UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
OFFICE OF ADMINISTRATIVE LAW JUDGES
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In the Matter of:

CP,

Respondent

Docket No. 17-25-OF

Overpayment/Pre-offset Proceeding

Appearances: CP, Respondent, pro se.
Karen Mayo-Tall, Esq. Office of General Counsel, U.S. Department of Education

Before: Angela J. Miranda, Administrative Law Judge

DECISION

I. Jurisdiction and Procedural History

The pre-offset authority involving a current employee of the U.S. Department of Education (Department) was delegated to the Office of Hearings and Appeals (OHA), which, thereby, exercises authority and jurisdiction to review the existence of a debt the United States claims to have against a current employee of the Department.[1] I am the authorized Pre-offset Official who has been assigned this matter by OHA.[2] Jurisdiction is proper under 5 U.S.C. § 5514 and 31 U.S.C. § 3716.

On February 2, 2017, the Respondent contacted her first-level Supervisor, and others, by email advising that she was invoking the Family Medical Leave Act (FMLA) for a two-week period from February 6, 2017 through February 17, 2017, which is pay period five for 2017. The Respondent reported that she would provide required medical certification pursuant to 5 C.F.R.

[1] The Department's policy is set forth in the U.S. Department of Education, Administrative Communications System Departmental Handbook, HANDBOOK FOR PROCESSING SALARY OVERPAYMENTS (ACS-OM-04, revised January 2012), https://connected.ed.gov/Documents/Handbook_for_Processing_Salary_Overpayments.pdf.
[2] 5 U.S.C. § 5514(a)(2)(D).

§630.1208 within a reasonable time frame. The Respondent obtained a brief statement from her treating psychiatrist, dated February 7, 2017. The statement confirms the Respondent was examined on that date, continues to have depression, and is not able to focus or concentrate. The psychiatrist recommended two weeks off from work and a follow-up appointment was scheduled for Tuesday, February 21, 2017. The Respondent was absent from work February 6, 2017 through February 17, 2017.

On February 13, 2017, in response to the Respondent's invoking leave pursuant to the FMLA, the Supervisor contacted the Respondent by email and confirmed provisional acknowledgment of the Respondent's February 2, 2017 leave request. The Supervisor provided, in attachments, a memo outlining conditions related to leave under the FMLA of 1993, a FMLA Fact Sheet, a standard form suitable for providing health care provider certification under the FMLA, and information about the Employee Assistance Program. The Supervisor's memo specifically advised the Respondent that written medical certification issued by the health care provider of the employee must support the need for the requested leave, if the certification does not support the need for the requested leave additional documentation may be required, the time period for submitting the required medical certification, and notice that an employee who fails to provide required certification is not entitled to sick leave.

The evidence suggests the Respondent reported to work on February 21, 2017 and made an inquiry as to why her request for leave was not approved and acknowledged that certification of time cards for pay period five was due. On that same date, at a later hour, the Supervisor inquired if the Respondent has the medical documentation as requested on February 13, 2017.[3] In the inquiry, the Respondent was advised that the Supervisor needed the medical documentation to approve the sick leave that was requested under the FMLA. Later on that same date, the Respondent's request for sick leave for pay period five was processed in WebTA, the official electronic time and attendance system at the Department, and the Respondent's time card for pay period five was certified.[4] Evidence shows the Respondent's absence from February 6 to February 17, 2017 was processed in WebTA as paid sick leave.

On March 16, 2017, the Supervisor reminded the Respondent her leave entitlement under the FMLA of 1993 was provisionally acknowledged pending submission of the required medical documentation. The Supervisor notified the Respondent she had not received any such documentation to date and that the sick leave previously processed (in WebTA) would have to be converted to leave without pay (LWOP) or annual leave. The Respondent was given a deadline of March 17, 2017 at 12:00 p.m. to indicate if she wanted to charge the absence to paid annual leave. When the designated deadline passed, the Supervisor sent a reminder email that she was awaiting a response but the Respondent did not respond at any time on March 17, 2017.[5]

[3] Review of the evidence submitted by the Respondent and the Department suggests the Respondent, upon return to work, provided the February 7, 2017 psychiatrist note to a time keeper but not to the immediate supervisor.

[4] This record suggests the Supervisor did not have the February 7, 2017 psychiatrist note on February 21, 2017 when the request for leave was processed and the Respondent's time card for pay period five was certified in WebTA.

[5] The record establishes the Respondent informed her Supervisor at 7:45 a.m. that she was teleworking on March 17, 2017 until 4:00 p.m. By written memo, on the same date, the employee was notified several attempts were made to contact her throughout the expected work hours on March 17, 2017. The memo included notice pursuant to Article 39.10 of the Collective Bargaining Agreement that the Respondent will be charged as absent without leave (AWOL) for 8 hours and she may request substitution of paid leave in place of AWOL.

In a writing dated March 20, 2017, the Supervisor reminded the Respondent she, as immediate supervisor, is responsible for ensuring certification of accurate time cards. The Respondent was again reminded the requested sick leave pursuant to FMLA was approved with provision that the required supporting documentation be submitted. The Supervisor informed the Respondent she still had not received any documentation and offered, as an alternative, that the Respondent may submit the requested certification to a designated employee in Employee Relations instead of submitting it to her as immediate supervisor. Later on that same date, the Respondent directed another employee to provide a copy of the psychiatrist's note to her immediate supervisor.[6]

On or about March 23, 2017, a correction to the time card for pay period five was processed in WebTA. The record shows when the correction was processed, the sick leave previously deducted from the Respondent's leave balance was restored and the Respondent was charged with an equal amount of leave without pay. Consistent with the processing of LWOP for an entire pay period (80 hours), an additional adjustment of four hours was made to the balance of the Respondent's accrued sick leave.

On March 29, 2017, the Respondent requested that the time keeper return the February 7, 2017 psychiatrist note. In a written communication on that same date, while providing the February 7, 2017 psychiatrist note to the designated employee in Employee Relations, the Respondent protested that management improperly changed her sick leave request to LWOP.[7]

On April 4, 2017, in response to the Respondent's submission of the psychiatrist note and employee protest, the Supervisor notified the Respondent she was now in receipt of the psychiatrist note but explained that the documentation as prepared was insufficient as required by the regulations at 5 C.F.R. Part 339. The Supervisor provided a release that would authorize the Federal Occupational Health Service to contact the provider in an attempt to obtain sufficient information for reevaluation of the request for use of paid sick leave under the FMLA. While the Respondent was appropriately advised completion of the release was voluntary, the evidence of record establishes the Respondent did not provide the requested authorization.

On April 10, 2017, the Department of the Interior, the payroll processing center for the Department of Education, sent a Bill for Collection directly to the Respondent. The Bill for Collection advised an overpayment was identified following a time card correction submitted for pay period five in 2017. The attachment to the Bill for Collection identified the Respondent received $5,152.80 (gross income) and $3,648.78 (net income), which is the amount of the alleged overpayment assessed to the Respondent.

On April 14, 2017, the Respondent filed a timely request for a pre-offset hearing.[8] An

[6] The record does not identify the position or title of the employee so directed by the Respondent and the Respondent has not established that her initial submission of the documentation was provided to an employee authorized to accept the documentation.

[7] Simultaneously the Supervisor was provided a copy of this written communication along with the attached medical documentation.

[8] Although the request for hearing was not submitted consistent with the directives in the Bill for Collection, it is accepted as timely filed.

Order Governing Proceeding (OGP) was issued on May 19, 2017. On May 30, 2017, the Respondent filed a signed statement affirming her prior narrative statements and supporting documentation on file dated April 14, 2017. On May 30, 2017, the Respondent filed a Statement of Financial Hardship. The Respondent then filed two documents, a Statement of Factual Evidence and Respondent's Factual Evidence, on June 5, 2017. The Department filed a brief and exhibits on June 22, 2017 setting forth its position in support of the Bill for Collection. Following receipt of the Department's brief, the Respondent filed a response to the Department's brief on June 27, 2017. Thereafter, on July 5, 2017, the Department was ordered to submit evidence in the form of official records as related to leave and payroll processing for the period in question. After issuance of an Order to Show Cause dated July 12, 2017, the Department submitted official leave and payroll records. I have carefully considered all evidence of record in this matter.

As relevant to this proceeding, the Respondent argues that the Bill for Collection identifying the alleged overpayment is not a valid debt because the Department erred in converting her family medical leave from paid sick leave to LWOP. The Respondent argues that the Department's action is improper because the leave was converted without the Respondent's permission and the Supervisor had no legal authority to convert her time. Furthermore, the Respondent also alleges that sick leave and annual leave should be exhausted prior to converting time to LWOP. In support of her argument, the Respondent asserts that her doctor's note was sufficient as evidence to support her sick leave and the Supervisor's request of additional medical documentation was a violation of her rights under the Health Insurance Portability and Accountability Act of 1996 (HIPPA). Lastly, the Respondent challenges the use of provisional approval of her request for sick leave, asserting there is no such concept in Federal service. Overall, the Respondent argues this is not a valid debt because the Department improperly processed her request to use sick leave consistent with her invoking leave entitlement under the FMLA. The Respondent also filed a "Hardship Affidavit" implying she is seeking relief from the imposition of an involuntary payment schedule.

The Department argues the debt as established, in the Bill for Collection, is valid and enforceable. The Department essentially promotes two arguments in support of this position: the Respondent refused to provide requested documentation and the Department allowed sufficient time to provide such documentation. Although the Department brief acknowledges receipt of the Respondent's medical documentation dated February 7, 2017, the Department seems to argue this documentation does not provide the information required under these circumstances, specifically a request for leave under the FMLA. Additionally, the Department asserts that the Respondent is mistaken in her belief that the agency cannot request additional medical documentation and the forms provided to the Respondent by the Supervisor are standard forms used within the Federal government. Overall, the Department argues the provisional approval of requested sick leave, initial processing of paid sick leave for the 80-hour absence in pay period five of 2017, and the correction of payroll for that time period restoring the previously processed sick leave and substituting leave without pay was proper.

In the context of the challenge of this alleged debt, the Respondent raises other concerns. The Respondent alleges the Supervisor is an ineffective manager and should be removed from her position or disciplined. She also references a variety of unfair labor practices and grievances,

including a filed Equal Employment Opportunity complaint. The Respondent submits evidence that on March 17, 2017, despite teleworking on that date, the Supervisor notified her that she would be charged as absent without leave (AWOL) and the Respondent requests that this charge be converted to paid work status.

The jurisdiction of this Tribunal is limited only to the issue as described herein, namely whether the alleged debt is a valid debt and, if valid, whether the employee has established extreme financial hardship such as to be relieved from involuntary collection of this debt. The relief requested in the form of removal or disciplining the Supervisor is beyond the scope of this proceeding. Resolution of the alleged unfair labor practices and grievances is also beyond the scope of this proceeding. The Respondent's request for reversal of the AWOL status charged on March 17, 2017 is outside the scope of this proceeding. Because this Tribunal does not have jurisdiction, in the context of this appeal, to address the other concerns raised by the Respondent, this decision will not address those concerns.

II. Issue

The issue before this Tribunal is whether the Respondent is liable for the assessed debt, reflecting net pay received for pay period five in 2017 (February 5 to 18, 2017) after the Respondent invoked leave entitlement under the FMLA. A secondary issue to be determined, if the debt is valid and the Respondent liable for the debt, is whether the Respondent has established extreme financial hardship to be relieved of the collection of up to 15% of the Respondent's disposable pay each pay period until the debt is satisfied.[9]

III. Legal Framework/Applicable Laws and Regulations

A head of a Federal executive agency is authorized to try and collect a claim of the United States Government arising out of or referred to the agency.[10] A head of a Federal executive agency may collect the claim by administrative offset after giving specific written notice and providing a comprehensive explanation of the rights to the debtor.[11] Consistent with the requirements of this statute, the Department has proscribed regulations related to collecting debts by administrative offset.[12]

The collection of debts by administrative offset requires specific notice at least 30 days

[9] The Department in its brief stated an involuntary repayment plan has not been established. This statement directly contradicts the collection repayment identified in the Bill for Collection as issued by the Department of Interior. As such, collection in this manner is consistent with the limit imposed by the Department's regulations at 34 C.F.R. §32.3(e). This collection attempt is an involuntary repayment plan despite the representation in the Department's brief that no involuntary repayment plan was established.
[10] 31 U.S.C. §3711(a)(1).
[11] *See*, 31 U.S.C. §3716.
[12] *See*, 34 C.F.R. Part 32.

before initiating a deduction.[13] An employee may challenge the existence or amount of an overpayment and may also challenge the involuntary repayment schedule by requesting a pre-offset hearing.[14] An employee challenging the involuntary repayment schedule must establish that collection of the involuntary repayment will cause extreme financial hardship and should be reduced.[15] Involuntary repayment schedules are based on a percentage of an employee's disposable pay. The regulations define disposable pay as 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 program; premiums for health and basic life insurance benefits; and other deductions that are required by law to be withheld.[16] The regulations allow involuntary collection of a specified amount or periodic deductions of 15% of disposable pay upon notice.[17]

In this case, the Respondent has requested a pre-offset hearing to contest the existence of the debt.[18] The standard of review for assessing the validity of the debt is whether the debt is clearly erroneous.[19] A determination is clearly erroneous if the hearing official is left with a definite and firm conviction that a mistake in determining the overpayment was made.[20] If the debt determination is "plausible in light of the record viewed in its entirety," the hearing official may not reverse the determination even if the "hearing official would have weighed the evidence differently."[21]

The Respondent is an employee of the Department of Education, who during all periods relevant to this matter, held a position included in the bargaining unit that is exclusively represented by the American Federation of Government Employees, AFL-CIO and its agent, the National Council of Education Locals No. 252. As such, the Respondent's conditions and terms of employment are subject to the current collective bargaining agreement (CBA) between the Union and the Department.[22] Article 39 of the CBA addresses leave.

The CBA requires that Article 39 be administered in accordance with Title 5, United State Code, Chapter 63; Title 5, Code of Federal Regulations, Part 630, and the terms of the CBA. Under the CBA, generally, supervisors and employees are responsible for being familiar with general leave provisions, policies, and procedures. Employees are responsible for

[13] 34 C.F.R §32.3. Specifically, the notice must be in writing, identify the origin, nature and amount of the overpayment, explain how interest is charged and how administrative costs and penalties will be assessed, demand repayment and allow an employee to enter into a voluntary repayment agreement, in the absence of a voluntary repayment agreement explain how the debt will be collected (involuntary), explain right to request a waiver and the right to request a pre-offset hearing concerning the existence of the debt or the involuntary repayment schedule, describe the applicable hearing procedures and requirements, notice that any amounts paid or deducted but later waived or found not owed will be returned, and that any knowingly false or frivolous statements, representations or evidence may subject the employee to applicable disciplinary procedures or civil or criminal penalties.
[14] 34 C.F.R. §32.5
[15] 34 C.F.R. §32.4(c).
[16] 34 C.F.R. §32.2.
[17] 34 C.F.R. §32.3(e).
[18] 34 C.F.R. §32.6.
[19] 34 C.F.R. § 32.9(b).
[20] *Id*.
[21] *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).
[22] The current agreement was agreed to and implemented on December 17, 2013.

requesting all leave from the appropriate leave approving officials in accordance with procedures and exercising responsibility and integrity in the use of leave.[23] Subject to limits imposed by law or Government-wide regulations, requests for sick leave shall be approved when an employee is incapacitated for performance of duties.[24] When sick leave is requested in excess of four consecutive workdays, the CBA requires a healthcare certificate or other supporting medical or healthcare documentation to substantiate the request.[25] The CBA defines a healthcare certificate as a written statement signed by a registered practicing physician or other registered practitioner certifying to the incapacitation, examination, or treatment, or to the period of disability while the patient was receiving professional treatment.[26] The CBA is silent as to requests for leave pursuant to the FMLA, therefore consistent with the CBA, Federal law and regulation must be followed.

The FMLA is a Federal law requiring covered employers to provide employees with job-protected and unpaid leave for qualified medical and family reasons.[27] Qualified medical and family reasons include personal or family illness, family military leave, adoption, or the foster care placement of a child.[28] An employer may require that a claim for leave under the FMLA be supported by certification issued by the healthcare provider. The regulation specifies the certification shall be sufficient if it states the date on which the serious health condition commenced, the probable duration of the condition, the appropriate medical facts within the knowledge of the health care provider, and if the leave is for personal illness of the employee, the certification must include a statement the employee is unable to perform the functions of the employee's position.[29] The FMLA requires that a healthcare certificate shall be submitted to the employer in a timely manner.[30]

The regulations implementing the FMLA provide a standard approach to offering family and medical leave to Federal employees and describe with more specificity the requirements for evaluating and processing requests for family medical leave.[31] Federal employees are provided with twelve administrative workweeks of unpaid leave during any 12-month period for certain family and medical needs.[32] Under the regulations, Federal employees are entitled to leave for a serious health condition of the employee that prohibits the employee from being able to perform any one or more of the essential functions of his or her position and the employee must invoke entitlement by providing proper notice of intended leave and medical certification meeting the specific requirements.[33]

Entitlement to family medical leave is unpaid unless the Federal employee specifically elects to substitute accrued annual or sick leave, advanced annual or sick leave or leave available

[23] CBA, Article 39, Section 39.01.
[24] CBA, Article 39, Section 30.04(B)(2).
[25] CBA, Article 39, Section 39.04(E).
[26] CBA, Article 39, Section 39.02(E).
[27] *See*, PL 103-3, Section 103, February 5, 1993, 29 U.S.C. Chapter 28, commonly known as the Family AND Medical Leave Act of 1993.
[28] PL 103-3, Section 102(a)(1)(A)-(D), 29 U.S.C. §2612(a)(1)(A)-(D).
[29] PL 103-3, Section 103(b)(1)-(3) and (4)(B), 29 U.S.C. §2613(b)(1)-(3) and (4)(B).
[30] Pl 103-3, Section 103(a), 29 U.S.C. §2613(a).
[31] 5 C.F.R. §630.1201.
[32] *Id.*
[33] 5 C.F.R. §630.1203.

through the voluntary leave transfer program.[34] The employee must notify the employer of the election of intent to substitute paid leave for unpaid leave prior to the commencement of the leave and retroactive substitution of paid leave for leave without pay is specifically prohibited.[35] The agency may not deny an employee's right to substitute paid leave or require an employee to substitute paid leave.[36]

The regulations regarding medical certification follow and supplement the statutory language of the FMLA.[37] The implementing regulations for the FMLA specifically provide that provisional leave, pending final written medical certification, shall be granted if the medical certification is not provided before beginning the leave.[38] The regulations specify that the written medical certification must be provided to the employer no later than 15 calendar days after the agency requests such medical certification and if the employee fails to provide the requested medical certification, the agency may charge AWOL or allow the employee to request that the provisional leave be charged as LWOP or charged to annual or sick leave.[39] The regulations specifically provide that an employee who does not comply with required notifications and does not provide medical certification, meeting all requirements of 5 C.F.R. §630.1208(b), is not entitled to family and medical leave.[40]

IV. Analysis

A. The Bill for Collection as notice of debt sent to the Respondent is defective and the Department has failed to follow its own regulations and policy as related to administrative offset.

Although the Respondent has not raised adequacy of the notice in this request for a pre-offset hearing, due process requires a brief review the notice and procedures. The Department of the Interior (DOI) provides payroll and debt services to the Department of Education. Despite this relationship, the Department of Education alone remains responsible for the implementation of its regulations and is solely responsible for adhering to the regulations as related to salary offset when recovering overpayments of pay or allowances from Department employees. In addition to published regulations, the Department has established policy regarding administrative collection of debts from employees.[41]

The procedures implemented in this action by the Department fail to follow the Department's own regulations and policy. Department policy directs that once the DOI identifies a salary overpayment, a Bill of Collection is generated and forwarded to the responsible office within the Department for initial intake and investigation.[42] The responsible

[34] C C.F.R. §630.1206.
[35] *Id.*
[36] *Id.*
[37] *See*, 5 C.F.R. §630.1208.
[38] 5 C.F.R. §630.1208(g).
[39] 5 C.F.R. §630.1208(h) and (i).
[40] 5 C.F.R. §630.1210(l).
[41] *See Footnote 1*, and hereinafter referred to as the Handbook.
[42] Handbook, Section VII.

office, which is the Office of Human Resources within the Office of Management, conducts an investigation and determines whether further collection action is justified.[43] If collection is justified, prior to initiating a deduction from the disposable pay of an employee, the Department is responsible for sending written notice to the employee.[44] While the regulations do not specify the manner of delivery, Department policy requires the notice be sent by certified mail, return receipt requested.[45] Department policy requires that the Department attach all supporting documentation to the notice.[46]

In this case, which is consistent with general practice in salary offset proceedings at the Department; the Department has relied on the DOI, Interior Business Center for issuance of the required notice. The notice in the form of a Bill for Collection mailed to the Respondent by the DOI, Interior Business Center fails to meet the regulatory requirements for pre-offset notice. The Bill for Collection does not satisfy the regulatory requirements in that the Respondent was not offered an opportunity to enter into a voluntary repayment agreement, it did not explain how interest will be charged or how administrative costs and penalties will be assessed, it did not explain the right to request a pre-offset hearing, it did not provide notice that any amounts paid or deducted but later found waived or not owed will be returned, it did not provide notice that any knowingly false or frivolous statement, representation or evidence may subject the employee to applicable disciplinary procedures or civil or criminal penalties, and the notice failed to provide the Respondent the regulatory mandated 30 days before the Department initiates a collection by deduction. The Department offered no explanation or justification for the failure of the Department to follow the regulatory and policy requirements.

B. The Debt is valid and the Department is required to pursue collection.

The debt is valid, and the Department was correct in assessing an overpayment and pursuing collection. The Respondent invoked family medical leave for a period of two-weeks (80 hours). Upon invoking the provisions of the FMLA, the Department had an obligation to not only follow the terms of the CBA and Department policies, but also to adhere to the Federal statute and regulations as related to the FMLA. Under the FMLA and the CBA, the Department has the authority to request medical documentation for extended sick leave to justify the employee's absence due to illness. Although the requirements for documenting the need for extended leave under the CBA are fairly generic, the requirements under the FMLA are very specific. Because the Respondent invoked leave pursuant to FMLA, the medical documentation necessary to support her request must meet the more specific requirements of the FMLA and the implementing regulations. The very brief February 7, 2017 psychiatrist note lacks appropriate medical facts to support the absence for two weeks and the generic reference to inability to focus or concentrate falls short of providing an evaluation that the Respondent is unable to perform one or more essential functions of her position. The note clearly fails to meet the specific requirements for certification of family medical leave.

The FMLA and implementing regulations specify time limits for submitting the required

[43] *Id.*
[44] 34 C.F.R. §32.3.
[45] Handbook, Section VII.
[46] *Id.*

medical certification. If proper medical certification is not submitted prior to the commencement of the absence, it must be submitted no later than 15 calendar days after the agency requests the certification. If not practicable under the circumstances to meet the 15 day requirement for submission, then an employee shall have 30 calendar days to submit the required certification. In this case, the Respondent, when invoking family medical leave, acknowledged the need for submitting required medical certification but did not provide the certification prior to her absence. On February 13, 2017, the Supervisor notified the Respondent that medical certification is requested and provided a standard form for completion by a health care provider to facilitate the evaluation of the request for family medical leave. Based on the date of this request, the medical certification should have been submitted to the immediate supervisor no later than February 28, 2017 but if not practicable under the circumstances, the required time for submission could be extended to no later than March 15, 2017.

The evidence establishes the Respondent did not submit any supporting documentation to the Supervisor and on March 16, 2017, the Supervisor notified the Respondent no documentation had been received and she intended to convert the provisionally approved sick leave to LWOP or annual leave but the Respondent was requested to state her preference no later than March 17, 2017.[47] On March 20, 2017, the Supervisor again gave the Respondent another opportunity to submit medical documentation (certification) before taking any action. On March 23, 2017, the Supervisor processed a correction to the time card for pay period five. The correction of the payroll time card restored the previously deducted 80 hours of sick leave, processed leave without pay for 80 hours, and adjusted previously accrued sick leave for pay period five consistent with leave without pay for an entire pay period. On March 29, 2017, the Respondent finally submitted the February 7, 2017 medical documentation to the alternatively designated employee in Employee Relations and the Supervisor, and simultaneously complained about the processing of the recent amendment to the pay period five time card. The claim by the Respondent that the previously deducted sick leave was not restored when LWOP for the same period was charged is not supported by the evidence.

Upon finally receiving the brief February 7, 2017 psychiatrist note and in response to the Respondent's complaint regarding the processed amendment to the pay period five time card, the Supervisor requested that the Respondent provide authorization to allow the Federal Occupational Health Service to contact the psychiatrist to supplement the submitted medical documentation. The record establishes this request was made to assist the Supervisor in making an informed decision regarding the FMLA sick leave request. The request for completion of the authorization was voluntary and the Respondent objected to completing the authorization. In a submission to this Tribunal, the Respondent reports her psychiatrist refused to fill out further certification and he does not consider her depression serious or life threatening. Under these circumstances the Supervisor was prevented from securing additional information to reevaluate the request for leave in February, 2017 under the standards of the FMLA and the implementing regulations.

[47] Notably, under the FMLA of 1993 and the implementing regulations, the Supervisor could have converted the provisionally approved sick leave to AWOL or allowed the employee to request the provisional leave be charged as LWOP, annual leave, or sick leave as appropriate. In this case, the Supervisor apparently did not consider converting the provisionally approved leave to AWOL.

The Respondent's claim that the request for additional evidence in support of her claim for paid sick leave under the FMLA was improper is without merit. The Supervisor's initial response to the Respondent's invoking entitlement to family medical leave was comprehensive and consistent with the regulations implementing the FMLA even though the Respondent's initial request invoking family medical leave failed to precisely follow the regulatory requirements for notice to invoke family medical leave and did not include the required election of intent to substitute paid leave for unpaid leave. Also notable in this case was the Respondent's failure to provide the initial documentation to the immediate supervisor upon her return to work. The record clearly shows, and the Respondent acknowledges in her submissions to this Tribunal, that the Respondent opted to provide that initial documentation to a time keeper upon her return to work and not her supervisor. The Respondent's suggestion that it was appropriate to provide the medical documentation to a time keeper and not the Supervisor is contrary to the CBA which requires all employees to request leave from supervisors, who are the designated leave approving officials. The Respondent provides no justification for submitting the required documentation to a person other than the leave approving official. The CBA requires all employees to know general leave provisions, policies, and procedures and the Respondent's argument that it is acceptable to provide supporting documentation to an individual who is not the leave approving official is without merit. Despite the Respondent's unwillingness to initially provide the note from her psychiatrist to the Supervisor, the Supervisor made additional requests for the documentation. When those requests were disregarded, the Supervisor advised the Respondent she may submit the documentation to a designee, namely a specific employee in Employee Relations. When no response from the Respondent was received, the amendment to the time card on March 23, 2017 was appropriately processed. After that action and nine days after the March 20, 2017 request for documentation, the Respondent provided a copy of the initial documentation to the designee and also provided a copy to the Supervisor. Although the time period for submission of the medical certification, as allowed in the implementing regulations, had passed, the record shows the Supervisor was still willing to evaluate the request for paid sick leave during the February absence, but the Supervisor could not reevaluate without additional information in support of the required certification and the Respondent refused to cooperate in providing the requested authorization.

The Respondent's claim that there is no procedure for provisionally approving leave is contradicted by the implementing regulations for family medical leave. Furthermore, the evidence establishes the Supervisor acted responsibly, and consistent with the family medical leave regulations, on February 21, 2017 when she provisionally approved the requested sick leave despite not having adequate documentation and allowed the Respondent's pay period five time card to be processed.

The Respondent's claim that her previously approved sick leave was not restored and that the substitution of LWOP was improper is not supported by the evidence. The implementing regulations allow an agency to charge AWOL if an employee fails to provide the requested medical certification.[48] Alternatively, the agency may allow the employee to request the provisional leave be charged as LWOP or annual leave, as appropriate.[49] The evidence establishes the Supervisor provided the alternative option to the Respondent and when the

[48] 5 C.F.R. §630.1208(i)(1).
[49] 5 C.F.R. §630.1208(i)(2).

Respondent did not provide a response, LWOP was processed.[50] In terms of pay, a charge of AWOL and LWOP are indications that leave is uncompensated. The difference is LWOP is an approved legitimate use of leave and AWOL, which may be the basis for disciplinary action, is an unauthorized use of leave when no leave has been granted.[51] When the Supervisor determined a correction to the charge of leave was necessary, her direction to the time keeper to create and validate a time card for pay period five and the certification and release by the Supervisor on March 23, 2017 was consistent with the established procedures and does not require the consent of the Respondent to make the mandatory correction.[52] Evidence submitted by the Department in the form of official Earnings and Leave Statements show sick leave was charged when the request for sick leave was provisionally approved and the same amount of sick leave was restored when LWOP was charged.

C. The Respondent has not established extreme financial hardship to obtain relief from involuntary collection of this debt.

Upon issuance of the defective notice, the Respondent was not given an opportunity to enter into a voluntary repayment agreement. Instead, upon issuance of the defective notice, the Respondent was advised the Department, though its payroll servicing agent, will immediately begin to collect repayment in installments by deducting 15% of disposable pay each pay period until the debt is satisfied.[53]

The Respondent submitted a hardship affidavit identifying monthly living expenses as compared to her monthly net income. The submission indicates the Respondent has a "total disposable income" of negative $1,399.00, suggesting the Respondent is consistently incurring more expenses than her monthly net income.[54] The Respondent's expenditures include a listing of what can be categorized as necessary expenses (like food, clothing, and shelter), discretionary expenses (like lunches, cable TV, and Religious contributions), and some miscellaneous expenses of support for elderly mother and college tuition. While the presented budget suggests perpetual over spending each month, the Respondent's calculation of "total disposable income" is not consistent with the regulatory definition of disposable income.

The Respondent's "total disposable income" is based on the net pay in the biweekly pay statement. Review of representative earnings and leave statements submitted in this record establish the calculated net pay is significantly lower than the regulatory defined disposable pay

[50] Technically if the implementing regulations had been followed, the Supervisor should have corrected the leave to AWOL. AWOL is a non-pay status resulting from an employee's unauthorized use of leave, while LWOP is an approved, legitimate use of leave. *See*, PMI 630-3.

[51] *See*, PMI 630-3.

[52] Correction of a time card is the responsibility of the supervisor and does not require consent or approval of the employee. *See*, ConnectED,WebTA Resource Portal, WebTA Frequently Asked Questions at https://connected.ed.gov/Pages/WebTA%20FAQs.aspx .

[53] The defective notice only informs the Respondent that collection by deduction of 15% of disposable pay will begin in the next pay period. The full terms of involuntary collection are not specified in the defective notice. The regulations require specific notification of how the debt will be involuntarily collected included specification of amount, frequency, approximate beginning date and duration of intended deduction. 34 C.F.R. §32.3(f).

[54] This presentation is somewhat misleading as the Respondent indicates her monthly "total disposable income" is only $6,344.00 when a more accurate calculation would be $6,850.76, based on average bi-weekly net income of $3,171.65 times 2.16 (standard calculation for converting biweekly income to monthly).

because the net pay includes multiple deductions into savings accounts, which are not deductible amounts when determining disposable pay based on the regulatory definition. The biweekly disposable pay based on the regulatory definition is about $3,496.65 as compared to the estimated biweekly net pay of $3,171.65; a difference of about $700.00 a month.[55]

While the Respondent's submissions fail to establish extreme hardship, she should have been allowed to propose a voluntary repayment agreement for the Department's review.

V. Findings of Fact

1) On February 2, 2017, the Respondent invoked entitlement to family medical leave under the Family Medical Leave Act (FMLA), indicating she will be absence for a two-week period, during pay period five, from February 6, 2017 through February 17, 2017.

2) The Respondent understood and acknowledged Federal regulations required medical certification to support her request and she obtained a brief note from a treating psychiatrist dated February 7, 2017 to support her request.

3) On February 13, 2017, the Supervisor provisionally acknowledged the Respondent's intent to invoke family medical leave. The Supervisor also explained limitations and requirements under the FMLA of 1993, advised that acceptable medical certification was required in support of the request, advised the certification must be submitted within fifteen (15) days, but not later than thirty (30) days, of the request for certification, advised additional information may be requested if the medical documentation was not acceptable, provided a form identifying types of information for submission of acceptable medical certification, and finally advised the Respondent she is not entitled to sick leave if acceptable medical certification is not submitted.

4) On February 21, 2017, the Respondent provided the February 7, 2017 psychiatrist note to a time keeper but not to the Supervisor, despite the Supervisor's prior direction that medical certification will be required to support the request.

5) Despite not having received the Respondent's medical documentation, on February 21, 2017, the Supervisor processed the Respondent's request for leave in the official electronic time and attendance system (WebTA) and certified the Respondent's time card for pay period five.

6) On March 16, 2017, the Supervisor reminded the Respondent that the leave entitlement under the FMLA of 1993 was provisionally acknowledged pending submission of required medical

[55] Based on the usual bi-weekly earnings and leave statement given the Respondent's pay rate and standard deductions consistent with the Respondent's claimed exemptions (and assuming a fully compensated work week, meaning no periods of LWOP or AWOL), 15% of the bi-weekly disposable pay would be $524.50.

documentation and advised the Respondent she had not received the requested medical documentation. The Respondent was advised if the supporting documentation was not submitted to the Supervisor, the previously processed paid sick leave would have to be converted to LWOP or annual leave. The Respondent was allowed until 12:00 noon on March 17, 2017 to select her preference.

7) The Respondent failed to select a preference on or before March 17, 2017.

8) On March 20, 2017, the Supervisor advised the Respondent, as her immediate supervisor she was responsible for ensuring accurate certification of time cards and again reminded the Respondent the processed sick leave pursuant to FMLA was approved with the provision that supporting documentation must be submitted. The Supervisor again reminded the Respondent she had not submitted any documentation to the Supervisor and offered, as an alternative that documentation may be submitted to a designated employee in Employee Relations.

9) On March 23, 2017, a corrected time card for pay period five was processed and the sick leave previously deducted from the Respondent's leave balance was restored and the Respondent was charged with an equal amount of leave without pay.

10) On March 29, 2017, the Respondent submitted the February 7, 2017 psychiatrist note to the designated employee and the Supervisor. The Respondent also complained that management improperly changed her sick leave request to LWOP.

11) On April 4, 2017, the Supervisor acknowledged receipt of the psychiatrist note, advised the Respondent that the note was not sufficient under the Federal regulations, and provided a release that would authorize the Federal Occupational Health Service to contact the provider in an attempt to obtain sufficient documentation for re-evaluation of the request for use of paid sick leave under the FMLA.

12) The Respondent refused to provide further authorization and disclosed, in submissions to this Tribunal, that her treating psychiatrist refused to fill out further certification and he does not consider her depression to be serious or life threatening.

13) On April 10, 2017, the Department of Interior sent the Respondent a Bill for Collection notifying the Respondent it intended to make a deduction of up to 15% of her disposable pay beginning in the next pay period to satisfy a debt resulting from a time sheet correction for pay period five in 2017.

14) The Secretary is authorized to use administrative offset to try and collect a claim of the United State Government arising out of or referred to the Department of Education.

15) Consistent with Federal statutes, the Secretary has published regulations to recover overpayments of pay or allowances from current or former employees through salary offset. The Secretary has established an Administrative Communication System (ACS) to inform employees of the Department's policies, procedures, requirements, and other important

information of general applicability through the use of directives and handbooks. The Department's Handbook for Processing Salary Overpayments describes the Department's policy and procedures for the collection of debts through salary offset.

16) On April 14, 2017, the Respondent filed a timely request for a pre-offset hearing challenging the validity of the assessed debt and indirectly challenging the involuntary payment plan imposed upon the Respondent.

17) The Supervisor's processing of provisionally approved paid sick leave for the Respondent on February 21, 2017 was required by the regulatory authority under the FMLA of 1993 and was consistent with authority as a supervisor to approve and deny leave requests and timely certify time cards for all assigned employees in WebTA, the electronic time and attendance system.

18) As an employee under the direct supervision of the Supervisor, the Respondent was obligated to provide any required supporting documentation for requested leave directly to the Supervisor.

19) The Supervisor's initial request for the supporting documentation on February 21, 2017, the March 16, 2017 reminder to provide the supporting documentation, and the March 20, 2017 reminder and offer of alternative designee for submission of the supporting documentation were appropriate actions to be taken by the Supervisor, consistent with statutory and regulatory authority, as well as consistent with Agency policy.

20) The February 7, 2017 psychiatrist note, offered in support of the Respondent's request for paid sick leave under the FMLA of 1993, is medical documentation that does not meet the medical certification standards required under the implementing regulations for family medical leave, specifically 5 C.F.R. §630.1208.

21) The March 23, 2019 correction to the time card for pay period five, restoring the previously charged sick leave to the Respondent's leave balance, charging an equal amount of LWOP, and making the other authorized adjustment were appropriate actions to be taken by the Supervisor, consistent with statutory and regulations authority, as well as consistent with Agency policy.

22) The April 4, 2017 request from the Supervisor to the Respondent for voluntary release to allow the Federal Occupational Health Service authority to contact the Respondent's treating source was an appropriate means to facilitate obtaining additional medical information in support of the Supervisor's intent to reevaluate the Respondent's request for family medical leave of an extended duration.

23) The debt as established at $3,648.78, is a valid debt and subject to collection by administrative offset.

24) The Department failed to follow its own policy and procedures for collection of a debt by administrative offset from the Respondent when:

a. it did not investigate the debt identified in the Bill for Collection prepared by the DOI,
b. it did not determine if evidence obtained in the investigation supports or disproves the basis of the debt,
c. it did not develop an official Department overpayment case file,
d. it allowed the Bill for Collection to be issued by the DOI directly to the Respondent, and
e. it allowed the Bill for Collection to replace the initial written notice of the debt.

25) The Bill for Collection, as issued, fails to provide proper notice that a debt has been assessed and that the Department will use administrative offset procedures to recover the overpayment of pay from the Respondent.

26) Although not the only deficiency in the regulatory required notice, the Bill for Collection failed to advise the Respondent she may submit a voluntary repayment agreement for the Department's review.

27) The Department failed to allow the Respondent the opportunity to enter into a voluntary agreement for repayment of the debt before instituting involuntary deductions from disposable pay.

28) The Respondent has not established extreme financial hardship such that she is eligible to relief from involuntary collection to the extent allowed under the statue and regulations.

VI. Conclusion and Order

Based on the foregoing findings of fact and conclusions of law, 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 $3,648.78;

2. To facilitate repayment of this debt and prior to implementing any payroll deduction, the Department shall provide a Payment Agreement Form to the Respondent within ten (10) days from receipt of this decision, which will allow the Respondent to consider options of paying the full debt by check or money order, pay the full debt by a one-time payroll deduction, repay the debt through biweekly payroll deductions in an amount less than, equal to, or greater than 15% of disposable income, explain how interest will continue to accrue on the unpaid balance, and explain how administrative costs, if any, will be charged;

3. The Department shall file a copy of said Payment Agreement with proof of service to the Respondent with the Office of Hearings and Appeals within ten (10) days from receipt of this decision;

4. The Respondent shall have ten (10) days from receipt of the Payment Agreement Form to submit a signed Payment Agreement Form to the designated Payroll Operations Division, indicating a voluntary onetime payment agreement (by check or money order) or authorizing biweekly payroll deduction in a specific dollar amount which is less than, equal to, or greater than 15% of disposable income, and which will be deducted until the debt is fully paid;

5. If the Respondent fails to timely submit a signed voluntary payment agreement pursuant to this decision, the Department may commence biweekly deductions of 15% of disposable income until the debt is fully paid.

___/s/ Angela J. Miranda_____
Angela J. Miranda
Administrative Law Judge

Dated: __September 29, 2017____

SERVICE

A copy of the attached document was served upon the following in the manner indicated:

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