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DECISION



General
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-18-050

DATE: January 31, 1978

MATTER OF: Jack W. Herbstreit - Waiver of
Indebtedness

- DIGEST:**
1. Employee of Department of Commerce, who transferred to a United Nations agency, discontinued his coverage under the Federal Employees Health Benefits Plan (FEHBP). Upon reemployment with Commerce, he reenrolled in FEHBP and retired approximately 5-1/2 months later with a request to continue coverage. Employee was credited for the time of discontinued enrollment to allow FEHBP coverage in his retirement. However, the payment of premiums for that period cannot be waived under 5 U. S. C. § 5584 as the premiums should have been paid by him personally and no appropriated funds were involved.
 2. Federal employee transferred to international organization and cancelled enrollment under Federal Employees Health Benefits Plan (FEHBP) during period of such employment. Record shows that it would be inequitable to require him to pay back premiums to continue enrollment upon his retirement since he could not have received any benefits during period covered by back premiums and nonpayment resulted from improper agency counselling. Thus, there exists such elements of legal liability and equity as to deserve consideration of Congress under the Act of April 10, 1928, 45 Stat. 413, 31 U. S. C. § 236, regarding meritorious claims against the United States.

This action concerns Mr. Jack W. Herbstreit's request for waiver of collection of \$2,630.85, which constitutes the full amount of employee contributions he owes to the Federal Employees Health Benefits Program (FEHBP), 5 U. S. C. §§ 8901, et seq. (1970), as amended, for the period of discontinued enrollment while he was employed in a specialized agency of the United Nations (UN) based in Geneva.

3-188058

The record shows that Mr. Herbstreit was an employee of the Institute for Telecommunication Science (ITS), Department of Commerce, until August 27, 1966. At that time he transferred to a position in a specialized agency of the UN based in Geneva, the International Telecommunications Union. Effective the pay period beginning November 5, 1966, Mr. Herbstreit cancelled his enrollment under the FEHBP, after carrying the high option of the Service Benefit Plan since 1960. He did so because he was compelled to enroll in the United Nations European Office ILO-ITU Health Insurance Fund. Moreover, he was not counselled about the requirement to be enrolled under the FEHBP during the 5 years of service immediately preceding retirement in order to be eligible to continue enrollment after retirement.

On October 7, 1974, Mr. Herbstreit resumed employment with the Department of Commerce and reenrolled in the Service Benefit Plan from October 13, 1974, until his retirement on March 29, 1975. Upon his retirement Mr. Herbstreit's coverage in FEHBP was cancelled by the Civil Service Commission (CSC) because the law (5 U. S. C. § 8905(b)(1)(A) (1970), as amended) requires that an annuitant be enrolled in FEHBP for 5 years immediately prior to retirement.

Subsequently, the CSC changed its position and allowed Mr. Herbstreit to continue coverage as an annuitant in FEHBP for the following reasons. Mr. Herbstreit had originally cancelled his FEHBP coverage when he transferred to the ITU because it was compulsory that he be covered under the United Nations European Office ILO-ITU Health Insurance Fund. Moreover, the CSC found that the Department of Commerce did not properly advise Mr. Herbstreit at the time he dropped the FEHBP coverage on transfer to the ITU that there was a requirement that he be enrolled under the FEHBP during the 5 years of service immediately preceding retirement in order that he be eligible to continue his enrollment after retirement.

The Commission, however, concluded that the law required Mr. Herbstreit to pay his share of the cost of FEHBP coverage for the period from November 11, 1966, through October 12, 1974, as if he had actually had such coverage. Mr. Herbstreit, therefore, requests that the repayment of these premiums retrospectively found due, be waived. The Department of Commerce has concurred in and expressed full support for Mr. Herbstreit's request.

B-188058

There is no authority under the law, 5 U. S. C. § 5581, to relieve Mr. Herbstreit of his indebtedness. Section 5584 of title 5, United States Code, authorizes the Comptroller General to waive claims of the United States against persons arising out of erroneous payments of pay or allowances. This law, however, by its terms, does not extend its benefits to Mr. Herbstreit. During the period involved Mr. Herbstreit was an employee of a UN organization and not of the Federal Government. Therefore, even if he had been properly counseled in 1968 concerning his health benefits and he had elected to continue paying the premiums for the period of non-Federal employment in order to qualify him for continuation of the health benefits into retirement at some later date, such payments would not have come from any Federal salary either by direct withholding or otherwise. Since there was no pay due from the Federal Government, if Mr. Herbstreit had continued coverage under the FEHBP, payment of the premium would have come from his own personal funds and not from appropriated funds. Under such circumstances it cannot be said that the failure to collect the premiums resulted in an erroneous payment of pay. Accordingly, we cannot waive Mr. Herbstreit's indebtedness.

While we cannot waive the indebtedness under 5 U. S. C. § 5584, we recognize that the Commission's requirement that Mr. Herbstreit pay premiums for almost 8 years in order to continue coverage under the FEHBP, imposes a severe hardship upon him. Moreover, during the period in question Mr. Herbstreit was required to pay premiums for the UN health insurance. Also, the time during which Mr. Herbstreit could have filed claims for medical expenses for the period covered by the payment of back premiums has expired. In view of the unusual circumstances and since Mr. Herbstreit did not make timely premium payments due to the failure of his agency to counsel him properly, we believe that he is entitled to equitable relief. Therefore, we are referring Mr. Herbstreit's request for relief of liability to Congress under the Act of April 10, 1928, 45 Stat. 413, 31 U. S. C. § 236, regarding meritorious claims against the United States.

R. J. Kellin
Deputy Comptroller General
of the United States

UNITED STATES GOVERNMENT

George F. ...
GENERAL ACCOUNTING OFFICE *CP*

Memorandum

TO : Director, Claims Division

January 31, 1978

Deputy
FROM : Comptroller General *Arkutan*

SUBJECT: Request for Waiver of Jack W. Herbstreit's
Indebtedness (Z-2715128) - B-188058-O. M.

Attached is our decision of today denying Mr. Herbstreit's request for waiver of his indebtedness in the amount of \$2,630.85 for the Federal Employees Health Benefits premiums found due for the period November 5, 1966, through October 12, 1974. We have, however, submitted to Congress a request for relief of liability under 31 U.S.C. § 236, concerning meritorious claims.

Attachment



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

Genevieve Roddenberry
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B-188058

JAN 31 1978

The Honorable Walter F. Mondale
President of the Senate

Dear Mr. President:

Pursuant to the Act of April 10, 1928, 45 Stat. 413, 31 U. S. C. § 250, we have the honor to transmit our report and recommendation to the Congress concerning the meritorious claim of Mr. Jack W. Herbstreit against the United States with the request that you present the same to the United States Senate.

An identical report is being transmitted to the Speaker of the House of Representatives.

Sincerely yours,

F. F. KELLER

Deputy
Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

James R. ...
UP
JAN 31 1978

B-188058

The Honorable Thomas P. O'Neill, Jr.
Speaker of the House of Representatives

Dear Mr. Speaker:

Pursuant to the Act of April 10, 1928, 45 Stat. 413, 31 U.S.C. § 238, we have the honor to transmit our report and recommendation to the Congress concerning the meritorious claim of Mr. Jack W. Herbstreit against the United States with the request that you present the same to the House of Representatives.

An identical report is being transmitted to the President of the Senate.

Sincerely yours,

F. KELLER

Deputy Comptroller General
of the United States

Enclosure



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20543

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B-188058

The Honorable Timothy E. Wirth
Member, United States
House of Representatives
District Office
9488 West Colfax Avenue
Lakewood, Colorado 80215

Dear Mr. Wirth:

We refer further to your interest in the request of Mr. Jack W. Herbstreit, 4707 Briar Ridge Trail, Boulder, Colorado 80201, for a waiver of collection of the amount of \$2,630.85, which constitutes the full amount of his premiums to the Federal Employees Health Benefits Program (FEHBP), 5 U.S.C. §§ 8901, et seq. (1970), as amended, for the period of time he was employed in a specialized agency of the United Nations based in Geneva.

By decision of today we have held that we have no authority under 5 U.S.C. § 5584 to relieve Mr. Herbstreit of his indebtedness. We have, however, because of the strong equities in favor of Mr. Herbstreit, today referred the matter to the Speaker of the House of Representatives and the President of the Senate with our report and recommendation that Congress favorably consider Mr. Herbstreit's claim that his indebtedness be waived pursuant to the Act of April 10, 1928, 45 Stat. 413, 31 U.S.C. § 236 (copies enclosed).

Sincerely yours,

R.F. KELLER

Deputy Comptroller General
of the United States

Enclosures



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

Deane Erdreich
CP

B-188038

JAN 31 1978

To the Congress of the United States

Fursuant to the Act of April 10, 1920, 43 Stat. 413, 31 U. S. C. § 236, regarding meritorious claims against the United States, we submit the following report and recommendation on the claim of Mr. Jack W. Herbstreit, a retired employes of the Department of Commerce, to be relieved of liability in the amount of \$2, 330.85, which constitutes the full amount of employes contributions for the Federal Employees Health Benefits Program (FEHBP), 5 U. S. C. §§ 8301, et seq. (1970), as amended, for the period of time he was employed in a specialized agency of the United Nations (UN) based in Geneva.

The record shows that Mr. Herbstreit was an employes of the Institute for Telecommunication Science (ITS), Department of Commerce, until August 27, 1966. At that time he transferred to a position in a specialized agency of the UN based in Geneva, the International Telecommunications Union (ITU).

Effective the pay period beginning November 5, 1966, Mr. Herbstreit cancelled his enrollment under the FEHBP, after carrying the high option of the Service Benefit Plan since 1960. He did so because he was compelled to enroll in the United Nations European Office ILO-ITU Health Insurance Fund. Moreover, he was not counselled about the requirement to be enrolled under the FEHBP during the 5 years of service immediately preceding retirement in order to be eligible to continue enrollment after retirement. On October 7, 1974, Mr. Herbstreit resumed employment with the Department of Commerce and reenrolled in the Service Benefit Plan from October 13, 1974, until his retirement on March 29, 1975. Upon his retirement Mr. Herbstreit's coverage in FEHBP was cancelled by the Civil Service Commission (CSC) because the law (5 U. S. C. § 8905(b)(1)(A)) requires that an annuitant be enrolled in FEHBP for 5 years immediately prior to retirement.

Subsequently, the CSC changed its position and allowed Mr. Herbstreit to continue coverage as an annuitant in FEHBP for the following reasons. Mr. Herbstreit had originally cancelled his FEHBP coverage when he transferred to the ITU because it was compulsory that he be covered under the United Nations European Office ILO-ITU Health Insurance Fund. Moreover, the CSC found

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that the Department of Commerce did not properly advise Mr. Herbstreit at the time he dropped the FEHBP coverage on transfer to the ITU that there was a requirement that he be enrolled under the FEHBP during the 5 years of service immediately preceding retirement in order that he be eligible to continue his enrollment after retirement. The Commission found:

"* * * Particularly in view of the fact that he continued to pay his Federal life insurance premiums and retirement contributions during his assignment with the International Telecommunications, we believe that if he had been properly counselled he would have continued to pay his health benefits premiums."

Accordingly, the Commission ordered that Mr. Herbstreit's November 11, 1966, cancellation of his FEHBP enrollment be voided and that he be allowed to continue his health benefits enrollment into retirement. The Commission, however, felt that the law required that Mr. Herbstreit pay his share of the cost of FEHBP coverage for the period from November 11, 1966, through October 12, 1974, as if he had actually had such coverage. Mr. Herbstreit then asked us to waive the requirement of his payment of these premiums retroactively found due. The Department of Commerce, in considering the equities of the case, has concurred in and expressed full support for Mr. Herbstreit's request.

In our decision dated today, B-188058, we have held that we have no authority to relieve Mr. Herbstreit of his indebtedness under 5 U. S. C. § 5534 concerning the waiver of claims of the United States against persons arising out of erroneous payments of pay or allowances. Mr. Herbstreit was an employee of a UN organization and not of the Federal Government during the period involved. Therefore, even if he had been properly counseled in 1966 concerning his health benefits and he had elected to continue paying the premiums for the period of non-Federal employment in order to qualify him for continuation of the health benefits into retirement at some later date, such payments would not have come from any Federal salary either by direct withholding or otherwise. Since there was no pay due from the Federal Government, if Mr. Herbstreit had continued coverage under the FEHBP, payment of the premium would have been from his own personal funds and not from appropriated funds. Accordingly, we cannot waive Mr. Herbstreit's indebtedness.

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The result of the above action is that Mr. Herbstreit must pay the United States an amount totaling \$2,630.85 in order to continue coverage under the FEHBP.

We note, however, that the CSC has found that the Department of Commerce was at fault in not properly advising Mr. Herbstreit and that Mr. Herbstreit did not know that he should have retained FEHBP coverage, and this lack of knowledge was not his fault. Moreover, Mr. Herbstreit has not received any benefits from the FEHBP coverage for which he must now pay the premiums. In other words, Mr. Herbstreit is now faced with paying premiums for FEHBP coverage for an 8-year period during which he could not and did not take advantage of the benefits conferred by such coverage.

In addition, we point out that Mr. Herbstreit's employment by the ITU was sanctioned by the United States Government. In fact, recognizing the desirability of his service with the ITU, Congress enacted Private Law 91-166, approved September 26, 1970, for the purpose of extending rights and entitlements conferred on Mr. Herbstreit by virtue of subchapter IV of chapter 35, title 5, United States Code, for a period in excess of that stated in the aforesaid subchapter. The above-cited law, however, does not remedy the unfortunate situation in which Mr. Herbstreit now finds himself.

Considering all of the above, we consider that collection action against Mr. Herbstreit would be against equity and good conscience and not in the best interests of the United States. However, as noted above, this Office is precluded from using its waiver authority under 5 U.S.C. § 5584.

The Act of April 10, 1928, 45 Stat. 413, 31 U.S.C. § 238, provides, however, for the submission to the Congress by this Office of those claims against the United States which may not be lawfully adjusted by an appropriation theretofore made but which are determined to contain "such elements of legal liability or equity as to be deserving of the consideration of the Congress." We believe the claim of Mr. Herbstreit contains such elements of legal liability and equity as to deserve the consideration of Congress, and we recommend that he be relieved from liability to pay the sum of \$2,630.85 for FEHBP premiums for the period November 5, 1966, through October 12, 1974, and that the Congress appropriate such amount for payment into FEHBP on behalf of Mr. Herbstreit.

B-188058

If the Congress should concur in our recommendation in this case, our opinion is that enactment of a statute in substantially the following language will accomplish the relief recommended.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That: (a) Jack W. Herbstreit, a retired employee of the Institute for Telecommunication Science, Office of Telecommunications, Department of Commerce, is hereby relieved of liability to the United States in the sum of \$2,630.85, representing premiums to the Federal Employees Health Benefits Plan for the period November 5, 1966, through October 12, 1974. In the audit and settlement of the accounts of any certifying or disbursing officer of the United States, credit shall be given for the amount for which liability is relieved by this Act.

"(b) There is appropriated out of money in the Treasury not otherwise appropriated the sum of \$2,630.85 for payment into the Federal Employees Health Benefits Fund to cover Mr. Herbstreit's liability for the aforesaid premiums."

R.F. KELLER

Deputy Comptroller General
of the United States