



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of
DONNA
Respondent

Docket No. 12-56-WA
Waiver Proceeding

DECISION GRANTING WAIVER

This proceeding comes before the Office of Hearings and Appeals (OHA) through the request of Respondent's Representative. Respondent, a former employee of the U.S. Department of Education (Department), died on December 21, 2011, and her mother is her representative in this waiver request. Respondent's request arises under 5 U.S. C. § 5584 (Waiver Statute) authorizing the waiver of claims of the United States against debtor due to erroneous payments made to a Federal employee¹ and is based on notice of a salary overpayment of \$ 1036.68 based on five Bills of Collection (BoC).²

Respondent's Representative filed a timely request for waiver³ of a debt caused by an erroneous salary overpayment. The legal authorities pertinent to this waiver request draw from the aforementioned statute, the Department's implementing regulations at 34 C.F.R. Part 32 (§ 32.1 et seq.), and the policy set forth in the Department of Education, Administrative Communications System, Handbook for Processing Salary Overpayments (Handbook, ACS-OM-04) (revised January 2012). Taken together, these authorities prescribe procedures for

¹ General Accounting Office Act of 1996, Pub. L. No. 104-316, Title I, § 103(d), Oct. 19, 1996, 110 Stat. 3828 (5 U.S.C. § 5584); *see also In re Richard*, Dkt. No. 04-04-WA, U.S. Dep't of Educ. (June 14, 2005) at footnote 1 (setting forth the statutory framework governing debt collection by salary and administrative offset); *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 procedure may be found on the Office of Hearings & Appeals website at <http://oha.ed.gov/overpayments/index.html>.

² The overpayment is identified as Debt ID No.0390043113, No.12210850783, No. 122210043113, No. 0810043113, and No.0530043113 referenced in the invoice of September 25, 2012, with breakdown of the pay periods and pay code applied.

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..

processing debts, authorizing deductions from wages to pay debts, and setting standards for waiving those debts when appropriate.⁴ The Handbook, ACS-OM-04, specifically delegates waiver authority involving all former and current employees of the Department to the Office of Hearings and Appeals (OHA), which, thereby, exercises waiver authority on behalf of the Secretary. The undersigned is the authorized waiver official who has been assigned this matter by OHA.⁵ Resolution of this case is based on the matters accepted as argument, evidence, and/or documentation in this proceeding when considered as a whole, including the Respondent's mother's signed and sworn statements, the Department's Bill of Collection (BoC), documents generated by the Federal Personnel Payroll System (FPPS), the FEHB handbook as posted at OPM's website, a certified copy of Respondent's death certificate (Commonwealth of Virginia, Division of Vital Records, document under Section 32-353.27, Code of Virginia), and statements by the Respondent's co-workers and Department personnel that describe Respondent's observable medical conditions during the 2010-2011 period, the office donations of leave, the ongoing medical condition that caused Respondent to separate from employment in the National Institute on Disability and Rehabilitation Research (NIDRR) within OSERS, and the financial circumstances of Respondent's family. This decision constitutes a final agency decision.

At issue in this case is whether an employee of the Department should be granted waiver of repayment of a debt arising from the failure to deduct the proper amount of an employee's elected health benefit coverage. For the reasons that follow, the tribunal concludes that waiver of the debt is warranted. Accordingly, Respondent's request for waiver is granted.

DISCUSSION

The Notice of the overpayment citing the basis of the overpayment was the result of the Department processing health benefit deductions paid by the Agency on Respondent's behalf under pay code 501, for multiple pay periods 2011,03,04,05,06,07,08,09,10,11,12,1314 at \$86.39 per pay period. Five Debt Sheets reflect the deduction breakdowns tied to the effective pay periods.

Under the Federal Employees Health Benefits Act of 1959 (FEHBA),⁶ Congress established a comprehensive employer-sponsored group health insurance program (known as the Federal Employees Health Benefits or FEHB for Federal employees. Under the Act, the Federal government and the employees share responsibility for premiums payable to the employee's health plan.⁷ For further information on an employee's coverage under health benefits, see the FEHB Handbook, which copy is available online.⁸ The Handbook outlines the necessity of Employing Office Notification to the employee when an employee moves into leave without pay status or has insufficient pay to cover the premiums. The notice informs the employee of his

⁴ In addition to regulations promulgated by the Department, standards prescribed by the Department of Justice and the Department of Treasury govern administrative debt collection efforts; those standards are widely known as the Federal Claims Collection Standards (FCCS). *See* 31 U.S.C. § 3711 (2000) and 31 C.F.R. ch. IX, Parts 900 – 904 (2000).

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

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

⁷ 5 U.S.C. § 8906.

⁸ FEHB Handbook on the OPM website, at <http://www.opm.gov/insure/health/reference/handbook/FEHB13.asp>

options regarding continuing or terminating his coverage/ enrollment. A sample Notice is included. An employing office must send the notice by first class mail, if it cannot give the written notice in person. The employing office must keep track of whether the employee signed and returned the notice within the required time frame (31 days except for person who live s overseas, then 45 days).⁹ An employee must pay his share of health benefits premiums if he is in leave without pay status for an entire pay period, or if his pay during a pay period doesn't cover the full amount of withholdings due, unless he wants his enrollment to terminate. Again, the employing office must notify the employee of the choices available and provide the employee with a method to make direct payments.

As a preliminary matter, the tribunal must decide whether the fact that an employee receives the benefit of coverage of health insurance should necessarily preclude granting waiver of a debt. This issue must be resolved as a threshold matter because in some waiver cases involving an administrative error in FEHB program payroll deductions, the tribunal has expressed support of the view that in addition to satisfying the traditional waiver standard, the employee must also show that he or she did not obtain the benefit of FEHB coverage during the pay period(s) at issue:¹⁰ hence, providing the basis for a categorical rule that would preclude granting waiver to debtors who obtain the benefit of health coverage. In this proceeding, Respondent neither asserts nor provides evidence that she lacked coverage.¹¹ In fact, there was no first hand testimony about her eligibility and maintenance of FEHB coverage throughout the period at issue, except the mother's confirmation of her long illness, hospitalizations, medications.¹² Presumably Respondent received these services under her FEHB coverage plan. Respondent's mother does confirm she spoke of health benefit premiums that had to be paid. Respondent's mother similarly said the cost of Respondent's medications over time were so expensive that she was paying to cover them herself because there was no other way to pay for them. There is nothing in the record on the type of FEHB coverage, low or high option, or extent of benefits.

Mindful that waiver cases entail a case-by-case review, the tribunal holds that whatever weight should be accorded the fact that a debtor had use of her FEHB coverage, this factor should not be dispositive of whether waiver should be granted and the tribunal finds nothing in the Waiver Statute that requires a contrary conclusion.¹³

Given the case-by-case analysis that should be given cases that involve equitable remedies, it follows that no rule, canon, or principle should be summarily applied to replace the tribunal's individual judgment. For support and detailed analysis, see *In re Paul*, Dkt. No. 06-55-WA, U.S. Dep't of Educ. (Feb. 20, 2007) p.3, where the tribunal found there was no reason to deny a debtor an opportunity to show why waiver should be granted although the employee obtained benefits of FEHB coverage during the period at issue.

⁹ Sample FEHB Notice, at pages 4-5, handbook, supra.

¹⁰ *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (Nov. 9, 2005).

¹¹ For example, Respondent does not argue that she was denied FEHB coverage while seeking health care.

¹² Under FEHBA, Respondent shares the cost (biweekly) of health benefits coverage with the Department.

¹³ See, *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (Dec. 12, 2005), for the proposition that, in some cases, even where the employee has obtained the benefit of FEHB coverage, the equities may balance out in favor or in disfavor of the employee.

A waiver proceeding is a narrowly focused proceeding: at issue is whether Respondent's arguments and submissions support a request that a portion or the entire overpayment be waived in accordance with standards prescribed by statute and consistent with the case law and regulations promulgated by the Department. 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. Waiver is available as an equitable remedy to a Respondent who satisfies the relevant fault standard by demonstrating that his or her case does not involve fraud, misrepresentation, fault or lack of good faith on his or her part.¹⁴ Additionally, for a waiver to be granted, the debtor must demonstrate that the totality of the circumstances weigh against the collection of the debt because collection would not be equitable, in good conscience or in the best interests of the United States.¹⁵ Thus, it is necessary for the debtor to affirmatively satisfy the fault standard and the equity factor on the record.

The first consideration in determining whether a waiver is appropriate in a salary overpayment case is whether a Respondent lacks fault. Fault is determined by assessing whether a reasonable person knew or should have known or suspected that he or she was receiving more than his or her entitled salary.¹⁶ In assessing the reasonableness of a debtor's failure to recognize an overpayment, the tribunal may consider the employee's position and grade level, newness to federal employment, and whether an employee has records at his or her disposal, which would indicate a salary overpayment.¹⁷ A waiver may be granted where a Respondent demonstrates a lack of fault in accruing the debt. In doing so, 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 (4) identify all the facts and documents that support the debtor's position that a waiver should be granted. Alternatively, if a Respondent knew, or should have known or suspected that she or he was being overpaid, then that person is not without fault, and a waiver is not warranted.

In the present case, the debt arose when the Department processed a pay code adjustment for health benefits paid in the biweekly amount of \$86.39 for 12 pay periods in 2011. This notice was received by Respondent's mother who filed the request for waiver, explained the circumstances of her daughter's long term illness beginning in April 2010 with a stroke causing significant impairments, ensuing physical limitations and her inability to write and use computer, her ensuing memory impairments, her need for lengthy rehabilitative services to regain functions, limited success with those services, and her daughter's reliance on donated leave by fellow office workers in NIDRR. It was her daughter's ongoing hope to recover enough and return to that office which postponed her decision to separate for medical reasons until March 2011. As noted by a supervisor of that office, Ruth Brannon, she was a long term employee in a specialty area, characterized as a high achieving and dedicated employee in her functional capacity and several co-workers willingly donated leave to keep her in a paid status in hopes that she could return to full employment. Respondent was a grants specialist and did regulations work, for publication of the grants information in the Federal Register. Ms. Brannon

¹⁴ See, *In re Catherine*, Dkt. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

¹⁵ See, *In re Arthur*, Dkt. No. 07-02-WA, U.S. Dep't of Educ. (May 10, 2007).

¹⁶ See, *In re Tammy*, supra.

¹⁷ See, *In re Veronc*, Dt., No. 05-14-WA, U.S. Dep't of Educ. (July 22, 2005).

spoke to me after Respondent's mother named her as having knowledge of the Respondent's circumstances and who could verify Respondent's observable limitations after her stroke, her wishes to return to the position, the willingness of other coworkers to join in and donate leave to allow her time to recover more fully, and separately to speak about Respondent's limited financial and family means, including living with her mother and being strained to meet costly medicine expenses. When Respondent did come into the office on different occasions after the stroke and after rehab services, Ms. Brannon avers that her lack of a functional recovery was clear. Because of the stroke's effect on her one arm, she had lost most use of that hand and could not perform computer work even from home.

As Respondent's mother has affirmed after the stroke, the Respondent had memory impairment and whether she thought she had made payments, as they came due, there was a non-fault reason for any failure in that regard. Likewise, with her compromised functionality, there is no basis to believe she could monitor her leave and earnings statements via computer and meet any duty of that kind. Furthermore, even if she wanted to, Respondent's mother could not take on that kind of role for her daughter for several and fully understandable reasons. She is in her eighties and was fully preoccupied with her daughter's ongoing care, medical appointments, and efforts at recovery. In any event, she was unfamiliar with the federal benefits process, payroll matters, and requirements that might result in incurring a debt by the Department's payment of health benefits. It is not her duty or responsibility to account for any notice that Respondent may have received about payment of her health benefits. Respondent's mother explained a strained financial situation, the costly medicines and her willingness to pay those, and lastly, to incur the costs of her daughter's funeral in December 2011, leaving no assets for coverage of this debt.

In applying the fault standard to this case, the tribunal concludes that Respondent has demonstrated she lacked fault regarding the debt. The supporting statements identify and review Respondent's medical impairments both mental and physical. These address her cognitive function, specifically memory loss, and her inability to manipulate computer functions which inhibited any ability to monitor LES and other notices by computer access from Respondent's home. Arguably, Respondent's efforts to stay in touch with her employing office, to continue to try and overcome medical problems and return to the job, show her good faith efforts to meet the terms of her employment until such time as she was forced to separate.

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 fraud or deceit, and in good faith with regard to all matters concerning the overpayment. Then, the tribunal must balance the equities by assessing 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 and consider good conscience in light of the particular facts of Respondent's case.

The Department's waiver cases have adopted a number of factors pertinent to determining whether collection of a claim against an employee is against equity and good conscience or otherwise not in the best interests of the United States, including the following (a) whether recovery of the claim would be unconscionable under the circumstances; (b) whether, because of the erroneous payment, the employee has relinquished a valuable right or changed

positions for the worse, regardless of financial circumstances; (c) whether recovery of the claim would impose an undue financial burden upon the debtor under the circumstances,¹⁸ and (d) whether the time elapsed between the erroneous payment and discovery of the error and notification of the employee is excessive. These factors are neither exhaustive, nor mutually exclusive; instead, the factors aid the tribunal in assessing under what circumstances, collecting a debt is “beyond the bounds of what is customary or reasonable” or “unjustly excessive.”¹⁹

Respondent states that following her daughter’s death on December 21, 2011, she is at an extreme disadvantage in attempting to respond to this overpayment claim. She only learned of the claim in September 2012, which was eighteen (18) months after her daughter separated from employment with the Department. The passage of time has been detrimental to her ability to build a case for waiver of the \$1,036.68 debt since she has no access to leave and earnings statements from 2011, the affected time period. Respondent’s mother was not privy to her daughter’s LES materials, to the health benefit election process, to even know what share (amount) for health benefit deductions was to be applied. Yet, once notified, she made efforts to communicate with her daughter’s former office(NIDRR) and seek clarification and guidance on this matter which was never within her control. She showed due diligence in seeking to understand and process this health benefits matter, which has remained a concern and emotional burden long after her daughter’s death. Moreover, Respondent states that at the time of her daughter’s death and since then, there are no assets, thus, repayment of the \$1,036.68 debt would result as a financial burden. Respondent’s mother had to pay Respondent’s funeral costs in December 2011 for lack of assets. Finally, Respondent’s mother is not receiving any benefits as survivor in this situation .

Based on the review of these circumstances, and finding that the delay imposed a serious burden on Respondent’s mother capacity to present her case, and collection now would impose a serious financial burden, the requisites of equity and good conscience in this case favor Respondent. Accordingly, I find that in the interests of the United States waiver should be 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 \$1,036.68 is **HEREBY GRANTED.**

November 8, 2012



Nancy S. Hurley
Nancy S. Hurley
Waiver Official

¹⁸ See, *In the Matter of Mrs. Kathryn H. Vandergriff*, 55 Comp. Gen. 1238, B-182, 704 (July 2, 1976).

Acknowledgment by the tribunal that it need find only that the Respondent has shown that the financial burden suffered is reasonably related to repayment of the debt, and that repayment is not otherwise consistent with equity and good conscience.

¹⁹ *Aguon v. Office of Personnel Management*, 42 M.S.P.R. 540, 549-50 (1989).