



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
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In the Matter of

Docket No. 13-28-WA

D,

Waiver Proceeding

Respondent.

DECISION DENYING WAIVER

At issue in this case is whether a current employee of the Department of Education (Department) should be granted a waiver of \$2,602.20 for salary overpayments. These overpayments occurred because the Department failed to deduct healthcare insurance premiums from the Respondent's pay. The overpayments occurred over 19 consecutive pay periods (pp). The overpayment started with pp 2012-18 and continued to pp 2013-10. For the reasons that follow, the tribunal concludes that waiver of the debt is not warranted. Accordingly, Respondent's request for waiver is denied.

Jurisdiction

Under 5 U.S.C. § 5584 (the Waiver Statute), the Department has the authority to waive claims of the United States against debtors as a result of an erroneous payment of pay to a federal employee.¹ The Department promulgated regulations at 34 C.F.R. Part 32 (§ 32.1 *seq.*) and its *Handbook for Processing Salary Overpayments* (Handbook, ACS-OM-04) (January 2012),² specifically delegated the exercise of the Secretary's waiver authority for salary overpayments to the Office of Hearings and Appeals (OHA).

¹ See 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), (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: <http://oha.ed.gov>.

² The *Handbook*, ACS-OM-04, was revised and reissued by the Department on January 19, 2012.

The undersigned is the authorized waiver official who has been assigned this matter by OHA. Resolution of this case is based on the matters accepted as argument, evidence, and/or documentation in this proceeding, when considered as a whole, include the Respondent's request for waiver, supplemental documentation, and documents compiled by the Department's payroll office including the BoC. This decision constitutes a FINAL agency decision.

Discussion

Respondent acquired the debt in question following her transfer from the U.S. Department of Homeland Security (DHS) to the Department in August 2012. When the Respondent transferred from DHS to the Department, without a break in service, her payroll deduction for her healthcare insurance premium should have continued. However, due to Human Capital and Client Services (HCCS) office's administrative error, the Respondent's healthcare benefit paperwork was not properly processed. The administrative error caused the Respondent to receive healthcare benefits without a payroll deduction for the healthcare insurance premium. The failure to deduct healthcare insurance premiums from the Respondent's pay continued until pp 2013-10.

In a waiver proceeding, the debtor acknowledges the validity of the debt, but argues that they should not have to repay the debt. The standard for determining whether a waiver is appropriate requires a 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,³ and (2) whether Respondent can demonstrate that collection of the debt would be against equity and not in the best interests of the United States.

To determine whether these requirements are met, the debtor, upon requesting a waiver hearing, is required 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.

At issue in this proceeding is whether Respondent's arguments and submissions support a request that the entire overpayment be waived in accordance with standards prescribed by statute and consistent with the case law and regulations promulgated by the Department. Therefore, the Respondent's waiver can only be granted if there is a lack of fault by the Respondent and it would be against equity to collect the debt.

Fault in a waiver case is not limited to acts or omissions indicating fraud, misrepresentation or lack of good faith by a debtor. Fault in a waiver case is determined by assessing whether a reasonable person should have known or suspected that he or she was receiving more than his or her entitled compensation.⁴ 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

³ See *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

⁴ See *In re Tammy*, Dkt. No. 05-20-WA, U.S. Dep't of Educ. (November 9, 2005).

her disposal, which, if reviewed, would indicate a salary overpayment.⁵ Thus, every waiver case must be examined in light of its particular facts and circumstances.⁶

The fault standard is satisfied, for example, when the circumstances of the debt show that the employee could not have known he or she was erroneously compensated. An application of this standard by this tribunal can be seen in the matter of *In re Joan*, Dkt. No. 06-49-WA, U.S. Dep't of Educ. (January 25, 2007). In that case, an employee recovering from an automobile accident exhausted her available, advanced and VLTP⁷ leave, subsequently, she was paid despite her leave status. Due to her incapacity, the employee in *Joan* was unable to access her Leave and Earnings Statement (LES) at the time the erroneous payments were made. The tribunal held that since the employee was paid during her hospital recovery she could not have known of the overpayment.⁸

Conversely, the tribunal has concluded that the fault standard has not been satisfied when the circumstances of the debt show that the employee could have known he or she was erroneously compensated. An application of this standard by this tribunal can be seen in the matter of *In Re Carolyn*, Dkt. No. 11-02-WA, U.S. Dep't of Educ. (August 10, 2011). In that case, the Respondent transferred from the Transportation Security Administration (TSA) to the Department, with a pay increase. When the Respondent transferred from TSA, her healthcare benefit election should have been transferred, but due to an administrative error on the part of the Department's HCCS,⁹ Respondent's healthcare benefits paperwork was not properly transferred. As a result of the administrative error, Respondent continued to receive healthcare benefits, but no funds were deducted from the Respondent's payroll checks to cover the employee's contribution of the healthcare insurance premium. This error continued for about a year. Respondent stated that since she received a pay increase when she transferred to the Department, any increase in her payroll check was from her pay increase. The Respondent argued that since it was an administrative error and that she could not have known of the error from her payroll checks, then an overpayment waiver should be granted. The tribunal denied the Respondent's waiver request and concluded that the Respondent was not without fault. The tribunal determined that even though the Respondent did not cause the administrative error, she had a duty to review her entire LES for any errors. Had the Respondent reviewed her LES for errors, she would have seen on the face of the LES that deduction for the healthcare insurance premium was absent. The Respondent expected healthcare benefits, and therefore she should have expected healthcare insurance premium deductions. The Respondent could not rely upon her payroll checks as an indicator whether an overpayment had occurred.

This case is similar in facts and circumstances as *In Re Carolyn*. The Respondent explains the circumstances of the overpayment in a letter to this tribunal dated July 19, 2013. In that letter, the Respondent states that she was unaware that her healthcare insurance premiums were not being deducted from her pay. The Department informed the Respondent, at the New Hire Orientation meeting, that her healthcare insurance election would be automatically

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

⁶ *Id* at 5.

⁷ See 5 C.F.R. § 630.901 (2007); PMI 630-10, Department of Education, Voluntary Leave Transfer Program (October 2, 1989).

⁸ *In re Catherine*, Dkt. No. 05-26-WA, U.S. Dep't of Educ. (December 12, 2005).

⁹ In 2009, the Department changed the name of Human Resource Services to Human Capital and Client Services.

transferred from DHS to the Department. The Respondent was also informed that her Flexible Spending Account (FSA) election would not automatically transfer from DHS to the Department. The Respondent was told she would have to take action to elect payroll deduction for FSA. The Respondent admits that she did review her LES to ensure that her FSA election was being properly deducted from her pay, but she did not think to review the rest of her LES for any other errors.

After her transfer to the Department, the Respondent submitted healthcare claims, by way of her healthcare providers, to her healthcare insurance carrier. These healthcare claims were paid by the healthcare insurance carrier. The Respondent learned in December 2012 that there was a problem regarding her healthcare insurance. After denial of healthcare insurance benefits, the Respondent contacted HCCS. According to the Respondent, HCCS informed her that an administrative error occurred during the Respondent's transfer from DHS to the Department. HCCS stated that it would work to resolve the healthcare insurance benefit problem. However, the Respondent's healthcare insurance benefit problem was not resolved, and in May 2013, the Respondent was notified that her healthcare insurance was to be terminated. HCCS researched the issue, and it was determined that the employee's share of her healthcare insurance premium were not being deducted from her pay.

Respondent argues the waiver should be granted because the debt resulted through no fault of her own, and an administrative error on the part of the Department caused the entire problem. The Respondent believes she could not have known of the payroll deduction problem because her healthcare insurance carrier paid her healthcare providers for covered services. To further support her argument, the Respondent states she received a pay increase during her transfer to the Department. According to the Respondent she expected to see an increase in pay, and therefore, her increased paycheck did not alert her to any potential pay problems. The Respondent believes that since she relied on statements made by Department personnel regarding her healthcare insurance premium deduction, that she had no reason to suspect that healthcare insurance premiums were not being deducted from her pay. The Respondent's belief caused her not to review her LES.

This tribunal has made clear that no employee has a right to pay that he or she obtains as a result of overpayment.¹⁰ Employees are obligated to check the accuracy of each salary payment to ensure no such overpayment is being made,¹¹ including ones that are made as a result of a missing deduction.¹² This duty is imposed upon the employee because he/she is uniquely able to know when and why changes in pay should or have occurred, and when such changes are a result of erroneous payments.

There are no mitigating factors in this case that abrogate the Respondent's duty to review her entire LES for errors. The duty imposed upon the employee does not grant an employee an option to select only certain portions of their LES to review for errors. The Respondent does not

¹⁰ See *In re Carolyn*, Dkt. No. 11-02-WA, U.S. Dep't of Educ. (Aug. 10, 2011).

¹¹ Employees are obligated to verify bank statements and electronic transfers of salary payments, question discrepancies in balances from salary payments, and set aside funds for repayment when he or she discovers a discrepancy. See *In re Joanne*, Dkt. No. 06-22-WA, U.S. Dep't of Educ. (May 1, 2007).

¹² See *In re Carolyn*, Dkt. No. 11-02-WA, U.S. Dep't of Educ. (Aug. 10, 2011).

argue she did not have access to her LES or that she was unable to review her LES because of incapacitation. In fact, the Respondent did review her LES, but only for a FSA deduction from her pay. The reliance on statements made by Department personnel does not alleviate the duty of the Respondent to review her entire LES for errors. Ignorance of a duty for an employee to review their LES has never been recognized as sufficient mitigating factor to finding the employee free of fault in a waiver case such as this.

Respondent is not new to federal employment nor is the Respondent new to receiving an LES. The Respondent is a highly skilled GS-14 with over 12 years of federal employment experience. With such a professional skill level and length of federal employment, it is not unreasonable to expect the Respondent to be familiar with the information shown on the face of her LES. The employee wrongly asserts that even if she had reviewed her LES, the Department's error was not clear and conspicuous on the face of the LES. A subtraction from an employee's pay is indeed clear and conspicuous on the LES. Each subtraction is itemized in a section of the employee's LES called "Deductions." The employee's portion of their healthcare insurance premium is a deduction from pay. Therefore, the deduction for healthcare insurance premium would have been listed in the very same section that the Respondent admits she reviewed for proper FSA deduction. The Respondent selected FEHB healthcare insurance, expected healthcare insurance coverage, received healthcare insurance benefits and therefore, should have expected to see the corresponding deduction for her portion of the healthcare insurance premium. The Respondent's LES from DHS would have also conspicuously itemized deductions, including healthcare insurance premiums, on her LES. Had the Respondent reviewed her LES, after transferring to the Department, she should have noticed the missing expected healthcare insurance premium deduction.

Despite having a duty to review her LES, the Respondent received another indicator that there was a problem with her pay. In December 2012, the Respondent discovered she did not have healthcare insurance coverage. Immediately, the Respondent should have reviewed her LES to see if she had been paying for healthcare insurance coverage. After reviewing her LESs, the Respondent would have discovered she had not been paying her portion for healthcare insurance coverage. When HCCS said they had resolved the problem with her healthcare insurance, she should have reviewed her next LES to ensure that HCCS did indeed resolve the problem. While discovering the error on her LES in December 2012 would have not erased the earlier overpayments, it would have concurrently resolved her healthcare insurance coverage problem and overpayment issue.

The Department's administrative error was on the face of the Respondent's LES, and the Respondent had a duty to review every LES she received. A reasonable person would have wanted to review their LES during a pay period of transition. For example, a reasonable person would have wanted to confirm they were paid the correct amount of hours, that their pay rate was as promised and that deductions were being properly processed. Had the Respondent reviewed her pp 2012-18 LES for errors, she would have noticed a normal expected deduction was missing. The Respondent has not presented any evidence that shows that she could not access her LES or that the information contained on the LES was unclear, complicated and confusing to comprehend.

Guided by *In Re Carolyn*, the facts of this case and the analysis herein, the tribunal concludes that Respondent is not without fault as that term is defined under waiver standards. The Department's error was clear and conspicuous on the face of the Respondent's LES. The Respondent had a duty to verify the accuracy of her LES and report any discrepancies he discovered in her LES to HCCS.

To secure a waiver based upon equity and good conscience, an individual must have acted fairly without fraud or deceit, and in good faith.¹³ There are no rigid rules governing the application of the equity and good conscience standard. The tribunal must balance equity and/or appraise good conscience in light of the particular facts of the case.¹⁴ Factors weighed by the tribunal include the following: whether recovery of the claim would be unconscionable under the circumstances; collection of the debt would impose an undue financial burden.¹⁵

The Respondent argues that it would be against equity and good conscious to require her to repay the amount owed because she did nothing to cause the administrative error. However, the mere fact that an administrative error caused the overpayment does not immediately mean it would be against equity and good conscience of the United States to seek repayment.¹⁶

Repayment of unplanned debt can be difficult and unpleasant. However, those facts do not make it tantamount to showing of a financial burden as such that the equity calls for waiver. There is nothing in the record to support a finding that repayment would cause the Respondent to lose medical care, housing or other life sustaining needs. A statement by the Respondent that she cannot afford to repay the debt is not sufficient evidence to support her hardship claim. Lacking any evidence to the contrary, the tribunal concludes that the Respondent does not qualify for a waiver based on equity for financial hardship.

Respondent did not cause the Department's error nor is there any evidence that Respondent lacked good faith. However, the Department's deduction pay error was conspicuous on the LES. The tribunal concludes there are no mitigating factors to warrant an exception to the general rule that an employee has a duty to examine their LES, and report any discrepancies. The Respondent derived benefits and cost savings from her healthcare insurance carrier. It would be against equity and good conscience to reward an employee, by waiving their debt, after the employee shirked their responsibility to review their LES for errors. This principle is especially applicable in the Respondent's case after her discussion with HCCS in December 2012. Therefore, guided by *In Re Carolyn*, the entire record and the analysis herein, I find that a waiver of this debt should not be granted.

¹³ See 5 U.S.C. § 5584 and *In re Anh-Chau*, Dkt. No. 05-01-WA, U.S. Dep't of Educ. (June 17, 2005) and 5 U.S.C. § 5584.

¹⁴ See *In re David*, Dkt. No. 05-22-WA, U.S. Dep't of Educ. (December 14, 2005); *In re Cynthia*, Dkt. No. 05-06-WA, U.S. Dep't of Educ. (September 14, 2005).

¹⁵ See *id*

¹⁶ See, e.g., DOHA Case No. 02032601 (May 31, 2002), which relies on 5 U.S.C. § 5584, stating that waiver is precluded when an employee is aware that he is being overpaid. The employee does not acquire title to any excess payments merely because the government has committed an administrative error. He has the duty to hold the overpayment for the eventual repayment to the Government.

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 \$2,602.20 is HEREBY DENIED. This decision constitutes a final agency decision.

So ordered this 24th day of October 2013.

George H. Abbott, III
Waiver Official