a waiver case when failure to deduct an employee's share of the FEHB payment is the factual predicate of the existence of the debt. In *Catherine*, the hearing official held that waiver of a FEHB debt is appropriate when there is no indication of fraud on the part of the employee regarding the debt, there is no evidence or indication that the employee ignored the missing payroll deduction -- notwithstanding that she should have known of the missing deduction, and that the facts support the debtor's position that it is unclear whether the debtor would have been able to use her employer-sponsored health insurance during the pay period(s) at issue. Here, each of the *Catherine* factors favor Respondent, including Respondent's evidence that her health insurance provider deactivated her coverage.¹⁷

II.

The remaining question is whether Respondent demonstrates that it is against equity and good conscience for the Federal government to recover the debt in this case. To secure a

¹⁶ Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005) (*Catherine*).

¹⁷ Respondent does not indicate why she did not notice that her Leave and Earning Statement (LES) disclosed the fact that the Department failed to deduct her share of her premium for FEHB coverage. Of course, 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. Yet, the tribunal is mindful that, 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 schedule C employee, Respondent is not likely to have recognized an unanticipated increase in pay -- as a result of the failure to make an anticipated deduction.

favorable ruling on the equity standard, Respondent must show that he has acted fairly, without 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 competing interests in the Federal government's recovery of all debts owed to the United States and 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 it is against equity to collect the overpayments because the overpayments were caused by the Department's error and not as a result of her act or omission. In addition, Respondent argues that repayment of the debt is unfair because Respondent's health care provider deactivated her coverage; hence, leading to the conclusion that it would be profoundly unfair to require Respondent to pay for a benefit for which she may not have had genuine access.

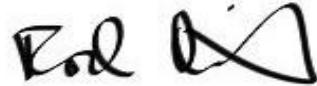
On the basis of the foregoing, the tribunal makes the following findings: (1) that as a result of Respondent's transfer from the Department of Labor to the Department of Education, she was informed by Department of Education that, along with other benefits, her health insurance had transferred with her, (2) that the Department did not process the appropriate forms to ensure that the Department's payroll office continued to make deductions from Respondent's pay covering her health insurance premium, and (3) that on May 30, 2012, Respondent attempted to use her health insurance for the first time after her transfer back to the Department, and on that date, Respondent's expected health insurance provided, Kaiser Permanente, informed Respondent that her insurance coverage "had been deactivated." These findings serve to underscore why the tribunal is persuaded that the facts in this case balance equity in favor of Respondent. 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. Accordingly, Respondent's request for waiver is granted.¹⁸ This decision constitutes a final agency decision.

¹⁸ Waiver, among other things, constitutes a "cancellation...of a debt..." 5 C.F.R. § 550.1103.

ORDER

IT IS ORDERED, pursuant to the authority of 5 U.S.C. § 5584, that Respondent's request for waiver of the debt to the United States Department of Education for bill of collection #21640896227 in the amount of \$1,181.90 (net debt balance) is **GRANTED**.

So ordered this 22rd day of August 2012.



Rod Dixon
Waiver Official