

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Department of Health and)	DATE: October 3, 1990
Human Services,)	
)	
- v. -)	
)	
Dolly Jackson,)	Docket No. C-265
)	
Respondent.)	DECISION CR 102
)	

DECISION

This Debt Collection Act case was heard pursuant to a request for hearing filed by the Respondent wherein she denied that the Department of Health and Human Services (DHHS) had overpaid her in the amount of \$1,603.09. DHHS alleged that overpayment occurred when the total amount of Respondent's backpay award, when reduced by required offsets and deductions, was insufficient to cover health insurance premiums owed for the period covered by the award. After considering the entire record, I find that DHHS has shown that an overpayment occurred and that a debt of \$1,603.09 is due and owing from Respondent. I further find that, while I lack authority to grant a waiver of this debt, this is a case in which waiver is appropriate. I therefore recommend that a waiver be granted.

BACKGROUND

By letter of June 20, 1990, DHHS notified Respondent that she had been overpaid in the amount of \$1,603.09. The alleged overpayment resulted from implementation of Merit System Protection Board (MSPB) Decision #SF07528910643. The MSPB Decision reversed Respondent's retirement and reinstated her to a part-time position as a Claims Clerk (Typing), GS-4, step 10, for the period April 22, 1986 to August 9, 1989. The MSPB Decision reflected an agreement reached between Respondent and DHHS to settle her claim that her retirement had been involuntary.

Respondent timely filed a request for hearing. In her written request, she did not dispute DHHS' calculation of the amount of the overpayment. Instead, she argued that she had not been informed at the time she entered into the settlement of her MSPB appeal that an overpayment was possible. Respondent further argued that there had been no discussion of reinstatement to a part-time position at the telephone settlement conference conducted by the MSPB.

On August 1, 1990, I conducted a telephone prehearing conference in this case. At the prehearing conference, Respondent stated that she wished to argue both that she was not indebted to the Department and, in the alternative, that the amount of the debt was incorrectly calculated. In response to my Prehearing Order, the parties submitted documents and written arguments.

DHHS requested that I conduct a paper hearing. Respondent requested the opportunity to examine witnesses. However, the testimony Respondent wished to elicit from these witnesses relates to the fairness of the agreement reached between Respondent and DHHS to settle her MSPB appeal. Because I lack authority to reopen or reconsider the MSPB decision, I conclude that the testimony Respondent sought is not relevant to the matters in dispute in the present case. Accordingly, I conclude that it is appropriate for me to decide this case on the paper record.

ISSUES

The issues are:

1. Whether the debt claimed by DHHS from Respondent in the amount of \$1,603.09 is due and owing; and, if so,
2. Whether Respondent should be granted a waiver of her obligation to repay the debt.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent retired on April 22, 1986, after 35 years of federal service. At the time of her retirement she was employed by DHHS, Social Security Administration (SSA), as a Claims Clerk, at grade GS-4, step 10, with an annual salary of \$16,723. DHHS Ex. 1: MSPB Opinion at 2, MSPB Appeal at 1.¹

2. Respondent began receiving annuity payments under the Civil Service Retirement System (CSRS) on May 1, 1986. On August 29, 1986, the Office of Personnel Management (OPM) notified her that she must redeposit the amount of \$5,519.00 or accept a reduction in her annuity payment from \$918.00 to \$591.00 per month. The redeposit was required because Respondent had previously withdrawn the retirement contributions attributable to approximately nine years of her federal service. Respondent was unable to pay the redeposit, but did not wish to accept the reduced annuity. For this reason, OPM withheld annuity payments to Respondent until the redeposit amount was satisfied. DHHS Ex. 1: MSPB Opinion at 2.

3. On May 3, 1987, Respondent requested OPM to allow her to elect an alternative annuity under an amendment to 5 U.S.C. 8343, which was effective June 6, 1986. In its decision on Respondent's request, OPM concluded that she was not eligible for an alternative annuity because her annuity had commenced on May 1, 1986, prior to the effective date of the amendment. On reconsideration, OPM affirmed its earlier decision. DHHS Ex. 1: MSPB Opinion at 2-3.

4. Respondent appealed OPM's decision to the San Francisco Regional Office of the MSPB. She contended that she had not been informed during her retirement counseling that a redeposit would be required before she could receive an annuity in the amount of \$918 per month. Had she been so informed, she argued, she would have delayed her retirement date. After a hearing, the administrative law judge (ALJ) concluded that Respondent's retirement had been involuntary, because she had reasonably relied on misinformation supplied by SSA

¹ Documents transmitted by DHHS to the Departmental Appeals Board (DAB) with the original hearing request are cited DHHS Ex. (exhibit number). Where an exhibit contains multiple documents, the individual document cited is identified. Other documents are cited by type and date, e.g., DHHS Memo of (date).

regarding the amount of her annuity. DHHS Ex. 1: MSPB Opinion at 3-4.

5. OPM petitioned the MSPB for review of the initial decision of the ALJ. OPM contended that the ALJ should have decided Respondent's involuntary retirement claim as an appeal against SSA, as the former employing agency, rather than against OPM. On June 6, 1989, the MSPB issued a decision vacating the ALJ's decision and remanding Respondent's involuntary retirement claim to the San Francisco Regional Office to be docketed as a separate appeal against SSA. DHHS Ex. 1: MSPB Opinion at 1.

6. On August 9, 1989, Respondent and DHHS entered into an oral agreement to settle Respondent's claim that she had been retired involuntarily. The parties' agreement was recorded in an Initial Decision of that date, Docket No. SF07528910643, issued by an ALJ of the MSPB's San Francisco Regional Office. DHHS Ex. 2 at 1.

7. The terms of the settlement, as recited in the Initial Decision, were as follows:

a. Respondent's April 22, 1986 retirement was to be canceled and she was to be reinstated to her former position. The Initial Decision clearly stated that Respondent would be reinstated to a part-time position, with a regularly scheduled tour of duty of 24 hours per week.

b. Respondent was to receive back pay for the period April 22, 1986 to August 9, 1989. The Initial Decision notified Respondent that her back pay would be offset by annuity payments and outside earnings she had received during the period, in accordance with relevant laws and regulations.

c. Respondent would retire effective August 9, 1989, the date of the settlement.

The ALJ found that the settlement was lawful and that it had been fairly reached by the parties. DHHS Ex. 2 at 2.

8. The Initial Decision contained the following "Notice to Appellant":

This initial decision will become final on September 13, 1989, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on

which you can file a petition for review with the Board. . . . You may request Board review of this initial decision by filing a petition for review if you believe that the settlement agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake.

DHHS Ex. 2 at 3.

9. Respondent did not petition the MSPB for review of the Initial Decision.

10. By letter of June 20, 1990, DHHS notified Respondent that processing her backpay award had resulted in an overpayment in the amount of \$1,603.09. DHHS Ex. 14.

11. Respondent's backpay for the period May 1, 1986 to August 9, 1990 totaled \$36,757.36. The value of her accumulated leave totaled \$4,569.60. DHHS Ex. 14.

12. During the period May 1, 1986 to August 9, 1989, Respondent received gross annuity payments from her Civil Service Retirement plan of \$38,091.00. After deducting premiums for health and life insurance, Respondent received net annuity payments of \$34,544.35 for the period. DHHS Ex. 10; DHHS Memo of 8-23-90 to DAB.

13. DHHS calculated the overpayment by offsetting against Respondent's backpay award the net amount of annuity payments she had received from May 1986 to August 1989. The difference remaining after the offset was \$6,782.61. From this amount DHHS subtracted \$2,573.02 as Respondent's retirement contribution for the period of her reinstatement and \$599.24 for required contributions to Medicare. After those subtractions, \$3,610.35 remained. DHHS Ex. 14.

14. Required health insurance premiums covering the period of Respondent's reinstatement totaled \$5,213.44. The remainder of Respondent's backpay award was insufficient to cover the deduction for health benefits. The difference between the remainder of Respondent's backpay award and the health insurance premiums is \$1,603.09, the amount of the alleged overpayment. DHHS Ex. 14; see also DHHS Memo of 8-10-90 to DAB.

15. Subchapter S-8 of FPM Supplement 990-2 contains instructions to federal personnel officers governing computation of backpay awards.

16. FPM Supplement 990-2, section S8-7(d) provides for the recovery of civil service retirement annuity payments

from erroneously separated employees. That section provides, in pertinent part:

Any employee who, as a result of separation that is subsequently determined by an appropriate authority to have been erroneous, has been in receipt of retirement annuity payments . . . is indebted to the Government for the gross amount of retirement annuity payments authorized for the period covered by the corrective action.

17. FPM Supplement 990-2, section S8-7(d) further provides that the Government must reduce the gross amount of annuity payments by the required deductions for health benefits and life insurance before collecting the net amount of annuity payments from the employee:

Because the gross amount of annuity payments had already been reduced by required health benefits and life insurance premiums, the agency recovers an amount of annuity from the backpay award equal to the gross annuity less health benefits and life insurance premiums, and transfers that amount to the retirement system.

18. FPM Supplement 990-2, section S8-7(e) governs other deductions from backpay awards. That section requires deductions for retirement contributions and health benefits. Regarding deductions for health benefits section S8-7(e) provides:

Health benefits premiums for an employee restored to duty following an erroneous separation for retirement must be deducted if coverage under the health benefits program continued without interruption during the erroneous retirement [emphasis original].

19. Respondent's health benefits continued uninterrupted throughout the period of her erroneous retirement. DHHS Ex. 10.

20. DHHS calculated the overpayment in accordance with applicable statutes, regulations and policies.

21. Respondent has been overpaid in the amount of \$1,603.09. That amount constitutes a debt owed by Respondent to DHHS.

ANALYSIS

The issue in this case is whether the \$1,603.09 balance due for health insurance premiums for the period of Respondent's reinstatement, April 22, 1986 to August 9, 1989, is an overpayment and a debt owed by Respondent to DHHS. I conclude that the unpaid health insurance premiums constitute an overpayment and a debt.²

At the time of her original retirement, on April 22, 1986, Respondent was employed by SSA, an agency of DHHS. She retired as a Claims Clerk, Typing, GS-4, step 10, earning \$16,723.00 annually. Shortly after her retirement, OPM informed her that she was required to redeposit \$5519.00 to her retirement account or accept a reduced annuity. Respondent was unable to make the redeposit. Therefore, OPM collected the redeposit amount by temporarily reducing her annuity payments. This redeposit and offset was a financial hardship to Respondent. It was at this point, in May of 1987, that Respondent requested OPM to allow her to elect an alternative annuity. OPM's denial of that request, and Respondent's subsequent appeal to the MSPB, ultimately resulted in the settlement agreement which underlies the overpayment at issue in this case.

The MSPB treated Respondent's request for an alternative annuity as a claim that her retirement had been involuntary. The MSPB found credible her testimony that, had she been informed at the time she retired that the redeposit was required, she would have elected to delay her retirement and to continue working long enough to satisfy the redeposit amount. The MSPB remanded the involuntary retirement claim to the ALJ. Respondent and DHHS agreed to settle the involuntary retirement claim. The terms of the settlement agreement reversed Respondent's retirement and reinstated her to her former position. Respondent agreed that she would retire effective August 9, 1989, the date of the settlement. DHHS agreed that it would pay her based on a part-time tour of duty of 24 hours per week for the period of her reinstatement.

² DHHS also concluded that Petitioner was indebted for \$8,265.39 for federal taxes and \$3,750.62 for state taxes attributable to her backpay award. I have no authority to decide whether Petitioner is indebted for either federal or state taxes, and make no findings as to these issues.

Respondent does not argue that DHHS' calculations of her backpay award are erroneous or that the award was computed contrary to applicable statutes or regulations. Rather, her arguments primarily relate to the fairness of the agreement she reached with DHHS to settle her MSPB appeal of her retirement date. Implementation of that agreement resulted in the backpay award. Respondent contends that the ALJ's Initial Decision does not accurately reflect the substance of the oral agreement she entered into with DHHS. Specifically, she alleges that DHHS' representative never stated that her reinstatement would be to a part-time position. Respondent further argues that the settlement agreement violates 5 U.S.C. 5596, in that reinstatement to a part-time position fails to make her whole, since she was employed full time prior to her involuntary retirement. Finally, Respondent argues that, had she been informed at the time of settlement that reinstatement to a part-time position might result in an overpayment to her, she would not have entered into the agreement.

I do not have the authority to reopen or otherwise modify the Initial Decision of the MSPB, the implementation of which resulted in the overpayment to Respondent. For this reason, I cannot consider arguments that challenge the validity of that decision and the agreement on which it is based. If, as Respondent now argues, no mention was made of reinstatement to a part-time position at the settlement conference, her remedy was to petition the MSPB for review of the ALJ's Initial Decision. The Initial Decision clearly reflected the ALJ's understanding that Respondent was to be reinstated to a part-time position.

Moreover, the Initial Decision notified Respondent that she could petition for review if she believed the settlement agreement was unlawful, involuntary, or was the result of fraud or mutual mistake. Accordingly, Respondent could also have petitioned the MSPB for review of the decision based on her arguments that the settlement violated 5 U.S.C. 5596 and/or that the agreement resulted from DHHS' failure fully to inform her as to the possible consequences of the settlement. This she did not do. The Initial Decision became final on September 13, 1989. I cannot now reopen that decision.

Taking the ALJ's Initial Decision as the starting point, DHHS properly calculated the amount of the overpayment. DHHS complied with the terms of the settlement agreement and properly applied applicable statutes, regulations, and policies. Federal personnel policies require that

backpay awards be offset by the amount of retirement annuity payments received by an employee during the period covered by a corrective action. FPM Supplement 990-2 S8-7(d). The FPM also specifies that the agency is to recover from the backpay award an amount equal to the gross annuity payment less deductions for health benefits and life insurance premiums. Id. Therefore, DHHS properly offset Respondent's backpay award by the net amount of annuity payments she received for the period. The deductions made for retirement contributions and health benefits were also required. FPM Supplement 990-2 S8-7(e). Accordingly, I conclude that the amount of \$1,603.09 constitutes an overpayment to Respondent and a debt owed to DHHS.

Respondent has requested, in the event I conclude a debt is due and owing to DHHS, that she be granted a waiver of that debt. I am without authority to order a waiver in this case. I may only grant a waiver request for an amount not exceeding \$500. 5 U.S.C. 5584(a)(2)(A). The amount of the debt in this case exceeds \$500. Authority to grant waiver requests for amounts greater than \$500 rests with the Comptroller General of the United States.

However, I note that this case may present a situation in which waiver of the debt may be appropriate. HHS Personnel Manual, Instruction 550-8-30(C) provides that waiver is appropriate where "Action to collect the claim would be against equity and good conscience and not in the best interest of the Federal Government." In this case, I believe those criteria are met.

Respondent argues that the DHHS representative did not inform her at the time of settlement that reinstatement to a part-time position might result in an overpayment to her. She argues that, had she been so informed, she would not have entered into the settlement agreement. I am quite convinced that had Respondent known that the settlement she reached with DHHS would result in her owing money to DHHS, she would not have made the agreement. The record in this case amply demonstrates the financial difficulties that have confronted Respondent since her retirement. It is apparent to me that Respondent only initiated the MSPB appeal which gave rise to this overpayment in an attempt to get some relief from the financial difficulties facing her. Thus, while there is no indication that the DHHS representative affirmatively misled Respondent, it does appear that he may not have fully explained the possible consequences of the settlement to her. Accordingly, it is my view that action to collect the debt would be against equity and good conscience in this instance.

CONCLUSION

Based on the evidence of record, on applicable law, regulations and policies, I conclude that Respondent is indebted to DHHS in the amount of \$1,603.09.

/s/

Steven T. Kessel
Administrative Law Judge