

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Department of Health and)	DATE: August 1, 1994
Human Services)	
)	Docket No. C-94-291
- v. -)	Decision No. CR324
)	
Linda J. Adams,)	
)	
Respondent.)	

DECISION

This Debt Collection Act case was heard pursuant to a request for hearing filed by Linda J. Adams (Respondent) in which she denied allegations made by the Department of Health and Human Services (DHHS) that she was indebted to it for a salary overpayment in the amount of \$3,946.99. After considering the entire record, I find that DHHS has shown that an overpayment occurred and that a debt in the amount of \$3,867.35 is due and owing from Respondent. I find further that Respondent's request for payment below the minimum payment schedule because of extreme financial hardship should be granted and that Respondent's request for a waiver should be considered pursuant to the process set forth in the DHHS Personnel Manual.

BACKGROUND STATEMENT

On August 2, 1993, DHHS issued to Respondent a Certification of Salary Overpayment (Certification) in the amount of \$3,946.99. The Certification informed her also that, failing her voluntary repayment, DHHS intended to collect the debt by deducting 15 percent of her biweekly disposable pay until the debt was satisfied. This Certification constituted a notice of debt according to the provisions of the Debt Collection Act of 1982 as amended. 5 U.S.C. § 5514.

In response to the Certification, Respondent filed several timely requests for a hearing. DHHS Ex. 1;¹ R. Exs. 1, 3. In the requests, Respondent alleged that DHHS should not be allowed to collect any overpayment, because the Department of Labor (DOL) had not finally adjudicated whether she was entitled to continuation of pay (COP) during this period. R. Ex. 1. Alternatively, if there was an overpayment, Respondent requested a waiver of the overpayment or a reduced repayment schedule, because of extreme financial hardship. DHHS Ex. 1; R. Ex. 3. Finally, Respondent requested that she be granted a hearing on a Certification of Salary Overpayment which DHHS issued for pay she received in August 1989. DHHS Ex. 1. Participating in this proceeding were Respondent; Respondent's representative, Frank Comito of the American Federation of Government Employees; and the DHHS representative, Kevin Short (Employee Benefit Specialist). The parties agreed at the June 13, 1994 conference that this case could be decided on the admissions in that conference and the documentary evidence submitted by the parties. ALJ Ex. 1.

ISSUES

The issues presented for decision are:

- (1) whether there is a valid debt which is presently owed by Respondent to DHHS;
- (2) whether Respondent should be allowed to make payments below the minimum payment schedule because of extreme financial hardship; and
- (3) whether I should consider the merits of Respondent's request for a waiver of this debt.

¹ Exhibits will be cited as follows:

DHHS Exhibit	DHHS Ex. (exhibit number/page)
Respondent Exhibit	R. Ex. (exhibit number/page)
Tape of Prehearing Conference dated June 13, 1994 conducted by Administrative Law Judge (ALJ)	ALJ Ex. 1

The exhibits are listed and described in the Appendix.

APPLICABLE STATUTES, REGULATIONS,
AND POLICIES

Statutes:

5 U.S.C. § 5514; 5 U.S.C. § 5584; 5 U.S.C. § 8101; 5 U.S.C. § 8118.

Federal Regulations and Manuals:

20 C.F.R. Part 10, Subpart C, Part 501; 45 C.F.R. Part 16; 45 C.F.R. Part 30.

DHHS Personnel Manual Instruction 550-8 (June 7, 1990); Instruction 550-9 (May 5, 1988).

Federal Personnel Manual, Chapter 810, § 5-1 (June 21, 1988).

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Having considered the entire record, arguments, and submissions of the parties, and being advised fully, I make the following Findings of Fact and Conclusions of Law (FFCL):

1. By letter dated February 1, 1994 (Request), the Regional Personnel Office, DHHS Region II, requested that the Departmental Appeals Board (DAB) conduct a hearing concerning the August 2, 1993 Certification issued to Respondent.
2. The Request was received by the DAB on February 8, 1993. Id.
3. The DAB has jurisdiction in the matter pursuant to 5 U.S.C. § 5514; 45 C.F.R. Part 30; and DHHS Personnel Manual 550-9.
4. At all relevant times, Respondent was employed by the Social Security Administration (SSA) in Camden, New Jersey. DHHS Ex. 6.
5. This case occurred in the context of Respondent's ongoing efforts to establish that she has suffered an employment-related injury or to have DHHS reasonably accommodate her alleged disability. DHHS Exs. 2, 3, 4, 6, 7, 9, 13; R. Exs. 1, 5.

6. This case is related to a timely claim for workers' compensation filed by Respondent pursuant to the Federal Employees' Compensation Act, 5 U.S.C. § 8101 et seq., for an alleged employment-related injury of June 9, 1992. DHHS Ex. 6.

7. In connection with her absences resulting from this alleged injury, Respondent received COP benefits as authorized by 5 U.S.C. § 8118. Id.

8. The Office of Workers Compensation Programs (OWCP), Employment Standards Administration of DOL, has jurisdiction over the question of whether an employee has suffered an employment-related injury and whether the employee is entitled to COP. 20 C.F.R. §§ 10.2(a), 10.201(d).

9. If OWCP determines that an employee is not entitled to COP after it has been paid, the payments, at the employee's option, shall be charged to annual or sick leave or considered overpayments of pay under 5 U.S.C. § 5584. 20 C.F.R. § 10.201(e).

10. Respondent's June 9, 1992 workers' compensation claim was rejected by OWCP on October 16, 1992. DHHS Ex. 6.

11. After OWCP's initial denial of a workers' compensation claim, a claimant can request an oral hearing before OWCP, a review of the written record by OWCP, a reconsideration by OWCP, and, finally, a hearing before the DOL Employees' Compensation Appeals Board (ECAB). 20 C.F.R. §§ 10.130 - 10.139, Part 501.

12. Respondent appealed OWCP's rejection of her June 9, 1992 claim. The issue of whether she was unable to work because of a work-related injury and was entitled to COP during the period following June 9, 1992 remains on appeal before DOL. ALJ Ex. 1.

13. Pursuant to OWCP's rejection of Respondent's June 9, 1992 claim, Respondent's supervisor informed the Regional Personnel Office that the COP Respondent had received subsequent to June 9, 1992 had been denied and should now be deemed an overpayment. DHHS Ex. 6.

14. Respondent's supervisor indicated also that, because of OWCP's denial of COP, certain sick and annual leave hours which Respondent had taken in September, October, and November had not been earned and also should be converted to leave without pay. Id.

15. By a Certification dated August 2, 1993, the Assistant Director for the Personnel and Pay Systems Division notified Respondent that she had been overpaid in the amount of \$3,946.99. DHHS Ex. 5.

16. The Certification did not reference any time period, but the attached audit indicated that the overpayment was calculated on the basis of Respondent's time and attendance records from June 13, 1992 through November 14, 1992. Id.

17. The audit papers attached to the Certification identified the overpayment amount as \$3,867.35 rather than \$3,946.99. In the June 13, 1994 conference call, the Employee Benefits Specialist agreed that the amount of the debt was the lower figure of \$3,867.35. ALJ Ex. 1.

18. In response to the Certification, Respondent filled or had filed on her behalf, several documents: (1) a "Hearing Request Form" requesting a hearing on the overpayment and a waiver of the overpayment (DHHS Ex. 1); (2) a letter dated August 18, 1992 to the Assistant Director for the Personnel and Pay Systems Division appealing the overpayment (R. Ex. 1); and (3) a "Hearing Request Form" requesting a hearing, a repayment plan below the minimum payment schedule, and a waiver (R. Ex. 3).

19. While Respondent continues to challenge the validity of OWCP's denial of her claim for her alleged injury of June 9, 1992, she does not dispute that, if OWCP's denial is sustained on appeal, she is indebted to DHHS in the amount of \$3,867.35. ALJ Ex. 1.

20. The fact that Respondent's workers' compensation claim for her alleged injury of June 9, 1992 is still on appeal before DOL is not a bar to the right of DHHS to institute collection procedures for the overpayment at issue.

21. When an employee of the United States is indebted to the United States, the United States may recoup that indebtedness by installment deductions from the employee's current pay account. Such deductions may not exceed, except with the consent of the employee, 15 percent of disposable pay. 5 U.S.C. § 5514.

22. The DHHS Personnel Manual provides that, if the hearing officer determines that the proposed salary offset will cause extreme financial hardship, the hearing officer may accept either the debtor's proposed

alternative offset schedule or direct offset of the maximum amount that will not impose extreme financial hardship on the debtor. DHHS Personnel Manual, Instruction 550-9-80.D.2. The provision at 550-9-80.D. sets standards for determining whether the proposed offset will "impose extreme financial hardship."

23. DHHS has proposed to deduct 15 percent of Respondent's disposable biweekly pay until the debt is satisfied. DHHS Ex. 5. Further, the Employee Benefits Specialist represented that DHHS would be willing to accept slightly less than \$100 on a biweekly basis. ALJ Ex. 1.

24. Respondent requested that she be allowed to repay any overpayment found due and owing at a rate below the minimum payment schedule on the grounds that payment at the minimum schedule would cause extreme financial hardship. R. Ex. 3.

25. Respondent filed a statement concerning her income and expenses which was uncontested by DHHS. Respondent represented that she, her husband, and her daughter live on her earnings, which are averaging less than \$1,000 a month, and her daughter's Supplemental Security Income payment of less than \$500 a month. Respondent represented that she has expenses of \$1,775 a month including high medical and transportation costs. R. Ex. 6.

26. Respondent demonstrated that to repay the debt at the minimum payment schedule would cause extreme financial hardship at the present time. R. Ex. 6.

27. Respondent requested that this debt be waived. DHHS Ex. 1; R. Ex. 3.

28. A claim of the United States arising out of erroneous payment of pay may be waived if the collection of the claim would be against equity and good conscience and not in the best interests of the United States. 5 U.S.C. § 5584.

29. DHHS has established policies and procedures for considering such waiver requests. DHHS Personnel Manual, Instruction 550-8.

30. Alternatively, when a waiver request is made simultaneously with or during the pendency of a request for a hearing on the debt, the waiver request may be referred for decision to the hearing officer reviewing the debt. 45 C.F.R. § 30.15(p).

31. The Employee Benefits Specialist requested the DAB to conduct a hearing on the debt, pursuant to 5 U.S.C. § 5514. Therefore, Respondent's 5 U.S.C. § 5584 waiver request was not "referred for decision" to the DAB pursuant to 45 C.F.R. § 30.15(p). Request.

32. Respondent requested that a hearing on her alleged overpayment of August 1989 be conducted concurrently with the hearing on the August 2, 1993 Certification. DHHS Ex. 1.

33. By a Certification of Salary Overpayment dated May 11, 1992, DHHS claimed that Respondent was indebted in the amount of \$1,586.75 for pay she received in August 1989. DHHS Ex. 10.

34. Respondent received the disputed pay while on approved court leave for jury duty. DHHS Ex. 8.

35. Subsequently, DHHS adjusted Respondent's leave record to leave without pay and issued the May 11, 1992 Certification. Id.

36. On June 18, 1993, the Chief Counsel, DHHS Region II, denied Respondent's request for a waiver of the August 1989 overpayment. Id.

37. Respondent represented that she had previously requested a hearing on the August 1989 overpayment. DHHS Ex. 1.

38. In this proceeding, Respondent filed documents supporting her representations that she requested such a hearing. R. Ex. 4.

39. On June 22, 1994, I issued a Remand Order requiring DHHS to process Respondent's request for a hearing on the August 1989 overpayment pursuant to the DHHS Personnel Manual.

40. In this proceeding, DHHS filed a number of documents concerning a workers' compensation claim made by Respondent for an alleged injury suffered December 29, 1992. See DHHS Exs. 2, 3, 4, 7.

41. The documents referred to in FFCL 33 - 40 have no relevance to the overpayment at issue in this case.

42. There is a valid debt which is presently owed by Respondent to DHHS in the amount of \$3,867.35. FFCL 6 - 20.

43. Respondent should be allowed to repay the debt under an alternative payment schedule because of extreme financial hardship. FFCL 21 - 26.

44. I do not have the authority to consider the merits of Respondent's request for a waiver of this debt. FFCL 27 - 31.

DISCUSSION

I. There is a valid debt which is presently owed by Respondent to DHHS.

Respondent received COP in connection with a workers' compensation claim filed for an alleged injury of June 9, 1992. The purpose of COP is "to eliminate interruption of the employee's income while the claim (workers' compensation) is being adjudicated." Federal Personnel Manual, Ch. 810, § 5-1. The maximum period of payment of COP is 45 days. 5 U.S.C. § 8118. An employee has a choice as to whether to use annual or sick leave to cover absences or request COP. 20 C.F.R. § 10.202. In conjunction with her June 9, 1992 claim, Respondent received COP. FFCL 7.

Subsequently, OWCP determined that Respondent had not suffered a compensable injury and denied her claim of June 1992. Respondent's time and attendance records were then adjusted and an overpayment assessed for the COP she received pursuant to the claim. FFCL 10, 13 - 16.

In certifying the overpayment, DHHS acted in accordance with the regulations governing the payment of COP. Section 10.201(e) of 20 C.F.R. provides:

If the Office [OWCP] finds that the employee is not entitled to continuation of pay after it has been paid, the payments, at the employee's option, shall be charged to annual or sick leave or considered overpayments of pay under 5 U.S.C. 5584.

Since Respondent did not have annual or sick leave to cover the absences in question, the COP was properly determined to be an overpayment of pay. FFCL 9, 42.

Respondent did not contest that, if OWCP's denial of her claim for an injury of June 9, 1992 is correct, then an overpayment occurred in the amount of \$3,867.35. FFCL 19. However, Respondent argued that, until the DOL's entire process for adjudicating her claim for workers'

compensation is completed, DHHS cannot certify a salary overpayment and proceed to collect it. Respondent identified no authority for her position that DHHS must forbear collection until the DOL administrative adjudication process is completed.

Under the workers' compensation regulations, a claimant has several further administrative review alternatives after OWCP's initial denial of a claim. The claimant can request an oral hearing before OWCP, a review of the written record by OWCP, a reconsideration by OWCP, and, finally, a hearing before the ECAB. 20 C.F.R. §§ 10.130 - 10.139. The ECAB is independent of OWCP and identified separately from OWCP under the regulations. 20 C.F.R. § 139. The ECAB makes the final administrative review of a workers' compensation claim. FFCL 11.

I conclude that OWCP's October 16, 1992 denial of Respondent's claim for her June 9, 1992 injury is a sufficient basis for DHHS' certification of a salary overpayment and that DHHS is entitled to collect that overpayment. Section 10.201(e) of 20 C.F.R. provides that, if OWCP finds that the employee is not entitled to COP after COP has been paid, the payments must be charged to annual or sick leave or considered an overpayment of pay. If DOL had intended that erroneously paid COP could not be considered an overpayment until the entire DOL administrative adjudication process was complete, it would have framed 20 C.F.R. § 10.201(e) in terms of the ECAB's decision on COP rather than OWCP's decision. Because the regulation refers to the decision of OWCP, I conclude that OWCP's decision is a sufficient basis for certification of an overpayment. FFCL 9, 20.

Further, I conclude that OWCP's initial denial of COP, rather than its subsequent hearing or reconsideration decisions, is sufficient basis for certification of an overpayment. The regulation at 20 C.F.R. § 10.204(a)(5) provides that the employing agency must terminate an employee's COP if the OWCP notifies the agency that COP should be terminated. An OWCP decision instructing an agency to terminate COP would ordinarily be an initial denial since an employee may receive COP for only 45 days. The fact that OWCP's initial denial is a basis for terminating COP supports my conclusion that OWCP's initial denial also is a basis for determining that COP should not have been paid and that an overpayment has occurred.

Finally, the overpayment regulations address the question of what happens if an overpayment certification is reversed after collection has begun. The regulation at

45 C.F.R. § 30.15(j)(10) provides that "amounts collected and later . . . found not owed will be promptly refunded." Should Respondent prevail in her workers' compensation case, any money and interest recouped as a result of this decision should be refunded to her.

Therefore, the Employee Benefits Specialist having concurred that the amount of the debt is \$3,867.35 rather than \$3,946.99, I find a debt in the amount of \$3,867.35 presently claimed by DHHS is due and owing by Respondent. FFCL 42. Because Respondent's hearing request was not forwarded to the DAB in time to issue the decision in accordance with the 60-day time standard set forth in 5 U.S.C. § 5514(a)(2), I find that interest on this debt should not begin to accrue until the date of this decision.

II. Respondent should be allowed to repay the debt under an alternative payment schedule because of extreme financial hardship.

When an employee of the United States is indebted to the United States, 5 U.S.C. § 5514 authorizes installment deductions from the employee's current pay account. It provides also that the deductions may not exceed, except with the consent of the employee, 15 percent of disposable pay. FFCL 21. Additionally, 550-9-80D.2 the DHHS Personnel Manual provides that:

[i]f the hearing officer determines that the proposed offset will cause extreme financial hardship, he or she may either accept the debtor's proposed alternative offset schedule or direct offset of the maximum amount that will not impose extreme financial hardship on the debtor.

The provision at 550-9-80.D sets standards for my determination as the hearing officer on whether the proposed offset will "impose extreme financial hardship." It defines extreme financial hardship as "whether the proposed offset will prevent the debtor from meeting costs necessary for essential subsistence expenses for the debtor, his or her spouse, and his or her dependents." FFCL 22.

In this case, DHHS proposed to deduct 15 percent of Respondent's disposable biweekly pay until the debt is satisfied. Further, in a telephone conference of June 13, 1994, the Employee Benefits Specialist represented that DHHS would be willing to accept slightly less than \$100 on a biweekly basis. FFCL 23.

Respondent represented that repayment of this debt will cause extreme financial hardship for her and her family. Respondent filed a statement concerning her income and expenses. At the present time, the only income Respondent, her husband, and her daughter have are Respondent's earnings, which are averaging less than \$1000 a month, and Respondent's daughter's Supplemental Security Income payment of less than \$500 a month. Respondent represented that she has expenses of \$1775 a month, including high medical and transportation costs. FFCL 25.

I find that a deduction of 15 percent of Respondent's disposable pay will cause extreme financial hardship. FFCL 26. Therefore, I order this debt to be repaid at a rate of 10 percent of Respondent's disposable pay, i.e., that part of Respondent's pay remaining after the deduction from her earnings of any amounts required by law to be withheld. Since Respondent's pay fluctuates according to the number of hours Respondent is able to work, the amount actually recouped by DHHS will fluctuate accordingly.

III. I do not have the authority to consider the merits of Respondent's request for a waiver of this debt.

Under 5 U.S.C. § 5584, a claim of the United States arising out of erroneous payment of pay may be waived. That section provides:

- (a) A claim of the United States against a person arising out of an erroneous payment of pay . . . to an employee of an agency, the collection of which would be against equity and good conscience and not in the best interests of the United States, may be waived in whole or in part by--
 - (1) the Comptroller General of the United States; or
 - (2) the head of the agency when--
 - (A) the claim is in an amount aggregating not more than \$500;
 - * * *
 - (B) the waiver is made in accordance with standards which the Comptroller General shall prescribe.

Respondent requested a waiver pursuant to this statute. FFCL 27.

In Instruction 550-8 of the DHHS Personnel Manual, DHHS has established policies and procedures for considering such waiver requests. The Secretary of DHHS (Secretary) will approve or recommend approval of a request for waiver of a claim "when the facts show that the conditions set forth in the regulations of the Comptroller General are met" in accordance with the Department's guidelines.² The guidelines are set out at 550-8-30. FFCL 29.

The provision at 550-8-50 sets forth detailed procedures for considering waiver requests. First, a personnel officer conducts an investigation of the circumstance of the overpayment and makes a report to a reviewing official. The reviewing official reviews the personnel officer's findings and makes a recommendation for approval or disapproval of the waiver to a deciding official. If the amount is less than \$500, the deciding official then makes a final decision on the waiver request. If the amount is greater than \$500, the deciding official may deny the waiver request or recommend approval. If the deciding official recommends approval, the complete file is forwarded to the Comptroller General through the Chief, Administrative Law Branch, Business and Administrative Law Division, Office of General Counsel. FFCL 29.

In addition to the provisions set forth in the DHHS Personnel Manual, 45 C.F.R. § 30.15(p) provides that waiver requests are to be handled pursuant to the DHHS Personnel Manual " . . . except that a waiver request made simultaneously with or during the pendency of a request of review under this section may be referred for a decision under the waiver standards to the hearing officer reviewing the debt under this section." FFCL 30.

While Respondent requested a waiver simultaneously with her request for hearing on the overpayment, the waiver request was not "referred for decision" pursuant to 45 C.F.R. § 30.15(p). Rather, the Request from the Employee Benefits Specialist requested a hearing on the debt under

² The Secretary's authority for waiving erroneous payments of pay has been delegated to the Associate General Counsel, Business and Administrative Law Division, Office of General Counsel. DHHS Personnel Manual 550-8-70. This authority has been redelegated to the SSA Claims Officers and to the Chief Counsels in the Regional Offices. The Chief, Administrative Law Branch considers requests for reconsideration when the Regional Chief Counsels or the SSA Claims Officers deny a request for waiver.

5 U.S.C. § 5514, not a hearing on the waiver request under 5 U.S.C. § 5584. FFCL 31, 44. Therefore, I do not have authority to consider Respondent's waiver request. Subsequent to my decision on this overpayment, the Employee Benefits Specialist should initiate the procedure set forth in the DHHS Personnel Manual for consideration of Respondent's request for a waiver.

It is so Ordered.

/s/

Charles E. Stratton
Administrative Law Judge

APPENDIX

RECITATION OF THE RECORD THAT WAS REVIEWED

I admitted the following exhibits in this case:

- DHHS Ex. 1: "Hearing Request Form" filed by Respondent for hearing on the August 2, 1993 Certification of Salary Overpayment of \$3,946.99.
- DHHS Ex. 2: "Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay" (DOL Form CA-1) filed by Respondent for an alleged injury of December 29, 1992.
- DHHS Ex. 3: Transmittal to Respondent's supervisor of correspondence from OWCP to Respondent concerning the December 1992 injury.
- DHHS Ex. 4: Transmittal to Respondent's supervisor of OWCP's rejection of Respondent's claim for the December 29, 1992 injury.
- DHHS Ex. 5: Certification of Salary Overpayment for the period June 13, 1992 through November 14, 1992 with attached audit.
- DHHS Ex. 6: Respondent's supervisor's correspondence to the Regional Personnel Office concerning OWCP's denial of Respondent's claim for an alleged injury suffered June 9, 1992. Attached are the OWCP decision and earnings and leave statements concerning the June - November 1992 time period.
- DHHS Ex. 7: Respondent's supervisor's memo to the Regional Personnel Office concerning DOL's denial of Respondent's December 1992 claim.
- DHHS Ex. 8: Region II Chief Counsel's decision denying Respondent's request for a waiver of the August 1989 overpayment.

- DHHS Ex. 9: Composite exhibit of documents concerning Respondent's alleged work-related injuries.
- DHHS Ex. 10: Certification of Salary Overpayment dated May 11, 1992 for an alleged overpayment occurring in August 1989.
- DHHS Ex. 11: "Indebtedness Payment Agreement Election Form" filed by Respondent in response to the May 11, 1992 Certification of the August 1989 overpayment.
- DHHS Ex. 12: Documents that DHHS represents were filed by Respondent in response to the May 11, 1992 of the August 1989 overpayment.
- DHHS Ex. 13: Letter of November 22, 1993 from OWCP concerning a hearing on Respondent's workers' compensation claims.
- R. Ex. 1: Respondent's letter of August 18, 1993 appealing August 2, 1993 Certification of Salary Overpayment to the Assistant Director for the Personnel and Pay Systems Division.
- R. Ex. 2: Respondent's letter concerning where she sent her request for a hearing on the August 2, 1993 Certification of Salary Overpayment.
- R. Ex. 3: "Hearing Request Form" requesting a hearing, payment below the minimum payment schedule, and waiver on the August 2, 1993 Certification of Salary Overpayment.
- R. Ex. 4: Documents that Respondent represents she filed in response to the May 11, 1992 Certification of Salary Overpayment.
- R. Ex. 5: Composite exhibit containing documents concerning Respondent's alleged work-related illness and claims for workers' compensation.

- R. Ex. 6: Respondent's statement of income
and expenses.
- ALJ Ex. 1: Audio recording of a prehearing
conference call conducted June 13,
1994.