



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
OFFICE OF ADMINISTRATIVE LAW JUDGES
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In the Matter of

MC,

Respondent

Docket No.: 15-18-OF

Overpayment/Pre-offset Proceeding

Appearances: 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 former and current employees 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 former or current employee of the Department.¹ The undersigned is 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 March 13, 2011, the Respondent was converted from a political appointee to a career conditional, non-bargaining unit employee. On November 8, 2011, the Office of Personnel Management (OPM) notified the Department that information from OPM's Central Personnel

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), available at <http://www.oha.ed.gov/overpayments.html>.

² 5 U.S.C. § 5514(a)(2)(D) (2012).

Data File showed that the Department did not obtain prior approval before converting the Respondent to her competitive position. When a current or recent political appointee is converted to a competitive or non-political excepted service position, the Department must obtain prior approval from OPM. Because the Department failed to do so, OPM reviewed the Respondent's appointment to ensure the appointment was free from political influence, met merit system principles, and met applicable civil service laws and regulations. On June 13, 2012, OPM found the Respondent's appointment illegal and directed cancellation of her appointment.

On October 15, 2012, the Department sent the Respondent its Notice of Intent to Remove. The Respondent appealed to the designated Deciding Official, Mark Washington, at the time Acting Chief Administrative Officer and PIO, Office of the Deputy Secretary. Mr. Washington affirmed the cancellation on April 26, 2013, but, at the urging of the Respondent, the Department agreed to request a variance from OPM. On August 2, 2013, OPM granted a variance for leave accrual, pay, and retirement for service performed as a de facto employee from March 13, 2011 until the Respondent's last day of employment on May 31, 2013, but OPM did not approve service credit for time-in-grade and career tenure. As a result of the cancellation, the Department issued a Notice of Overpayment on March 17, 2015 for the Respondent's pay from March 13, 2011 to May 31, 2013. The alleged debt is \$157,464.18.

On March 31, 2015, the Respondent filed a timely request for a pre-offset hearing with OHA. An Order Governing Proceeding (OGP) was issued on April 3, 2015. The OGP was first amended on April 14, 2015 and amended a second time on April 23, 2015. On May 6, 2015, the Respondent filed a signed statement affirming her prior narrative statements and supporting documentation on file dated March 28, March 31, and April 14, 2015. On May 22, 2015, the Department filed a brief setting forth its position related to the Notice of Overpayment. An OGP Following Receipt of Department's Brief was issued on May 26, 2015 raising specific questions that, if answered, would be of benefit to this Tribunal's resolution of the appeal. Both the Respondent and the Department have submitted their responses and supporting exhibits.³

As relevant to this proceeding, the Respondent argues the overpayment is incorrect because OPM has recognized her as a de facto employee. OPM granted her full service credits for leave accrual, pay, and retirement benefits. Furthermore, the Respondent argues that the debt's existence contradicts the fact that her benefits, and accrued annual leave in the form of a lump sum payment, were subtracted from the Department's calculation of the overpayment. Thus, the Department was paying the Respondent a lump sum for benefits to a salary the Department claims does not exist. The Respondent indirectly argued that recoupment of the salary paid resulted in the Respondent working without the benefit of paid compensation.

The Department alleges OPM provided them with confusing instructions with respect to the Respondent's cancellation of appointment and the subsequent overpayment. Notably, the record is void of any attempt by the Department to obtain clarification from OPM. Instead the Department has consistently advised the Respondent a debt would result following the removal directed by OPM. Despite the consistent and unwavering pursuit of the alleged overpayment

³ The Department initially submitted its responses and supporting exhibits on June 18, 2015. Due to factual and technical errors in this initial submission, the Department re-submitted its responses and exhibits on June 24, 2015. This decision is based on the June 24th submissions.

over a period of more than two years, the Department now argues the debt is not owed. In arriving at this conclusion, the Department argues since the Department lacked the intent to procure the Respondent's services on a voluntary basis they thus must pay her for her services.⁴

II. Issue

The issue before this Tribunal is whether the Respondent should be liable for the alleged debt for her pay from March 13, 2011 to May 31, 2013 after OPM issued a variance granting her leave accrual, pay, and retirement benefits as a de facto employee during that time period.

III. Legal Framework/Applicable Laws and Regulations

In this case, the Respondent has requested a pre-offset hearing to contest the existence of the debt.⁵ The standard of review for assessing the validity of the debt is whether the debt is clearly erroneous.⁶ 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.⁷ 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."⁸

OPM's granted variance for leave accrual, pay, and retirement benefits is the Respondent's basis for contesting the debt's validity. OPM promulgates and enforces regulations necessary to carry out the provisions of the Civil Service Act and the Veterans' Preference Act (reenacted in Title 5 of United States Code), the Civil Service Rules, and all other statutes and Executive Orders.⁹ As relevant to this proceeding, an agency is required to obtain prior approval from OPM before appointing any current or recent political appointee to a competitive or non-political excepted service position.¹⁰ If OPM suspects an agency has illegally appointed an employee without such approval, OPM has the authority to investigate the qualifications of the applicants for the employee's position and evaluate whether the agency complied with applicable laws, rules, regulations, and directives.¹¹ If OPM determines an agency made an illegal appointment, OPM may direct the agency to take corrective action against the employee and for any other apparent violation of applicable laws, rules, regulations, and directives.¹² OPM's findings from these investigations are binding unless changed as a result of the agency's evidence or arguments against them.¹³

OPM also has the authority to grant a variance for an illegal appointment if: (1) the

⁴ See 31 U.S.C. § 1342 (2012).

⁵ 34 C.F.R. §32.6 (2014).

⁶ 34 C.F.R. § 32.9(b) (2014).

⁷ *Id.*

⁸ See *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

⁹ 5 C.F.R § 5.1 (2015).

¹⁰ See John Berry, U.S. Office of Pers. Mgmt., MEMO 2009-11-05, Political Appointees and Career Civil Service Positions (2009).

¹¹ See 5 C.F.R § 5.2(a)-(b) (2015).

¹² See 5 C.F.R §§ 5.2(c), 5.3(a) (2015).

¹³ 5 C.F.R § 5.3(a)(2) (2015).

variance is the only way to avoid unnecessary hardships to the illegally appointed employee; (2) the variance would be within the spirit of the applicable laws and regulation; and (3) the efficiency of the federal government and the integrity of the competitive service are protected and promoted.¹⁴ The variance can grant service credit for a period of de facto employment to prevent loss of employment, pay, grade, or unnecessary hardship to the employee. Before seeking a variance, the agency must: (1) try to give the employee a legal appointment; (2) evaluate if the employee could have been properly appointed at the time the error was made; and (3) determine if the employee could have been competitively within reach of the position's requirements at any time during the period of de facto employment.¹⁵ If OPM determines that an illegally appointed employee is a de facto employee, that employee is entitled to receive pay for services rendered, unpaid compensation, and accrual of annual leave with a lump sum payment upon separation unless the appointment was in violation of an absolute prohibition or the employee is guilty of fraud.¹⁶

IV. Analysis

The debt is invalid, and the Department should have never issued nor pursued the overpayment.¹⁷ Though OPM did not grant a variance that allowed the Respondent to remain in her position or grant a variance recognizing her time in grade, OPM granted a variance for leave accrual, pay, and retirement for the service the Respondent performed as a de facto employee thereby finding there was not a violation of an absolute prohibition, despite the improper appointment. Upon referral by OPM to the Office of Special Counsel (OSC), there was no allegation of fraud by the Respondent and only the Department was the subject of the OSC investigation. Thus, the Respondent was entitled to fully benefit from the variance granted by OPM.

The Department argues OPM's instructions regarding the Respondent's cancellation of appointment were confusing and contradictory. However, this confusion could have been easily resolved had the Department sought clarification from OPM directly rather than continue its pursuit of the alleged overpayment/debt. Furthermore, the Department's current rationale that the debt is not established because there was no specific agreement for the Respondent to volunteer her services, although arriving at the same conclusion as this Tribunal, fails to address the central issue of this matter, namely in light of the OPM variance, is the alleged debt pursued by the Department valid?

The letter dated August 2, 2013 from OPM to the Department clearly states the

¹⁴See 5 C.F.R § 5.1 (2015).

¹⁵ U.S. Office of Pers. Mgmt., *Correcting Erroneous Appointment*, <https://www.opm.gov/policy-data-oversight/hiring-authorities/variatiions/#url=Erroneous-Appointments> (last visited July 7, 2015).

¹⁶ *Victor M. Valdez, Jr.*, 48 Comp. Gen. 734 (Comp. Gen. Aug. 17, 1979).

¹⁷ Critical to this conclusion is the guidance offered in the Department's Handbook for Processing Salary Overpayments. Upon receipt of a Bill of Collection, OM/HR is obliged to conduct an investigation that includes evidence supporting the amount of the debt **and any other information that supports/disproves the basis for the debt** (emphasis added). The evidence gained by this investigation may provide justification against further collection action. The evidence of the variance for pay for services rendered while in the illegal appointment provided the Department with adequate justification to determine it was not necessary to seek collection of this alleged debt. See, *Footnote 1, supra*, Section VII(A)(2).

Respondent should receive “full service credit for leave accrual, **pay**, and retirement for service performed as a de facto employee” from March 13, 2011 to May 31, 2013 (emphasis added).¹⁸ Although the cancellation of the appointment was retroactive to the date of appointment on March 13, 2011, the establishment of the debt for the Respondent’s pay was entirely improper given OPM’s clear decision to grant the Respondent de facto employee status, and full pay for her service per its August 2, 2013 letter. Furthermore, the Request for Bill for Collection subtracts the Respondent’s accrued leave and retirement benefits from the overpayment produced after her appointment’s cancellation. The Department should have fully respected the granted variance and subtracted pay as well.

The Department’s numerous errors support this Tribunal’s definite and firm conviction that the Department made a mistake in issuing and pursuing this debt. The first Department error was with the job posting for the position in the Office of English Language Acquisition (OELA). In the posting on January 10, 2011, OPM found the Department developed a new position that was contrary to 5 U.S.C. §§ 5101, 5106. These provisions require agencies to classify positions based on the duties and responsibilities of the position and the qualifications to do the work. Agencies are responsible for classifying their positions appropriately and ensuring recruitment tools and personnel actions are based on the classified duties and responsibilities.¹⁹ The Department added unclassified duties and qualifications to this OELA position that were not associated with the classified duties of the position. Furthermore, the Department used a selective factor in the required job analysis of the OELA position based on those unclassified duties and qualifications, instead of the classified ones.

The Department made more mistakes assessing applicants for the position. The Department used an assessment questionnaire to rate and rank applicants. However, the questionnaire focused on experience linked to the inappropriate selective factor rather than on the experience necessary for the successful performance of the classified duties of the position. Furthermore, this position was advertised as a GS-12 position and four out of the nine resumes the Department referred for employment consideration did not demonstrate possession of the minimum requirement of one year specialized experience at the GS-11 level. Out of those nine resumes, only the Respondent was interviewed and the selecting official offered her the position within two days. Based on this hiring process, OPM found that the selecting official was predisposed to select the Respondent.²⁰ On June 13, 2012, OPM advised the Department that even if the Department sought the required prior approval from OPM for the Respondent’s competitive appointment, OPM would not have approved the Respondent’s appointment due to the Department’s erroneous job posting and selection process.²¹

¹⁸ Letter from Kimberly Holden, Deputy Associate Dir. of Recruitment & Hiring, U.S. Office of Pers. Mgmt., to Quasette Crowner, Acting Chief Human Capital Officer, U.S. Dep’t of Educ. (Aug. 2, 2013) (on file with the Dep’t of Educ.).

¹⁹ 5 C.F.R. § 300.103 (2015).

²⁰ The record shows OPM determined further investigation by the Office of Special Counsel (OSC) was necessary, and OPM advised the Department a referral to OSC would be made. The evidence suggests only the Department was the subject of that investigation and the Respondent was noted to have fully cooperated in that investigation. The Respondent was never a subject of the OSC investigation.

²¹ The evaluation of the chronological events and the fact that the Department did not provide any notice to the Respondent her appointment was under review by OPM until after OPM concluded the appointment must be cancelled, raises a serious concern. The evidence establishes the Respondent’s application for the posted position was prepared and submitted to highlight her experience and qualifications based on the qualifications and selective

Furthermore, upon selection following the improper announcement, the Department prepared personnel documents that incorrectly indicated the Bargaining Unit Status for the position as posted. This error as reflected on the Respondent's SF-50, effective March 13, 2011, illustrates the conversion of the Respondent into a career conditional, non-bargaining unit even though the position was originally authorized as a bargaining unit employee. This error effectively denied the Respondent adequate representation during her initial meeting discussing the cancellation of her appointment on July 31, 2012 with her supervisor, Dr. Rosalinda Barrera, and the Acting Director of Human Capital and Client Resources, Quasette Crowner. When the Respondent sought union representation, the Supervisory Human Resources Specialist, Michael Bayblock, indicated that union involvement would be inappropriate due to the Respondent's non-bargaining employee status. Mr. Bayblock improperly relied on the incorrect information as shown on her SF-50. Had her position been correctly categorized, she would have had access to representation at the initial meeting and at any subsequent meetings. The Respondent was in a bargaining unit position and was entitled to union representation for all meetings and Acting Director Crowner and Supervisory Human Resources Specialist Bayblock should have known the Respondent was entitled to union representation despite the incorrectly processed SF-50. Due to the Department's error, the Respondent was denied her right to union representation.

OPM also directed the Department to determine the effect of cancelling the Respondent's appointment on her service credit and other entitlements. OPM also directed the Department to take and report any corrective action taken related to the cancellation along with supporting documents. Notably, the evidence fails to establish the Department ever reported to OPM that they were issuing an overpayment to collect the Respondent's pay from March 13, 2011 to May 31, 2013. This is particularly troubling since OPM granted a variance for leave accrual, pay, and retirement for that time period. The evidence fails to establish the Department reported to OPM that it prepared a Memorandum of Agreement asking the Respondent to broadly waive her rights following the Department's action of improperly posting a position and removing the Respondent from the position, all the while advising the Respondent that she would incur an overpayment to be determined at some later date.²²

On December 17, 2014, the Respondent's appointment was cancelled in the system and the Respondent was notified that a bill of indebtedness would be generated. The Office of General Counsel (OGC) assured the Respondent that the debt would be waived if the Respondent requested a waiver hearing consistent with 5 U.S.C. § 5584 and 5 C.F.R. § 179.205. The "advice" from OGC was wrong because: (1) this overpayment should have never been issued per OPM's granted variance for the Respondent; and (2) requesting a waiver was not the Respondent's only remedy in that she also had the right to request a pre-offset hearing to contest

factors in the published announcement. When the Department failed to provide notice to the Respondent that OPM was investigating her appointment the Respondent was effectively denied an opportunity to prepare an application that highlighted her experience based on properly identified qualifications and selection factors for the position. Consequently, it appears OPM's determination that the Respondent be removed from her position was made prior to the Respondent being given an opportunity to establish her qualifications based on the knowledge, skills, and abilities for the position that the Department should have published. Although a serious concern, the resolution bears little impact on whether the debt is valid.

²² Per Respondent's request, the Memorandum of Agreement was never signed.

the debt.²³

The Department again erred when it issued a Notice of Overpayment on February 25, 2015 in that the Department failed to properly follow the statutory and regulatory requirements for such a notice.²⁴ Again because the Respondent was persistent in her communications with the Department, the error in notice was corrected on March 17, 2015. Though the Department remedied the error in notice, the notice remained defective because the Department failed to properly apply the variances granted by OPM. The Department improperly calculated the alleged overpayment totaling \$157,464.18. The Respondent's leave accrual, pay, and retirement benefits totaled \$181,561.43. In its Request for Bill for Collection, the Department subtracted the Respondent's leave accrual and retirement benefits, totaling \$24,097.25,²⁵ leaving a remaining balance of \$157,464.18. The Department has failed to establish any legitimate reason for the decision to establish an overpayment for the pay the Respondent received for services rendered during the period of de facto employment. The Department was correct in deducting the lump sum payment for leave accrual and retirement benefits from the total established in the Bill of Collection, thus the record establishes the Department partially followed OPM's directive regarding the variance. But again the evidence fails to establish any legitimate reason for only partially following OPM's directive and assessing an alleged overpayment for pay received by the Respondent.

The record clearly establishes the Department committed multiple errors in posting the position from which the Respondent was removed, evaluating candidates for the posted position, making an improper selection, converting a political appointee to a career conditional position without following the required reporting mandates, advising the Respondent that an overpayment would result from the Department's errors, pursuing an overpayment for pay despite OPM's finding the Respondent was a de facto employee and granting of a variance for pay, steering the Respondent to pursue only a waiver when the Respondent possessed the right to challenge the validity of the alleged debt, and suggesting that the OGC had the authority to monitor proceedings that were unquestionably delegated to OHA. This record establishes there is absolutely no doubt that the Department made a mistake issuing an overpayment for the Respondent's pay as a de facto employee. Review of the entire record, to the extent recited herein, clearly proves there is no plausible rationale for the alleged debt. Therefore, the debt is invalid.

V. Findings of Fact

1. The Respondent was hired at the Department of Education as a Schedule C appointee,

²³ The record establishes OGC made additional improper representations to the Respondent. Specifically, a representative from OGC advised the Respondent a waiver would be granted and OGC would monitor the proceedings to ensure a waiver would be granted.

²⁴ 34 C.F.R. §32.3 (2014).

²⁵ In its response to this tribunal's questions, dated June 18, 2015, the Department stated that \$8,591.61 of this amount was actually part of the total \$157,464.17 debt. However, the Respondent's last Leave and Earnings Statement for the pay period ending on June 29, 2013 indicates that the \$8,581.61 figure was Respondent's lump sum payment for her accrued leave. The evidence submitted from the Department at the hearing level establishes the Department fails to understand the effect of the variance granted by OPM and does not understand the calculation of the alleged overpayment.

confidential assistant, on March 30, 2009.

2. On December 20, 2010, the Department authorized a posting for GS-12 Education Program Specialist, a bargaining unit position. A request for Justification for Selective Factors and Quality Rating Factors had been submitted on December 14, 2010 and approved by a personnel manager on December 15, 2010 and a human resource specialist on January 1, 2011.
3. The Department announced a position for Education Program Specialist on USAJobs from January 1, 2011 until January 24, 2011.
4. The Respondent was selected for the posted position with an effective date of March 13, 2011.
5. By letter dated November 8, 2011, OPM notified Michael Bayblock, the then Director, Talent Recruitment & Hiring Division, ED, Atlanta, GA, that the appointment of the Respondent effective March 13, 2011 was under review because the Department failed to obtain the required prior approval for converting a political appointee to a competitive or non-political excepted service position.
6. On November 8, 2011, the Respondent obtained a rating of 2.6, designating Exceptional Results Achieved, in her end of year appraisal while in the position of Education Program Specialist. Based on this rating and exceptional services in the position, the Respondent was awarded an individual cash award.
7. Effective March 11, 2012, the Respondent was advanced from Grade 12, Step 1 to Grade 12, Step 2.
8. On June 13, 2012, OPM sent a letter to Quasette Crowner, Acting Director of Human Capital and Client Resources, directing cancellation of the Respondent's appointment. OPM found it would have not approved the Respondent's appointment had the Department sought the necessary pre-appointment review because: (1) the Department's job posting relied on unclassified duties and qualifications, used an inappropriate selective factor, and used an inappropriate assessment questionnaire; (2) four out of nine candidates forwarded to the selecting official did not meet the minimum GS-12 requirement for the position; and (3) the Department only interviewed the Respondent and offered her the position within two days, implying that the selecting official was predisposed to selecting the Respondent. OPM charged the Department to take corrective action and to determine what effect cancelling the Respondent's appointment would have on her service credit and other entitlements.
9. On July 17, 2012, the Respondent received an individual cash award recognizing meritorious service.
10. More than eight months after OPM first contacted the Department regarding the Respondent's appointment in OELA, on July 31, 2012, the Respondent was notified, in a

meeting with Ms. Crowner and the Respondent's supervisor, Dr. Rosalinda Barrera, the Department was directed by OPM to cancel her appointment. The Respondent was not permitted to have union representation at this meeting, despite the fact the Respondent was in a position within the bargaining unit.

11. On August 13, 2012, Ms. Crowner responded to OPM's letter of June 13, 2012 with the Department's plan for corrective action as well as its plan to identify options that allow the Respondent to continue employment with the Department.
12. On October 15, 2012, the Department sent the Respondent a Notice of Intent to Remove, which also indicated her appeal rights. The record is devoid of any evidence that Department reported this action to OPM, despite a clear directive from OPM that the Department must provide a copy of all documents related to the cancellation of the appointment and the offer that OPM will work with HR staff to insure all required steps are properly documented.
13. On November 7, 2012, the Respondent timely appealed and specifically requested the Department seek a variance from OPM. On April 26, 2013, Deciding Official, Mark Washington, affirmed the removal. However, the Department held the removal in abeyance until OPM issued a decision on the Department's variance request for the Respondent.
14. Prior to the issuance of the decision on variance by OPM, the Respondent voluntarily separated from the Department on May 31, 2013.
15. In a letter dated August 2, 2013, OPM granted the Respondent full service credit for leave accrual, pay, and retirement benefits as a de facto employee during her time with the Department. OPM did not grant the Respondent service credit for time-in-grade and career tenure.
16. On February 18, 2014, the Department prepared a Memorandum of Agreement (MOA) asking the Respondent to broadly waive her rights and hold the Department harmless for its actions. The record is devoid of any evidence that Department reported this action to OPM, despite a clear directive from OPM that the Department must provide a copy of all documents related to the cancellation of the appointment. The Respondent requested a meeting with Ms. Crowner and OGC to answer questions related to the MOA. The requested meeting was never held and the MOA was never signed.
17. In a meeting on August 27, 2014, the Office of Management was advised to cancel the Respondent's appointment and change her resignation date of May 31, 2013 back to her effective starting date of March 13, 2011.²⁶
18. The Department cancelled the Respondent's appointment on December 17, 2014. The

²⁶ In its initial response to the May 26, 2015 OGP, the Department stated that the Respondent and her union representative were present at this meeting. However, they were not present, and the Department corrected this factual error in its second response.

