



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
OFFICE OF ADMINISTRATIVE LAW JUDGES
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202
TELEPHONE (202) 245-8300

In the Matter of

EJ,

Respondent.

Docket No. 23-20-OF

Overpayment/Pre-offset Hearing

Appearances: Edward James, Respondent, self-represented.
Lydia Makande, Office of the General Counsel, U.S. Department of Education.

Before: Angela J. Miranda, Administrative Law Judge.

DECISION

I. Jurisdiction and Procedural History

The Office of Administrative Law Judges has current jurisdiction over the above referenced matter.¹ A request in relation to an overpayment of \$3,500.15, under Debt ID M2320500001, was filed in the Office of Hearings and Appeals (OHA) (OES Document 1). The request followed a decision that denied the Respondent's request for a waiver under Docket No. 23-18-WA, which

¹ The Department's policy is set forth in the U.S. Department of Education's Administrative Communications System, Handbook for Processing Salary Overpayments (ACSD-OFO-009, approved on January 19, 2012 and updated on July 12, 2022 and August 11, 2022). An erroneous payment to a federal employee, or former federal employee, creates a debt to the United States that requires collection or, in certain instances, allows waiver and various laws are available to the United States to administratively collect or waive these types of debts (5 U.S.C. §§ 5514 and 5584, 31 U.S.C. §§3711 and 3716. *See also*, Debt Collection Act of 1982 (Pub. L. 97-365, October 25, 1982), Federal Debt Collection and Procedures Act (Pub. L. 101-647, Title XXXVI, November 29, 1990), and Debt Collection Improvement Act of 1996 (Pub. L. 104-134, Section 31001, April 26, 1996)).

Historically, these administrative proceedings were the shared responsibility of the Comptroller General of the former General Accounting Office, now the Government Accountability Office, and the various Executive agencies, if the amount of the debt was below a certain dollar amount (*See*, <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/waiving-overpayments/>). With Passage of the General Accounting Office Act of 1996 (Pub. L. 104-316, Section 103(d)), the authority for administrative proceedings to collect or waive these types of debts was given to the Director of Office and Management and Budget (OMB). The Director of OMB redelegated this authority to the Executive Agencies by memorandum, dated December 17, 1996, and the dollar limit previously imposed for jurisdiction by the Executive agencies was eliminated. (*See*, https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/foia/gc_dec17.pdf.)

was issued on September 26, 2023.²

On September 27, 2023, the Respondent timely requested a pre-offset hearing to challenge the validity of the and included a full copy of the Notice of Debt dated, July 24, 2023 (OES Document 1). His request referenced two additional documents: a Grievance Decision dated March 20, 2023, and a “Request for Bill Collection,” issued on June 2, 2023. These documents were previously filed in the Waiver proceeding and are considered in this proceeding.³

Thereafter, an Order Governing Proceeding (OGP) was issued requiring the Department to file all government records supporting the alleged overpayment determination along with the Department’s brief (OES Document 2). On October 16, 2023, I issued an Amended OGP (OES Document 3).⁴

The OGP also advised the Respondent that the Department’s regulations allowed the imposition of an involuntary repayment schedule of 15% of disposable pay from each pay period until any established debt is paid in full (*Id.*). Therefore, the OGP allowed the Respondent an opportunity to submit a narrative or brief in response to the Department’s brief and to also submit financial information in support of his claim that repayment at the involuntary repayment schedule of 15% of disposable pay would result in extreme financial hardship.

The Department timely filed its brief and supporting exhibits (OES Documents 5 and 6). In response to an Order to Show Cause, the Respondent filed a hardship narrative, evidence of a deposit to a bank account, and a letter of indicating legal representation in the Respondent’s tax matter (OES Documents 8, 9, and 10).

Subsequently, two orders requiring the filing of additional Department records were issued (OES Documents 11 and 14). The identified Department records were timely filed (OES Documents 12, 13, 15, and 16). The hearing record is now complete, and this matter is ready for a decision.

II. Issues

1. Whether the Department has established the debt under Debt ID M2320500001 is a valid debt.
2. Whether, in the absence of an acceptable voluntary repayment agreement, the Respondent has established extreme financial hardship to obtain relief from imposition of an involuntary repayment schedule of 15% of disposable pay collected from each pay period until the debt is fully paid.

² A waiver proceeding is independent from a pre-offset hearing. Consistent with Department regulations, a pre-offset hearing does not review a denial of a waiver (34 C.F.R. § 32.5(a)(1)).

³ As a convenience to the Respondent a copy of those two documents were attached to the Order Governing Proceeding (OGP) dated September 29, 2023 (OES Document 2). In that OGP the parties were allowed an opportunity to object to the receipt of those documents in this hearing record. No objections were received.

⁴ The Amended OGP corrected the Debt ID number and adjusted the filing deadlines following the averted Federal government shutdown.

III. Legal Framework/Applicable Laws and Regulations

A. Debt Collection and Administrative Offset

The Federal Claims Collection Act of 1966 (Pub. L. 89-905, July 19, 1966) was enacted to avoid unnecessary litigation for the collection of claims of the United States. The law has been amended numerous times since 1996. One of the amendments resulted in codification at 31 U.S.C. § 3711, which address the collection and compromise of a debt owed to the United States.⁵

Consistent with the original intent of the Federal Claims and Collection Act of 1966, the current statute requires the head of an executive agency to attempt to collect a claim of the United States Government for money or property arising out of the activities of or referred to the agency (31 U.S.C. § 3711(a)(1)). The collection of such a claim is governed by regulations prescribed by the head of the agency and the standards that the Attorney General and the Secretary of Treasury prescribe (31 U.S.C. § 3711(d)(1) and (2)).⁶

The Department's regulations are found at Part 32 of Title 34 of the Code of Federal Regulations. Using the Administrative Communications System (ACS), the Department established policy in relation to salary overpayments with the issuance of the Handbook for Processing Salary Overpayments (ACS-OM-04), hereinafter referred to as the Handbook. Revisions were made to that Handbook on January 19, 2012. On July 12, 2022, technical changes were made, and the Handbook was renumbered per the new ACS document numbering system (ACSD-OFO-009).

Notably, there is one exception to the applicability of the procedures for recovery of overpayments by administrative offset. These procedures do not apply to an employee election of coverage or of a change of coverage under a federal benefits program which requires periodic deductions from pay if the amount to be recovered was accumulated over four pay periods or less (34 C.F.R. § 32.1(b)(2)(5)).

B. Notice Requirements

The relevant federal statute requires that the head of the agency provide notice to a federal employee prior to collection by administrative offset of a salary overpayment (31 U.S.C. § 3716). The statute specifically requires that the notice be in writing, identify the type and amount of the claim, state the intention of the agency to collect by administrative offset, and explain the rights of the debtor. The agency must provide an opportunity to inspect and copy the records of the agency related to the claim, an opportunity for review within the agency of the determination of the claim, and an opportunity to make a written agreement with the agency to repay the amount of the claim (*Id.*).

⁵ This section was subsequently amended by the Debt Collection Improvement Act of 1996 and the General Accounting Office Act of 1996.

⁶ The Attorney General and Secretary of Treasury published a notice of proposed rulemaking on December 31, 1997 (62 FR 68476-01) and the final rule was published on November 22, 2000 (65 FR 70390-01). The regulations for Federal Claims Collection Standards (FCCS) are found at 31 C.F.R. Parts 900-904. The final rule revised the FCCS issued by the Department of Justice and the General Accounting Office on March 9, 1994, and reflected changes under the Debt Collection Improvement Act of 1996 and the General Accounting Office Act of 1996.

The Department regulations provide that the pre-offset notice be in writing, establish the origin, nature, and amount of the overpayment, how interest is charged, and how administrative costs and penalties will be assessed (34 C.F.R. § 32.3(a) and (b)). The regulations require the Department to demand repayment while providing the opportunity to enter into a written repayment agreement with the Department (34 C.F.R. § 32.3(c)). The regulations require that the debtor be advised of the right to request a waiver if waiver of repayment is authorized by law (34 C.F.R. § 32.3(d)). The regulations require that the Department identify the intention to deduct up to 15% of the employee's disposable pay to recover the overpayment if a waiver is not granted and the employee has not entered into a voluntary written repayment agreement (34 C.F.R. § 32.3(e)). Additionally, the Department must provide specific details about the amount, frequency, approximate beginning date and duration of the intended deduction (34 C.F.R. § 32.3(f)). The Department's regulations require that Government records supporting the debt be provided with the notice or the notice must advise how those records will be made available to the employee for inspection and copying (34 C.F.R. § 32.3(g)). Lastly, the regulations require that the debtor be informed of the right to request a pre-offset hearing concerning the existence of a debt, the amount of the debt, or to obtain relief from an involuntarily imposed repayment schedule (34 C.F.R. § 32.3(h)).

The Department policy, which is mostly consistent with the requirements of the applicable statutes and Department regulations, provides further instruction as to how the Department will process salary overpayments and imposes additional requirements upon the Department.⁷

C. Requirement for a Hearing

The statute authorizing installment deduction for indebtedness to the United States resulting from an erroneous payment of pay and allowances, travel, transportation, and relocation expenses and allowances requires an opportunity for a hearing to challenge 1) that a debt exists, 2) the amount of the debt, or 3) in the case of an individual whose repayment schedule is established other than by a written agreement, to establish extreme financial hardship to be relieved of involuntary collection of 15% of disposable pay (5 U.S.C. §5514(a)(2)(D)). The Department regulations are consistent with the authorizing statute (34 C.F.R. §§ 32.4(a) and 32.3(e)).

The authorizing statute demands that the hearing be conducted by an individual who is not under the supervision or control of the head of the agency and does not prohibit the appointment of an administrative law judge as the hearing official (5 U.S.C. §5514(a)(2)(D)). The Department's regulations require that the hearing be conducted by a hearing official who is not an employee of the Department or under the supervision or control of the Secretary (34 C.F.R. 32.5(d)). With the implementation of the Handbook, the Department established policy interpreting this regulation and authorized an administrative law judge employed by the Department to preside over pre-offset hearings. This policy interpretation of the Department's regulation is consistent with the intent of the authorizing statute.

⁷ Current Department policy and practice shows the Department generally relies on its payroll agent, the Department of Interior, Interior Business Center to issue the required notice if the employee is a current employee. Often this notice is in the form of a "Bill for Collection" (as titled by the payroll agent in some notices), "Bill of Collection" (as titled in the Department's policy), or otherwise referenced as a debt letter. In the case where the employee is not a current employee of the Department, the notice is issued by the Department, often relying on the Bill for Collection generated by the payroll agent.

The authorizing statute's provision for a hearing on the existence or amount of the debt requires that the agency provide government records to establish the agency's claim for the debt (5 U.S.C. § 5514(a)(2)(B)). The Department's regulations are consistent with the statutory requirement (34 C.F.R. §32.3(g)). As such, the agency carries the initial burden of proof to establish the existence of and amount of the alleged debt.

The Department's regulations require the hearing official to decide whether the determination of the existence or amount of the debt is clearly erroneous (34 C.F.R. § 32.9(b)). The Department's policy describes the "clearly erroneous" standard by referencing a standard of review that governs appellate review of district court findings.⁸ The regulation specifies "a determination is clearly erroneous if the hearing official . . . considering the records as a whole is left with a definite and firm conviction that a mistake was made" (*Id.*). In following this standard, the hearing official is required to conduct a fair and impartial hearing (34 C.F.R. § 32.7(b)(1)).

D. Involuntary Collection and Extreme Financial Hardship

The authorizing statutes allow the agency to involuntarily collect on an established debt by installment deduction and administrative offset from the current pay, including basic pay, special pay, incentive pay, retired pay, retainer pay, or other authorized pay (5 U.S.C. § 5514 and 31 U.S.C. §§ 3711 and 3716). Pursuant to the statute, unless otherwise agreed to, the agency must limit collection to 15% of disposable pay (5 U.S.C. § 5514 (a)(1)). The authorizing statute allows a challenge to terms of an involuntary repayment schedule upon a showing of extreme financial hardship (5 U.S.C § 5514(a)(2)(D)).

The Department's regulations are consistent with the authorizing statute (34 C.F.R. §§ 32.3(e) and 32.2). The regulations require a showing of extreme financial hardship to obtain relief from an involuntarily imposed repayment schedule (34 C.F.R. §§ 32.4(c) and 32.5(a)(2)). The regulation requiring a showing of extreme financial hardship was found to be consistent with the authorizing statute.⁹ The Department's policy as described in the Handbook is generally consistent with the authorizing statute and the Department's regulations.

E. Employment and Personnel Management

An executive agency has the general authority to employ individuals consistent with congressional appropriations (5 U.S.C. § 3101). The appointing authority in each executive agency is responsible for notifying the Office of Personnel Management (OPM) of various personnel actions in the competitive service, including, appointment, resignation, and transfer (5 U.S.C. § 2951). The OPM extended this reporting requirement to all civilian employees, whether competitive, excepted, or Senior Executive Services (5 C.F.R. § 9.2).

The OPM provides guides for processing personnel actions (<https://www.opm.gov/policy-data-oversight/data-analysis-documentation/personnel-documentation/#url=Processing->

⁸ The Handbook relies on the "clearly erroneous" standard as described in *Anderson v. Bessemer*, 470 U.S. 564, 73-4 (1985).

⁹ See, *Sibley v. United States Department of Education*, 913 F. Supp. 1181 (N.D. Illinois (1995)).

[Personnel-Actions](#)) and each executive agency is responsible for preparing and processing those actions consistent with the guide.

F. Back Pay Owed to Federal Employees

An employee of an agency who was affected by an unjustified or unwarranted personnel action that resulted in the withdrawal or reduction or all or part of pay, allowances, or differentials is entitled to correction of the personnel action and payment for any part of pay, allowances, or differentials which the employee would have earned or received during the applicable period (5 U.S.C. § 5596(b)(1)(A)(i)). The employee is entitled to payment of interest on the amount of back pay which is computed at the rate or rates in effect under Section 6621(a)(1) of the Internal Revenue Code of 1986 (5 U.S.C. §§ 5596(b)(2)(A)&(B)).

Regulations to carry out 5 U.S.C. § 5596 are in the Code of Federal Regulations, Title 5, Part 550, Subpart H (5 C.F.R. § 550.801(a)). Consistent with the statute, when an appropriate authority determined that an employee was affected by an unjustified or unwarranted personnel action, the employee is entitled to back pay if the appropriate authority finds that the unjustified or unwarranted personnel action resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due to the employee (5 C.F.R. § 550.804(a)). Also consistent with the statute, the agency is responsible for computing the period covered by the corrective action and the pay, allowances, and differentials the employee should have received (5 C.F.R. § 550.804(a)(2)). The Department is responsible for computing the amount of interest due from the date on which the employee would have received the pay, allowances, and differentials and issue the interest payment within 30 days of the date on which accrual of interest ends (5 C.F.R. §§ 5503806(a)(1) and (f)).

IV. Findings of Fact

1. At all times relevant to this matter, the Respondent was and continues to be a current employee of the Department.
2. On March 20, 2023, a Deciding Official issued a Grievance Decision in favor of the Respondent (OES Document 2, pp. 9-15). The Grievance Decision required the Department to backdate the Respondent's promotion to Grade 12, Step 1, effective January 6, 2019; to backdate related within-grade increases (WGIs) based on the corrected date of promotion to Grade 12, Step 1 effective January 6, 2019; and to retroactively pay the calculable differences in pay he would have received as of January 6, 2019 but for the delay in considering his eligibility for promotion to Grade 12, Step 1 (OES Document 2, p. 14).
3. On April 18, 2023, a personnel action was processed promoting the Respondent from Grade 11, Step 2, to Grade 12, Step 1, with an effective date of January 1, 2019 (OES Document 13, p. 27).
4. On April 18, 2023, a personnel action was processed for a within-grade increase (WGI) for the Respondent for an increase from Grade 12, Step 1 to Step 2, with an effective date of January 5, 2020 (OES Document 6, p. 3).

5. On April 18, 2023, a personnel action was processed for a WGI for the Respondent for an increase from Grade 12, Step 2 to Step 3, with an effective date of January 3, 2021 (OES Document 6, p. 6).
6. Consistent with the Grievance Decision the Respondent was eligible for an increase from Grade 12 Step 3 to Step 4 with an effective date of January 2, 2022.¹⁰
7. Prior to issuance of the Grievance Decision, the Respondent was promoted to a position in Federal Student Aid at Grade 13, Step 1, with an effective date of January 30, 2022 (OES Document 16, p. 44).
8. In the Earnings and Leave Statement (ELS)¹¹ issued for pay period 10 of 2023, the Respondent received gross pay of \$12,035.01 (OES Document 6, pp. 9-10). That amount included payment for nine (9) hours at the hourly rate of \$55.46 for a total of \$499.14 and a payment for 71 hours at the hourly rate of \$55.46 for a total of \$3,937.66 (identified as payment related to a union dispute), the total of which equaled the Respondent's pay for that pay period. Also included was adjusted regular pay of \$3,500.15 (which represented the back pay amount following issuance of the Grievance Decision) and interest paid by the government to the employee for back pay in the amount of \$4,098.06 (*Id.*).
9. A Notice of Debt dated July 24, 2023, was issued on behalf of the Department, which indicated an overpayment occurred as a result of a correction made to a personnel action that was processed for pay period 10 of 2023 (OES Document 1, p. 5-10).
10. After receiving a decision denying a request for a waiver of this debt, the Respondent timely filed a request for a pre-offset hearing (OES Document 1, p. 1-2).
11. The asserted debt amount of \$3,500.15 is established as an overpayment to the Respondent following the Department's acknowledgement that it should have only paid the Respondent \$597.91 for interest on the back payment of pay.

V. Arguments

A. Respondent's Initial Request for a Hearing

In the request for a hearing, the Respondent explained a promotion and WGIs were not processed correctly and that failure to process was challenged under the available grievance process (OES Document 1, p. 1). A Grievance Decision, in favor of the Respondent, was issued by the Deputy Assistant Secretary of the Office of Elementary and Secondary Education on March

¹⁰ While the record does not include a copy of a personnel action documenting this WGI, the record does establish the back pay included a differential payment for this WGI.

¹¹ An employee of the Department receives a biweekly Earnings and Leave Statement (ELS) in electronic format. When the Department prints a reissue of an ELS, the reissued statement is identified as a Leave and Earnings Statement (LES). For consistency in this decision, the acronym of ELS will be used when referring to a statement filed in this record whether the actual document filed is an ELS or a reissued LES. (For examples, see OES Document 6, pp. 9 and 12).

20, 2023 (OES Document 2, pp. 9-15). In the request, the Respondent acknowledged he received a back payment that included interest in the amount of \$8,472.62 (OES Document 1, p. 1).¹²

Following the issuance of the Grievance Decision, the Respondent explained he was concerned because he could not identify if the proper cost-of-living adjustments were made, if the WGIs were properly processed, and he had questions about the interest payment that was calculated and made to him (OES Document 1, p.1.). The Respondent explained he contacted the Department's pay roll agent, the Department of Interior (DOI), Interior Business Center (IBC) but was told the IBC processes the payment based on the calculations provided by the Department and he was directed back to the Department if he had questions (*Id.*). The Respondent asserted he called the IBC again, but this time was told an IBC supervisor performed an initial audit and identified an error was made in calculating the interest payment (*Id.*).

In the request for hearing, the Respondent specifically discussed his ELS for pay period 8 of 2019, indicating there were adjustments to that statement when his pay was processed, suggesting it may be correct, but he questioned whether the ELS accounted for his WGIs (OES Document 1, p. 2).

B. Department's Brief

In its brief, the Department acknowledged the Grievance Decision and indicated the Department effectuated that decision with the issuance of personnel actions to correct the promotion to a Grade 12, Step 1 to January 6, 2019, and subsequent WGIs on January 5, 2020, and January 3, 2021 (OES Document 5, p. 2). In its brief, the Department explained the back pay that was owed to the Respondent was calculated along with interest the Department was obligated to pay for its failure to timely process the Respondent's promotion and subsequent WGIs when they were due (OES Document 5, p. 2).

The Department explained that payment implementing the directives of the Grievance Decision was issued to the Respondent in pay period 10-2023 (*Id.*, *See*, OES Document 6, pp. 9-10). The Department explained that the payment made included \$4,436.80 in regular pay for that pay period, an adjustment for back pay in the amount of \$3,500.15, and an interest payment of \$4,098.06 (*Id.*). The Department explained the interest payment was an error, as the interest owed to the Respondent was only \$597.91 (OES Document 5, p. 2). The Department acknowledged the error occurred when the adjustment of \$4,098.06 for interest was entered by an employee of the Department into the federal personnel and pay system instead of the correct amount of \$597.91, causing an overpayment of \$3,500.15 (OES Document 5, p. 3).

Given these acknowledgements, the Department argued the overpayment of \$3,500.15 is a valid debt and the Department is entitled to collect that overpayment from the Respondent (OES

¹² As identified in the Request for Bill for Collection and the estimated calculations for back pay, \$8,472.62 is the calculation of the Department's share of the calculated back pay, benefits, and interest payment resulting from the Grievance Decision, dated March 20, 2023 (OES Document 2, pp. 17-19). Notably, it is the estimated calculations that identified the interest on the back pay as \$4,098.06 (*Id.*, pp. 18-19). Although the estimated calculation includes a place the signature of the Approving Official, there is no approving signature or name of the official and it is unclear from this document whether these calculations were prepared by a Department employee, as suggested in the Department's brief, or the Department's payroll agent (*Id.*, p. 18).

Document 5, p. 3).

C. Respondent's Response or Narrative

The Respondent submitted a narrative to explain his financial circumstances. He explained he incurred a state tax debt after purchasing a home in Maryland in 2019 (OES Document 8). The Respondent explained that prior to the home purchase, he updated his state tax information with the Department's Human Resources Office, but the Department continued to deduct and remit taxes to the District of Columbia instead of Maryland through June 2022. As a result, he incurred a Maryland state tax debt and penalties of more than \$9,000 (*Id.*). The respondent explained he was behind in his mortgage payments by more than \$42,000.00 and has experienced financial strain due to the COVID pandemic when he had been paying medical bills for a family member who was hospitalized and died during the pandemic (*Id.*). The Respondent indicated he has been approved for a loss mitigation program in relation to his mortgage debt and provided some documentation in support of that assertion (*Id.* and OES Document 9). In relation to his Maryland State tax debt, he provided documentation that he has retained legal assistance to help resolve that tax debt (OES Document 10). He expressed his belief his financial hardship is likely temporary but until these problems can be fully resolved, he asserted he has certain financial hardship (OES Document 8).

VI. Analysis

A. Background

The evidence shows the Respondent was first employed by the Department on January 12, 2015 (OES Document 2, pp. 10-11). His position was a career ladder, Grade 9-11-12 and he was hired into that position at Grade 9, Step 1 (*Id.*). The evidence shows that he remained at Grade 9 until March 18, 2018, when he was promoted from Grade 9, Step 4 to Grade 11, Step 1 (OES Document 13, p. 14).¹³ On April 23, 2019, a corrected personnel action was approved that changed the effective date of the Respondent's promotion from March 18, 2018 to October 29, 2017 (OES Document 13, p. 9). Also on April 23, 2019, a WGI from Grade 11, Step 1 to Grade 11, Step 2 was approved with an effective date of October 28, 2018 (OES Document 13, p. 16).

The record shows the general schedule increase of 1.24% for 2019 and the appropriate locality payment was processed with the issuance of personnel actions approved between April 4, 2019 and April 30, 2019 (OES Document 13, pp. 20, 21, 23, 26, and 28). The general schedule increase was effective January 1, 2019. These changes are reflected in the ELS for pay period 8 of 2019, which indicates a re-compensation adjustment was processed in this pay period (OES Document 13, pp. 5-6).

Although the Respondent cited this pay period as related to the overpayment notice, that assertion is not supported. In most years, federal employees benefit from an increase to the general schedule. Typically, the increase is processed and paid for the first full pay period in the new year. In 2019, the increase to the general schedule was delayed for all Department employees and

¹³ On March 28, 2019, ten days after the personnel action was executed for the Respondent's promotion to Grade 11, a correction was executed (OES Document 13, p. 13). Only the information in section 45 (remarks) was changed.

personnel actions were not processed until April of 2019 or later in 2019.¹⁴ The payment of back pay in pay period 8 of 2019, was related to a delay in processing of the Respondent's promotion from Grade 9 to Grade 11, which was not subject to the Grievance Decision dated March 20, 2023 and not related to the alleged overpayment under review in this proceeding.

In January 2019, the principal operating component (POC), to which the Respondent was assigned was reorganized (OES Document 2, p. 12). The reorganization resulted in a series of personnel actions being issued between March 27, 2019 and March 30, 2019 (OES Document 13, pp. 18, 19, 22, 24, 25, and 29). Each of these personnel actions had an effective date of January 6, 2019, and none of these personnel actions were related to the Grievance Decision.

The record establishes that after the reorganization, the Respondent questioned his new supervisor about the agency's failure to promote him to Grade 12, when he was eligible for that promotion on October 28, 2018 (OES Document 2, p. 13). That questioning and other unrelated Department actions in and around 2019, led to the Union and the Respondent filing grievances against the Department. In a proceeding independent of this pre-offset hearing, the Respondent filed a grievance on December 15, 2022 (OES document 2, p. 9). In that grievance, the Respondent requested that his promotion to Grade 12, Step 1 be backdated to the correct date, that the Agency backdate any WGIs he was due while at Grade 12, and that the Agency pay back pay with interest for the difference in pay he would have received but for the agency's administrative errors with his promotion and WGIs (OES Document 2, p. 11).

On March 20, 2023, a grievance decision was issued by the designated Deciding Official (OES Document 2, pp. 9-15). Therein, the Agency was directed to backdate the Respondent's promotion to Grade 12, Step 1, with an effective date of January 6, 2019, to backdate the Respondent's WGIs based on the decision to promote the Respondent to Grade 12, Step 1 as of January 6, 2019, and to retroactively pay for the calculable difference in pay he would have received as of January 6, 2019, but for the delay in considering his eligibility for promotion to Grade 12, Step 1 as of January 6, 2019 (OES Document 2, p. 14).

Unrelated to the issue of the Department's failure to timely promote the Respondent to Grade 12, Step 1, the Grievance Decision and hearing record show the Respondent was promoted to a position in Federal Student Aid at Grade 13, Step 1 on or about January 30, 2022. Therefore, the period for which the Respondent was eligible for back pay pursuant to the Grievance Decision began on January 1, 2019, and continued through pay period ending January 29, 2022. The payment pursuant to that Grievance Decision was processed in pay period 10 of 2023, ending the period for which interest was owed.

B. Review of Personnel Actions Implementing the Grievance Decision and Review to Determine if the Department Correctly Calculated the Respondent's Cost-of-Living Increases and Within-Grade Increases

The analysis to determine if the Department correctly implemented the Grievance Decision

¹⁴ While neither party addressed this in their filings, the increases in 2019 were delayed. Therefore, I take administrative notice that the increases to the general schedule salaries were delayed in 2019 due to no fault of the Department.

and the Respondent's cost-of-living and WGIs is based on the general authority of an executive agency to employ individuals consistent with congressional appropriations. Consistent with that authority is the agency's responsibility to properly process personnel actions. That responsibility includes the duty to timely and correctly process any personnel action.¹⁵

Pursuant to the Grievance Decision, the Respondent was deemed eligible for a promotion to Grade 12, Step 1 as of January 6, 2019. Independent of the Grievance Decision, the hearing record shows a promotion to Grade 12, Step 1 was processed beginning in pay period 7 of 2019 (OES Document 13, p. 3).¹⁶ For the remainder of that calendar year, the Respondent was paid at the hourly rate for Grade 12, Step 1 (*See*, OES Document 13, pp. 5-8 and OES Document 16, p. 4).

Upon implementing the Grievance Decision, multiple personnel actions were processed. On April 18, 2023, a personnel action was approved by the Department's Chief Human Capital Officer, which established a promotion for the Respondent to Grade 12, Step 1 as of January 6, 2019 (OES Document 13, p. 27). Also on April 18, 2023, a personnel action was processed establishing a WGI from Grade 12, Step 1 to Grade 12, Step 2, with an effective date of January 5, 2020 (OES Document 6, p. 3). Lastly, the record established that on April 18, 2023, a personnel action was processed establishing a WGI from Grade 12, Step 2 to Grade 12, Step 3, with an effective date of January 3, 2021 (OES Document 6, p. 6). Pursuant to the Grievance Decision, the Respondent was eligible for a Step increase from Grade 12, Step 3 to Step 4 on January 2, 2022.¹⁷

Consistent with the Grievance Decision and considering all personnel actions that were processed following issuance of the Grievance Decision as well as in the ordinary course of business since January 6, 2022, the Respondent was eligible for pay adjustments in pay periods 2 through 6 of 2019, 2020, and 2021, and pay periods 2 and 3 of 2022. Review of those ELSs filed in this record and the Interest and Penalty Report filed by the Department, establish the required promotions and WGIs were processed to correct the required grade promotions and within-grade step increases. The calculation of back pay resulting from those personnel actions establish that back pay was calculated based on the appropriate salary tables for the calendar years 2019 through 2022 for the Washington-Baltimore-Arlington, DC-MD-VA-WV-PA locality area. The review of

¹⁵ Review of this record suggests the Department has not always met its responsibility to correctly and timely processing personnel actions for this Respondent. This history of failure preceded the issuance of the Grievance Decision. For example, on March 18, 2018, the Respondent was promoted from Grade 9, Step 4 to Grade 11, Step 1 (OES Document 13, p. 14). Over a year later, on March 23, 2019, that promotion was corrected to an effective date of October 19, 2017 (OES Document 13, p. 9). The record also shows that in the months of March and April 2019, the Department processed at least 12 personnel actions to correct previously processed personnel actions (OES Document 13, pp. 10, 13, 15, 16, 18, 19, 20, 21, 22, 25, 26, and 28).

¹⁶ Although this record does not include a copy of the personnel action evidencing the promotion to Grade 12, Step 1 with an effective date of March 17, 2019, the record includes ELSs from pay periods 6 and 7 of 2019 (OES Document 13, pp. 2 & 3). The ELS pay period 6 of 2019 shows the Respondent was at Grade 11, Step 1 and paid the corresponding hourly rate. The ELS for pay period 7 of 2019 shows the Respondent was at Grade 12, Step 1 and paid the corresponding hourly rate. In the remarks section the ELS for pay period 7 of 2019 indicates that a promotion or temporary promotion was processed in this pay period.

¹⁷ Although neither the Department nor the Respondent produced a personnel action establishing that the step increase was processed with an effective date of January 2, 2022, the calculations submitted by the Department in the Interest and Penalty Detail Report establish when the Department calculated the back pay owed to the Respondent following the Grievance Decision an adjustment to pay was made for the difference in the hourly rate that should have been paid to the Respondent for pay periods 2 and 3 of 2022 based on the hourly rate for Grade 12, Step 4 (OES Document 6, p. 30).

those documents confirm that the Respondent was eventually paid at the appropriate grade and step, including the appropriate cost of living increases. The amount of back pay due to the Respondent was \$3500.15, the amount that was paid to him in pay period 10 of 2023 (OES Document 6, p. 9).

C. Interest Payment

The Department has acknowledged its responsibility to pay an employee interest on back pay when an employee was affected by an unjustified or unwarranted personnel action that resulted in the withdrawal or reduction of all or part of pay that would otherwise be due to the employee. The Department also acknowledged its responsibility to compute the amount of interest that is due. In this case, the Department provided two exhibits related to its responsibility. The Department provided the Office of Personnel Management Fact Sheet establishing the annual interest rates required to be used when an Agency must pay an employee interest on back pay (OES Document 6, pp. 25-29). The Department also provided an Interest and Penalty Detail Report that identified the event date, amount due, and balance due (*Id.*, pp. 30-31). The report includes a separate Interest Detail showing the interest that accrued with each event date (*Id.*, pp. 31-34). This report establishes that the Department was responsible for paying the Respondent interest on back pay in the amount of \$597.91 (*Id.*, p. 33). More than that amount for interest was paid to the Respondent in the ELS processed for pay period 10 of 2023, prompting the issuance of the Notice of Debt (OES Document 6, pp. 9-10).

D. Validity of Asserted Overpayment

The Department acknowledged the error that resulted in an overpayment. Instead of paying \$597.91 in interest that was owed to the Respondent, the Department paid \$4,098.06 in interest in pay period 10 of 2013 (OES Document 6, pp. 9-10). The Interest and Penalty Detail Report establishes the total amount due to the Respondent for back pay and interest was \$4,098.06, therefore resulting in an overpayment of \$3500.15. The asserted overpayment is the difference between \$4,098.06 and \$597.91. Despite the error, the Respondent was only entitled to receive \$597.91 in interest on the back pay. An error such as this does not establish any right in the employee to keep the monies paid in error unless a waiver was granted. The documents filed in this proceeding establish an overpayment in the amount asserted in the Notice of Debt. Therefore, the Department has established the asserted overpayment is a valid debt.

E. Extreme Financial Hardship

The Respondent asserted extreme financial hardship in his hardship narrative filed on January 26, 2024 (OES Document 8). Therein he identified three significant circumstances contributing to his assertion of financial hardship, a Maryland State Tax debt, mortgage debt, and financial liability arising from the COVID pandemic when he financially supported a family member by paying medical bills who acquired COVID, was hospitalized, and passed away (*Id.*).

In relation to the Maryland State Tax debt, the Respondent explained he purchased a home in Maryland in 2019 (*Id.*). Despite his request to the Office of Human Resources to update his state residency, the Department continued to deduct taxes for the District of Columbia, where he

formerly resided, until June 2022 (*Id.*). He alleged this failure by the Department to act timely upon his request resulted in the Maryland State Tax debt that also included penalties in excess of \$9,000.00 (*Id.*). He provided evidence that he has retained legal representation to help resolve the Maryland State Tax debt (OES Document 10).

In relation to the mortgage debt, the Respondent explained after purchasing a home in 2019, he fell behind in his mortgage payments during the pandemic while paying medical bills for the family member and while trying to resolve the Maryland State Tax debt (OES Document 8). He explained his current mortgage provider is Serve Bank and he was approved for a Loss Mitigation Program (*Id.*). He provided some evidence to support that assertion and to explain a one-time cash payment made to him for reimbursement of money he paid for the family member's funeral following his death during the COVID pandemic (OES Document 9).

Although the Respondent does not explicitly identify the relief he is requesting, I find he has sufficiently established extreme financial hardship. Under the applicable statutes, regulations, and Department policy, having so established extreme financial hardship, the Respondent is entitled to a reduction of the percentage of discretionary income the Department may involuntarily collect in recovery of this debt. While I have the authority to reduce the statutory involuntary repayment amount, Department regulations do not allow me to reduce the involuntary repayment schedule to a deduction of zero percent (34 C.F.R. § 32.9(d)).

Nonetheless, the Respondent has the right to enter into a voluntary agreement for repayment that will be deducted from his earnings in each pay period until the debt is fully repaid. If the Respondent chooses to submit a repayment agreement to the proper office and that agreement is accepted then, repayment shall be pursuant to that voluntary repayment agreement. In the absence of a voluntary repayment agreement, or a voluntary repayment agreement that is not accepted by the Department, the Department is authorized to implement involuntary collection. However, given that the Respondent has established extreme financial hardship, the Department's collection in absence of a voluntary repayment agreement is limited to no more than 7% of the Respondent's disposable pay¹⁸ from each pay period until the debt is fully paid.

VII. Conclusion and Order

For the reasons indicated in this decision, the asserted debt is a valid debt that requires repayment by the Respondent. Based on the foregoing findings of fact and analysis, it is **HEREBY ORDERED**:

1. The Respondent shall pay to the U.S. Department of Education, in a manner as required by law, the sum of \$3,500.15, plus allowable interest and administrative fees.
2. The Respondent shall have fifteen (15) days from receipt of this decision to complete and submit a signed Payment Agreement Form consistent with the instructions in the

¹⁸ Disposable pay means the amount that remains from an employee's pay after required deductions for Federal, State, and local income taxes; Social Security taxes, including Medicare taxes; Federal retirement programs; premiums for health and basic life insurance benefits; and such other deductions that are required by law to be withheld (34 C.F.R. § 32.2).

Notice dated July 24, 2023.¹⁹ The Respondent must indicate the terms of the agreement for which he seeks approval. The signed Payment Agreement shall be submitted to the designated Payroll Operations Division.²⁰

3. If the Respondent fails to timely submit a signed voluntary payment agreement pursuant to this decision, which is accepted by the Department, the Department is authorized to collect through payroll deduction an amount equal to no more than 7% of disposable pay, until the debt is fully paid.
4. This decision constitutes a final agency decision.

Dated: April 24, 2024

Angela J. Miranda
Administrative Law Judge

¹⁹ The Payment Agreement Form and instructions are in this hearing record at OES Document 1, pp. 9 & 10. For the convenience of the Respondent, a copy of the Agency's Payment Agreement form included with the debt letter is attached to this decision.

²⁰ The Payment Agreement Form offers six (6) options for repayment. It indicates if "options two, three, four, or five" is selected, then the Payment Agreement Form must be returned to the IBC. A reasonable review of the Payment Agreement Form suggests the form must also be returned to IBC if option six is selected.