UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
OFFICE OF ADMINISTRATIVE LAW JUDGES
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202-4615

TELEPHONE (202) 619-9700 FACSIMILE (202) 619-9726

In the Matter of

S,

Respondent

Docket No.: 15-45-OF

Overpayment/Pre-offset Hearing

Appearances: Respondent, pro se.

Karen Mayo-Tall, Esq., Office of General Counsel, U.S. Department of Education
Lauren M. Friedrich, Esq., Office of General Counsel, U.S. Department of Education

Before: Angela J. Miranda, Administrative Law Judge

DECISION

I. Jurisdiction and Procedural History

On April 8, 2015, a Combined Bill of Collection was issued to the Respondent for an overpayment in the amount of $12,332.35, resulting from an overpayment of salary for the period July 14, 2013 (pay period 16, 2013) through February 7, 2015 (pay period 6, 2015).[1] The overpayment was a result of an error in designating the Respondent's duty station as Washington, DC, despite the fact she was working five days a week at an alternative workplace that is outside the commuting area for the Washington, DC-Baltimore-Northern Virginia locality area. The Respondent has filed a timely request for a pre-offset hearing (Office of Hearing and

[1] This Combined Bill of Collection includes an assessment of an overpayment for pay period 16, 2013 to pay period 4, 2014 in the amount of $4,505.16 (Debt ID M1509800004) and assessment of an overpayment for the pay period 5, 2014 to pay period 6, 2015 in the amount of $7,827.19 (Debt ID 50621116199) (Office of Hearings and Appeals E-File System (OES) Documents 2 and 28). A Bill of Collection for Debt ID 50621116199 was apparently issued on March 2, 2015. Neither party submitted a copy of the March 2, 2015 Bill of Collection.

Appeals E-File System (OES) Document 1).[2]

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 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.[3] I am the authorized Pre-offset Official who has been assigned this matter by OHA (5 U.S.C. §5514(a)(2)(D)). Jurisdiction is proper under 5 U.S.C. §5514 and 31 U.S.C. §3716.

II. Issues

1. Whether an administrative error was made based on Respondent's designated duty station of Washington, DC for pay period 16 of 2013 through pay period 6 of 2015, resulting in a valid debt to the United States?

2. Whether the Respondent has established an involuntary repayment schedule of 15 percent of disposable pay results in an extreme financial hardship and should be reduced?

III. Brief Answers

1. An administrative error was made in maintaining Washington, DC as the Respondent's official duty station when the Respondent began teleworking 100 percent of the time outside the Washington, DC-Baltimore-Northern Virginia locality.

2. The Respondent has established the need for relief from the maximum repayment schedule the Department is entitled to recover from officially established pay intervals.

IV. Legal Framework/Applicable Laws and Regulations

A. Debt Collection and Administrative Offset

The Federal Claims Collection Act of 1966, as amended, authorizes the head of an executive agency to collect claims of the United States (31 U.S.C. §3711). The agency is authorized to collect a claim by administrative offset if certain conditions are followed (31 U.S.C. §3716). The Debt Collection Act of 1982, as amended, allows the head of an agency to collect a debt to the United States from a current employee by installment deduction from officially established pay intervals up to a maximum amount of 15 percent of disposable pay or a

[2] Following a timely filed request for waiver, a decision granting a partial waiver was issued on June 19, 2015. This pre-offset hearing is NOT an appeal of that final Department Decision. While Department regulations specifically prohibit review of the denial of a waiver in a pre-offset hearing, the issuance of the decision on waiver is important to establish that the request for a pre-offset hearing was timely filed.

[3] 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.

greater percentage upon written consent of the employee, as well as other means of collection if the employment or period of active duty ends before collection of the indebtedness is completed (5 U.S.C. §5514). The Debt Collection Improvement Act of 1996 provided amendments to The Debt Collection Act of 1982 to maximize collections of delinquent debts owed to the Government by ensuring quick action to enforce recovery of debts and the use of all appropriate collection tools (Pub. L. 104-134, Section 31001). Under expanded authority administrative agencies were allowed to prescribe regulations on collecting debts of employees by administrative offset that are consistent with regulations on collecting by administrative offset promulgated by the Department of Justice, the General Accounting Office or the Department of Treasury (*Id.*). The Department has proscribed regulations for salary offset to recover overpayments of pay or allowances from employees (*See*, 34 CFR, Part 32).

B. Locality Pay

The Federal Employees Pay Comparability Act of 1990 (Pub. L. 101-509, Nov. 5, 1990) established guidelines for the General Schedule of pay to achieve pay comparability between Federal and non-Federal jobs. A comparability payment is payable within each locality determined to have a pay disparity greater than 5 percent (5 U.S.C. §5304(a)(1)). A comparability payment is considered part of basic pay for a variety of purposes and is paid in the same manner and at the same time as basic pay payable to an employee (5 U.S.C. §5304(c)(2)(A) and (B)).

Applicable regulations establish locality pay areas where locality rates of pay are payable to employees whose official worksite is located in specified areas, based on metropolitan statistical areas or combined statistical areas as defined by Office of Management and Budget (34 C.F.R. §§531.602 and 531.603). Each locality pay area has its own locality payment and locality pay percentage (34 C.F.R. §531.602). One such locality pay area is Washington, DC-Baltimore-Northern Virginia (34 C.F.R. §531.603(33)). An employee whose official worksite is in any area outside one of the 33 locality pay areas receives the locality payment and pay percentage associated with the "Rest of United States" (34 C.F.R. §531.603(34)).

The first factor an Agency considers in determining the applicable locality pay rate and percentage is identifying the employee's official worksite (34 C.F.R. §531.604). Generally the official worksite is the location where the duties of an employee's position of record are performed (5 C.F.R. §531.605). The applicable regulations include specific rules for employees covered by a telework agreement (34 C.F.R. §531.605(d)). For an employee working pursuant to a telework agreement, the employee's locality pay rate will not be adjusted or terminated if the employee is scheduled to work at least twice each biweekly pay period on a regular and recurring basis at the regular worksite for the employee's position of record (34 C.F.R. §531.605(d)(1)). An authorized agency official may make an exception to the twice-in-a-pay-period standard in appropriate situations of a temporary nature (34 C.F.R. §531.605(d)(2)). The regulation provides enumerated examples of appropriate situations when an official may make an exception (34 C.F.R. §531.605(d)(2)(i)-(v)).[4] One such situation is when the employee is affected by an

[4] The Office of Personnel Management provides a fact sheet that describes these regulatory requirements. https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/official-worksite-for-location-based-pay-purposes/

emergency situation that temporarily prevents an employee from commuting to the regular worksite (34 C.F.R. §531.605(d)(2)(ii)). The regulations require exceptions be determined on a case-by-case basis (34 C.F.R. §531.605(d)(4)).

When an employee covered by a telework agreement does not report to the regular worksite for the position of record twice each biweekly pay period on a regular and recurring basis or if an exception due to the temporary nature of the situation is not made, then the employee's official worksite is the location of the employee's telework site (34 C.F.R. §531.505(d)(3)). When an official worksite is changed to a different locality pay area, the employee's entitlement to locality rate for the new locality begins on the effective date of the change and the entitlement to a locality rate terminates on the date an employee's official worksite is no longer in the locality pay area (34 C.F.R. §531.609(a) and (c)(1)).

C. Telework/Flexiplace[5]

On December 9, 2010, Congress passed the Telework Enhancement Act of 2010 (Pub. L. 111-292). With passage of that Act, each executive agency was to establish and implement a policy under which employees were authorized to telework. Telework is a work flexibility arrangement under which an employee performs the duties and responsibilities of the employee's position from an approved worksite other than the location from which the employee would otherwise work (5 U.S.C. §6501(3)). Each Agency was required to establish a policy for telework and appoint a Telework Managing Officer to serve as an advisor for agency leadership, a resource for managers and employees, and as a primary agency point of contact for the Office of Personnel Management on telework matters (5 U.S.C. §§6502 and 6505).

An early predecessor to Telework Enhancement Act was an October 21, 1993 Office of Personnel Management Memorandum for Personnel Directors regarding alternative workplace arrangements (Flexiplace). In response to that memorandum, the Department developed a Personnel Manual Instruction on the Flexiplace Program (PMI 368-1), which was in place since at least August 30, 1995. By Amendment dated May 2, 2006, this policy discussed the factors to be considered in determining an employee's official worksite. At all times applicable to the period in question here, this instruction represented the Department policy on Flexiplace/Teleworking.[6]

Pay issues related to duty station were addressed in Appendix A, Section 6 of PMI 368-1 and the policy specifically noted a flexiplace (telework) site becomes the official worksite and duty station if the employee on a flexiplace work schedule is not scheduled to report to the regular worksite at least once a week on a regular and recurring basis. The policy further noted if the flexiplace (telework) site is located in a different locality pay area, then the employee's pay must be adjusted for the new locality pay area. Lastly the policy provided that all pay, leave, and travel entitlements will be based on the employee's official duty station.

[5] Flexiplace, flexible workplace, work-at home, telecommuting, and teleworking are interchangeable terminologies that refer to paid employment performed away from the office. (*See* PMI 368-1, dated August 30, 1995 and in effect through June 8, 2015 when superseded on June 9, 2015 by PMI 368-1 (REVISED).

[6] Effective June 9, 2015, the Department revised the Flexiplace Policy, renaming it the Telework Program (PMI 368-1 (REVISED)).

D. Involuntary Collection

When a valid debt of a current employee is owed and the repayment cannot be made in one full payment, the Department is authorized to deduct 15 percent of the employee's disposable pay unless the employee has entered into a voluntary agreement or a waiver was granted (34 C.F.R. §32.3(e)). The Department is entitled to charge interest, administrative costs, and penalties (34 C.F.R. §32.3(b)). Disposable pay is defined 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 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). Installment deductions must be made over a period of time not greater than the anticipated period of employment and if possible, the installment payment must be sufficient in size and frequency to liquidate the debt in, at most three years (34 C.F.R. § 32.10(b)). If the debt is found to be valid, not waived, and if the employee establishes the involuntary repayment schedule will cause extreme financial hardship, the hearing official must establish a schedule that alleviates the financial hardship but may not reduce the involuntary repayment schedule to a deduction of zero percent (34 CFR §32.9(d)).

V. Analysis

A. Validity of the Debt.

In this case, the Respondent has requested a pre-offset hearing to contest the existence/validity of the debt (34 C.F.R, §32.6). The standard of review for assessing the validity of the debt is whether the debt is clearly erroneous (34 C.F.R. §32.9(b)). 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 (*Id.*). 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" (*See, Anderson v. Bessemer City,* 470 U.S. 564, 573-74 (1985)).

The Respondent presented multiple arguments that the alleged debt is not valid (*See*, OES Documents 6 and 22). Frist, the Respondent argued the debt is not valid because the Department refused to update her duty station despite her multiple requests that the duty station be changed to "Rest of the United States." Second, she argues her circumstances meet the criteria as an exception to the requirement of updating a duty station for an employee who is teleworking from a worksite outside the locality area for the regular worksite but that employee is not scheduled to report to the regular worksite at least once a week on a regular and recurring basis. She primarily argues the telework agreement allowing the Respondent to work at an alternate worksite outside the Washington, DC-Baltimore-Northern Virginia locality was only a temporary change in work location. Lastly, she argues her immediate supervisor, the [redacted], had the authority to determine if the Respondent's circumstances met the criteria for a temporary change in work location and that determination was continued for nearly the entire duration of the period where the Respondent was teleworking from outside the Washington, DC-Baltimore-

Northern Virginia locality area. The Respondent asserts the determination was "suddenly and arbitrarily reversed due to an administrative inquiry within OM" [Office of Management]. Furthermore the Respondent notes the "practice of evaluating teleworkers and duty station is neither a common nor a consistent practice across the department" (OES Document 22). Thus she seems to indirectly present an argument that her immediate supervisor did not make an error in applying the exception and inconsistency of the Department practices undermines the validity of the alleged debt. These arguments are addressed individually below.

The Department contends the overpayment is the result of errors made by a senior level human resources official. Specifically the Department argues the official erred when it was determined the Respondent's relocation for two years whereby she performed telework work 100 percent of the time fell within the purview of the exceptions applicable to a "temporary telework location" (OES Document 20). This contention parallels the Respondent's second argument, but arrives at a conclusion that is opposite of the Respondent's argument, as is discussed further below.

The Department also argues the Respondent knew or should have known she was not entitled to the locality pay for the Washington, DC-Baltimore-Northern Virginia area despite the determination by the senior level human resources official and the Department then explains the "fault standard," concluding because the Respondent knew or should have known she was receiving an erroneous payment, she cannot acquire title to the erroneous payments under any conditions (*Id.*). Consequently, the Department argues the Respondent should be required to pay the full amount of the erroneous funds totaling $12,332.35 (*Id.*). In a supplemental submission, the Department discloses the retroactive change to the Respondent's duty station from Washington DC to the Rest of the United States was based on the findings in a report by the Department's Office of Inspector General (OES Document 28)[7].

The Department's reliance on the "fault standard" to establish the validity of the alleged debt is misplaced. The "fault standard" is a concept applicable only to a waiver proceeding. The Department's argument that the Respondent should be held responsible for $12,332.35 also fails. A Waiver Official issued a final decision finding the Respondent was not at fault for a portion of the alleged overpayment and the Waiver Official found equitable consideration warranted a partial waiver of the alleged debt. Regulations specifically prohibit the Administrative Law Judge from reviewing a denial of a request for a waiver (34 C.F.R. §32.5(1)).[8] This pre-offset hearing makes a final Agency determination as to the existence/validity of the alleged debt and is not in any respect an appeal of the waiver determination, which is a final Department determination.

Returning to the Respondent's first argument, she argues that the alleged debt is not valid because the Department refused to update her duty station when she requested. I find this argument is unpersuasive. Whether the Department refused to update the duty station or simply

[7] This information was provided by declaration of Naomi Sanchez but the Department has not submitted as evidence a copy of the report or findings of the Office of Inspector General.

[8] The regulations are abundantly clear that a decision issued in a waiver proceeding is a final Agency determination. As such, the Department's argument that the Respondent repay the entire alleged debt after a partial waiver was granted, necessarily fails.

failed to make a proper determination on the Respondent's duty station given her telework status, the action of the Department is indicative of an administrative error and a misapplication of the law and regulations. Simply because the Respondent requested a change in the duty station that was not made, does not invalidate an otherwise valid debt. Furthermore, the Respondent acknowledges she is experienced in personnel matters and asserts awareness of OPM's Changes in Pay Administration Rules for General Schedule employees. Her assertions along with her requests to change the duty station are a strong indication that the determination the exception applies was an error, even if made by a senior level official.

The Respondent's second argument is that her circumstances meet the criteria of an exception to the duty station/locality pay for employee's teleworking working 100 percent outside the locality of the regular duty station (OES Document 22). The Department agrees the pivotal question is whether the Respondent was "temporarily unable to report to the regular worksite for reasons beyond the employee's control" but contends the senior human resources official who determined the exception criteria were met, erred in that determination (OES Document 20). In support of the Department's position, it was argued the Respondent knew or should have known the temporary criteria were not met, but the Department provided no significant analysis of why the criteria were not met other than to say that was the determination following an Inspector General Investigation (OES Documents 20 and 28). The Respondent provided an explanation in support of her argument that she met the temporary criteria (OES Documents 6 and 22).

The Respondent argues and the facts establish she requested 100 percent telework for the period June 3, 2013 until December 31, 2013. The Respondent reports her request was approved by her immediate supervisor, [redacted] and her secondary supervisor, [redacted].[9] The Respondent made this request due to relocation outside the Washington, DC-Baltimore-Northern Virginia locality area following receipt of Active Duty Military Orders for her husband with an assignment to [telework city/outside Washington, DC-Baltimore-Northern Virginia locality]. The evidence shows the Respondent intended to request a year leave of absence, without pay after December 31, 2013. The Respondent presents some evidence that she reported to work at her regular worksite in Washington, DC during the period June 3, 2013 to October 30, 2013, but the evidence submitted fails to show the Respondent reported to her regular worksite at least two days per pay period during this same time period on a regular and recurring basis.[10]

On January 2, 2014 the Respondent requested that her "temporary, full-time telework

[9] The record does not include a copy of this approved telework agreement. The Respondent asserts her copy is in storage and not currently accessible and the Department asserts record keeping requirements do not require keeping a record of any Telework Agreement other than the current agreement. Despite the absence of the agreement from this record, there is little doubt the Respondent started teleworking outside the locality area of her regular worksite and continued to do so until at least April 3, 2015.

[10] Respondent submitted three exhibits showing airline reservations. Two of the exhibits are duplicates showing round trip travel from Washington, DC to [telework city/outside Washington, DC-Baltimore-Northern Virginia locality] on October 3, 2013 and October 6, 2013. The Respondent also provided evidence of round trip travel from [telework city/outside Washington, DC-Baltimore-Northern Virginia locality] to Washington, DC on October 15, 2013 and October 30, 2013. While this evidence suggests the Respondent may have reported to the regular worksite in Washington, DC during the period June 3, 2013 to October 30, 2013, the evidence is incomplete. Thus the Respondent fails to establish she reported to the regular worksite with the regularity required by the regulation and Department policy in order to maintain Washington, DC as her official worksite given the flexiplace/telework agreement presumably in place for the period June 3, 2013 to December 31, 2013.

agreement" be extended until November 2, 2014[11] and the Respondent requested that her duty station be updated to "Rest of The United States"[12] (OES Documents 11, 21, and 22). The Respondent contends she submitted an updated telework agreement in January 2014 but she was never provided with a copy of the signed/approved telework agreement. The Respondent also contends she was provided with verbal assurances there was no need to change her duty station and the decision by her prior immediate supervisor, that the exception as related to a temporary changes in work location, was applicable in her circumstances.

Beginning in February, 2014, the Respondent provided evidence she periodically reported to the Washington, DC worksite (OES Document 27). She reported she traveled back at the request of her immediate supervisor and did so for training sessions and meetings. The Respondent provided evidence the trips were considered authorized travel and she was provided reimbursement by the Department for roundtrip transportation from [telework city/outside Washington, DC-Baltimore-Northern Virginia locality] to Washington, DC as well as receiving reimbursement for lodging and meals while in Washington, DC.[13]

Essentially the Respondent argues her husband's active duty orders were outside her control and neither she nor the Department intended her full-time, 100 percent telework agreement to continue permanently. The Respondent also argued her immediate supervisor had the authority to make the determination and her working outside the Washington, DC locality area was a correct determination based on the policy guidance provided by the Office of Personnel Management. Furthermore, she argued the verbal assurances she received from other administrators within the Office of Management and the failure of subsequent immediate supervisors to change the duty station upon her request in January 2014, all support her argument. Overall, the Respondent argues the debt is not valid.

While a designated official at the Department may have the sole and exclusive discretion to make this determination, it is not without limitation and must be consistent with the law and regulations as well as Office of Personnel Management review and oversight. Here the Department contends the designated official simply made an error as determined by the investigation of the Inspector General. The regulations do not define temporary but the representative example the Respondent argues is applicable here requires an "emergency

[11] The Respondent apparently remained on full-time, 100 percent telework until April 6, 2015. Neither the Respondent nor the Department provided evidence an additional extension after November 2, 2014 was requested or approved.

[12] The communication making this request was by email sent on January 2, 2014 at 3:50 p.m. and included an attached letter from the Respondent to her immediate supervisor, [redacted]. The attached letter is dated January 2, 2013 but it appears the attachment is so dated based on a common error of recording the prior year in a date early in the New Year.

[13] From February 2014 until January 2015, the Respondent was on authorized travel from [telework city/outside Washington, DC-Baltimore-Northern Virginia locality] to Washington, DC at least seven times: January 3-7, 2014, March 11-13, 2014, April 28 to May 8, 2014, August 24-29, 2014, October 20-30, 2014, November 17-19, 2014, and January 11-15, 2015. Reimbursement for travel, lodging, and meals was provided for each of these periods of authorized travel. Authorized travel to Washington, DC is and would be contrary to travel entitlements based on an official duty station of Washington, DC. The Respondent fails to explain why she would be entitled to authorized travel in this circumstance while contending Washington, DC is correctly determined as her official workstation. Furthermore, this evidence contradicts the Respondent's claim she maintained a residence in the Washington DC-Baltimore-Northern Virginia locality.

situation" that temporarily prevents the employee from commuting to the regular/official worksite (5 C.F.R. §531.605(d)(2)(ii)).

The Respondent argues her situation meets the temporary exception because her husband's military orders qualify as a situation beyond her control, she maintained a permanent residence in the commuting area, the telework arrangement was not intended to be permanent as the military orders stationing her husband in [telework city/outside Washington, DC-Baltimore-Northern Virginia locality] were not to exceed two years, and if future military orders were for anything other than Washington, DC, she intended to resign her position (OES Documents 6 and 22). Furthermore she argued the apartment where she and her family resided in [telework city/outside Washington, DC-Baltimore-Northern Virginia locality] was only temporary and she held all her possessions in storage (OES Document 6). Lastly, she argued she maintained a Maryland residence as evidenced by her mortgage for the Maryland property and her Maryland Driver's license (OES Documents 6, 10, and 22).

While it is true neither the Respondent or her husband likely had control over where he was stationed, that fact of his employment is more a condition of enlistment/employment in the military than an emergency situation that prevented her from regularly commuting to her regular official worksite. Her argument that she maintained a "residence" in Maryland, while at the same time indicating that property produced rental income since 2013 and all her family possessions were in storage while she was in [telework city/outside Washington, DC-Baltimore-Northern Virginia locality], diminishes the persuasiveness of her argument. Her argument is further diminished by the evidence suggesting she was provided with per diem for lodging throughout 2014 and 2015 when she benefited from authorized travel from [telework city/outside Washington, DC-Baltimore-Northern Virginia locality], the worksite for her telework, to the Washington, DC area. All of this evidence strongly suggests the circumstances of her moving from the Washington, DC commuting area was not due to an emergency condition that could be addressed by a temporary telework assignment. Furthermore, the evidence shows she was not maintaining a residence in the Washington, DC locality because the home from which she moved was converted to rental property and was no longer property that was maintained as a personal residence. The assertion that her Maryland driver's license showed she maintained a residence in the Washington, DC commuting area is equally unpersuasive in this situation.

The Respondent argued in support of the decision of her immediate supervisor that criteria for exception were met. The Respondent cites an email communication dated May 21, 2013 (OES Documents 9 and 22). That evidence shows her immediate supervisor asking another employee if the Office of General Counsel provided any advice on the application of the exception for that employee. The evidence shows the immediate supervisor then notified an official in the Office of Management that the supervisor believed the Respondent's situation fell within the parameters for an exception based on the advice that supposedly was provided, but not fully revealed, for that other employee. The communication provides no further rationale for the determination other than a reference to a Fact Sheet on the subject of determining an Official Worksite for Location Based Pay Purposes as issued by OPM.[14]

[14] *See*, https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/official-worksite-for-location-based-pay-purposes/.

The OPM guidance clearly states an official worksite for an employee covered by a telework agreement who is not scheduled to report at least twice each biweekly pay period on a regular and recurring basis to the regular worksite is the location of the telework site, except in certain temporary situations. The intent of the exception is to address certain situations where the employee is retaining a residence in the commuting areas for the regular worksite but is temporarily unable to report to the regular worksite for reasons beyond the employee's control. A key consideration in applying the exception is stated to be the preservation of equity between telework employees and non-telework employees who are working the same area as the telework location. Temporary is only described as "in the near future" and appropriate situations consist of emergency situations including circumstances like recovery from an injury or medical condition, severe weather emergency, or a pandemic health crisis. Other appropriate exceptions include extended approved absence from work, authorized temporary duty travel status, or temporary detail to a location to an area other than that covered by the telework agreement. The OPM guidance specifically provides when an employee changes her place of residence to a distant location where commuting at least twice each biweekly pay period on a regular and recurring basis to the regular worksite is not possible, the official worksite becomes that of the locality where the telework is performed. Residence is not specifically defined but the common meaning is the dwelling in which a person lives. The evidence of record clearly shows the Respondent was not living in the Maryland property she argued was the residence she maintained in the commuting area for the Washington, DC worksite. Considering the totality of the circumstances here, the Respondent's argument is not supported by the facts established in this record.

The Respondent makes additional arguments in support of her receipt of locality pay for the Washington, DC-Baltimore-Northern Virginia locality area for the period in question here (OES Documents 6 and 22). She seems to argue Executive Order 13473, dated September 28, 2008[15] and the White House Initiative on Joining Forces entitles her to continued pay at the Washington, DC locality rate while residing outside this locality area and not reporting to the regular workstation on a regular and continuing basis. She argues this Order/regulation and the White House Initiative entitles her to additional support as a military spouse and family.[16] The Executive Order and subsequent regulation addresses noncompetitive appointment for certain military spouses in certain circumstances. Noncompetitive appointment is not an issue relevant to determining the validity of this overpayment and debt. Joining Forces is an initiative committed to raising awareness about the service, sacrifice, and needs of military families.[17] Employment, expanding opportunities and career development for veterans and military spouses, is one priority of Joining Forces.[18] Arguably, the Department's allowance of the Respondent's continued employment in her position with 100 percent teleworking from a remote location is consistent with the spirit and intent of the Joining Forces Initiative. Even the Respondent acknowledges the Department's accommodation to her situation allowed her to remain fully employed instead of going on extended leave without pay, as was initially intended, during her

[15] This Executive Order was codified at 5 C.F.R § 315.612, effective September 11, 2009. This regulation addresses noncompetitive appointment of certain military spouses under certain circumstances, one being a permanent change of station for an active service member. In this particular case, non-competitive appointment is not at issue and the change in duty station for the Respondent's husband was clearly a temporary appointment, not to exceed two years.
[16] The Respondent requests a statement in writing from the Department of Education as related to the applicability of these two provisions at the Department of Education. The claimant's request in this procedure is misplaced.
[17] *See*, About Joining Forces, https://www.whitehouse.gov/joiningforces/about.
[18] *See*, Joining Forces: Employment, https://www.whitehouse.gov/joiningforces/issues/employment.

husband's deployment outside the Washington, DC-Baltimore-Northern Virginia locality area. Although the Department's allowance of the accommodation for 100 percent teleworking is consistent with the intent of the Joining Forces Initiative, the Department must also act in a manner consistent with preserving the equity between the telework employee and non-telework employees who are working in the same areas as the telework location.

Therefore upon review of the arguments presented and the evidence of record, I find the alleged debt for the period in question to be valid.[19]

B. Involuntary Payment and Extreme Financial Hardship

The Respondent asserts repayment would result in a "great and undue financial hardship" (OES Documents 6 and 22). The Respondent reports having no disposable funds due to the purchase and rehabilitation of a home in March 2015. The Respondent claims she entered into a purchase contract and construction contract before she was notified of the overpayment.[20] She alleges she took a loan from her TSP for the construction payments and exhausted most of her savings and brokerage accounts. She contends she "struggles to make ends meet and provide necessities for her children" and will do so until the construction project loans are paid. The Respondent reports living paycheck to paycheck and did not expect the Department to reverse the prior decision that the exception to the locality pay applied in her circumstance. She asserts the alleged debt will "exacerbate and possibly destroy an already extremely difficult financial situation" for her family.

The evidence shows a mortgage on property purchased in March 2015 in excess of $xxx,000 and a construction contract about the same time in the amount of $xxx,000 (OES Documents 13 and 14). Additional evidence shows the Respondent had notice of the potential for the debt prior to making changes to the original construction contract, adding additional square footage and increasing the contract price to $xxx,000 (OES Document 26). Subsequent modifications made to the original construction contract resulted in increasing the original cost by changing the flooring in the upstairs, finishing the basement, adding a patio, and adding a shed, increasing the contract price to $xxx,000 (*Id.*). One additional change to the original contract was the Respondent's assumption of the cost for appliances in the kitchen, adding another $x,000 in costs for the construction project (*Id.*). The Respondent provided no timeline for the additional increases for the construction contract but overall the evidence suggests, at least some of these additional expenses were added after April 8, 2015, the date of the combined Bill for Collection.

In support of establishing extreme financial hardship, the Respondent submitted a budget based on net earnings from her and her husband's employment along with approximate monthly

[19] This finding that the debt is valid should not and does not consider equitable considerations, as required in an adjudication of waiver. Therefore this finding should not and does not change the partial waiver previously granted.
[20] Despite this claim, the evidence suggests the Respondent first received notice of the change in duty station in February, 2015 with processing of the changes in personnel actions. This was followed by a Bill of Collection in early March, 2015. The combined Bill of Collection in April, 2015 established additional debt but other evidence shows the Respondent was aware, or should have been aware, the determination by her immediate supervision on the applicability of the exception was being questioned back in May 2013, before she started teleworking at a site outside the Washington, DC-Baltimore-Northern Virginia locality (OES Document 9).

expenses for major sources of recurring expenses (OES Document 27). The submitted budget establishes a net total family income from employment as $xx,xxx and approximate monthly expenses of $x,xxx, with a monthly surplus of approximately $3,034 (*Id.*). The budget also shows rental income on two properties of $x,xxx, but the Respondent asserts that income is used to meet expenses related to maintaining two rental properties (*Id.*). Submitted tax returns suggest a loss in relation to the rental properties, but the Respondent has failed to show with specificity the income and expenses as related to two rental properties (*Id.*). The Respondent suggested she may incur additional monthly expenses due to a serious medical condition for a non-dependent family member but has submitted no evidence in support of this speculation (OES Document 6).

Based on the salary for the Respondent's permanent position of record,[21] the Respondent's gross biweekly salary is $x,xxx (OES Documents 22 and 26). Consistent with the regulations, the Respondent has disposable pay of $x,xxx.xx. Pursuant to the regulations, the Department may seek a maximum involuntary repayment of $4xx.xx in installment payments deducted from biweekly salary, until the debt is repaid. The Department reports no involuntary repayment plan was imposed (OES Document 28). The Respondent reported she did not enter into a voluntary repayment agreement (OES Document 27), but the Department provided evidence that the Respondent did authorized a voluntary repayment (OES Document 28).[22] In an email on June 30, 2015, the Respondent authorized voluntary collection of the debt following the issuance of the partial grant of a Wavier (*Id.*). Voluntary repayment was collected beginning in 2015 pay period 15 but suspended after 2015 pay period 19, while this pre-offset hearing proceeded (*Id.*).

The Respondent uses the terminology "disposable funds" throughout her submissions but what she presents as "disposable funds" is not the same as the regulatory definition for "disposable pay." Instead she uses a combination of net pay and remaining funds after household and family expenses to justify an inability to pay the maximum allowed deduction. She presents a family budget in support of her claim of extreme financial hardship, but the budget fails to show monthly expenses exceeding net employment earnings from her and her husband. While the Respondent presents a complex financial situation, the complexity seems to arise from financial decisions made since at least March 2015, including the purchase of residential property and investing in significant renovations/expansions while maintaining additional residential rental property. Notably the financial complexity also includes renting living quarters for her family other than the rental properties owned by the Respondent and her husband (OES Document 27). The budget presented establishes surpluses that are inconsistent with the Respondents claim of living paycheck to paycheck and an inability to meet financial demands for the necessities for her and her family. Although the Respondent has claimed financial distress as related to choices made, she has failed to establish she is unable to meet basic needs of food, shelter, and clothing for herself and family while continuing payment on the debt owed.

When the Respondent authorized repayment of this debt through voluntary deduction

[21] The Respondent revealed she was temporarily promoted to [redacted] but that temporary promotion ended October 3, 2015. The Respondent indicates she returned to her position of record at the GS-14, Step 6 as of October 4, 2015.

[22] The Respondent requested that the repayment installment be in the "smallest increments possible." Thereafter collection of $1xx.xx was commenced with pay period 15 (OES Document 28).

from her biweekly pay, she requested that the payment be based on the smallest increments possible (OES Document 28). Collection of $1xx.xx was commenced, exclusive of interest owed. Based on the regulatory definition of disposable pay, this appears to be collection at about 4 percent of the Respondent's current disposable pay, as defined in the regulations. The Department has expressed intent to be amenable to an extended repayment schedule, but provided no additional specifics or argument (OES Document 20).

Based on consideration of the entire record, I find the Respondent's complex financial situation warrants some relief from the maximum involuntary repayment schedule. Although some relief is warranted, the monthly budget submitted by the Respondent establishes that a repayment schedule greater than was previously established should be set. Therefore, collection should be set at no more than 8 percent of disposable pay (as defined in the regulation), not including interest fees, until the remaining indebtedness (after partial waiver applied) is collected.

VI. Findings of Fact

1. Respondent is a current employee of the Department and has been so employed for all periods relevant to this matter.
2. During the relevant period resulting in an overpayment, the Respondent was a [redacted], GS-0201-14, and received a within grade increase, Step 4 to 5, effective June 2, 2013.
3. Respondent requested permission to telework five days per week for the period May 28, 2013 to December 31, 2013, and her alternate work station would be a residence outside the commuting area for the Washington, DC duty station. The record establishes the Respondent made this request due to her husband's deployment with the National Guard and a family that included [redacted] young children.
4. Respondent reports a telework agreement allowing an alternate workstation outside the commuting area for Washington, DC was approved by the [immediate supervisor] and the [secondary supervisor] in May 2013, but her copy is in storage and currently unavailable. The Department reports it only retains current telework agreements and does not have copies of any prior approved agreements.
5. The record establishes, on May 21, 2013, the [immediate supervisor] reported to an official in the Office of Management/Front Office that she believed the Respondent's circumstances of teleworking five days per week outside the regular duty station was consistent with OPM temporary telework policy and guidance.
6. The respondent started teleworking, at a location outside the Washington, DC-Baltimore-Northern Virginia commuting area, five days per week on about June 3, 2013.
7. Respondent informed this Tribunal she reported to the Washington, DC office for periods of time between June 3, 2013 and February 2014 and travel expenses from her alternate work station were not reimbursed by the Department. In support of this information she produced airline confirmations showing she traveled round trip from Washington, DC to [telework city/outside Washington, DC-Baltimore-Northern Virginia locality] on October 3, 2013 and October 6, 2013 and she traveled round trip from [telework city/outside Washington, DC-Baltimore-Northern Virginia locality] to Washington, DC on October 15, 2013 and October 30, 2013.

8. On October 30, 2013 the Respondent requested that her immediate supervisor change her duty station to [telework city/outside Washington, DC-Baltimore-Northern Virginia locality] and a revised telework agreement for 2014 will be submitted.
9. On January 2, 2014[23] Respondent requested an extension of "temporary, full-time telework until November 2, 2014" with the intent to report to the District of Columbia duty station on November 3, 2014. At the same time, the Respondent requested that her duty station be updated to "Rest of the United States" consistent with her alternate work location in [telework city/outside Washington, DC-Baltimore-Northern Virginia locality].
10. The Respondent reports she submitted a telework agreement in January 2014 for continued telework outside the Washington, DC commuting area, but was never provided a copy of the signed/approved agreement by her immediate supervisor.
11. On January 12, 2014, a personnel action was processed granting a general adjustment for one percent increase effective January 12, 2014. The duty station was identified as Washington, DC.
12. On January 24, 2014 the Respondent communicated a message to an Official in the Office of Management/Front Office requesting discussion of her "duty station" and potential official travel to the District of Columbia from February 4 to 7, 2014.
13. The Respondent reported to the Washington, DC office periodically beginning in February 2014. Work related travel was authorized and the Respondent was reimbursed for transportation, lodging, and meals while in the Washington, DC area for the dates February 3-7, 2014, March 11-13, 2014, April 28, 2014 to May 5, 2014, August 24-29, 2014, October 20-30, 2014, November 17-19, 2014, and January 11-15, 2015.
14. On January 11, 2015, a personnel action was processed granting a general adjustment for one percent increase effective January 11, 2015. The duty station was identified as Washington, DC.
15. On February 20, 2015, multiple personnel actions were processed under the authorization of Veronica Johnson. The first was effective July 14, 2013 and adjusted the duty station for the Respondent from Washington, DC to [telework city/outside Washington, DC-Baltimore-Northern Virginia locality]. The second, effective November 3, 2013, processed a name change for the Respondent. The third, effective January 12, 2014, processed a change in duty station for the general adjustment that had been originally processed on January 12, 2014. The fourth, effective January 11, 2015, processed a change in duty station for the general adjustment that had been originally processed on January 11, 2015.
16. The Department reports the personnel actions reflecting change of duty station were processed based on findings of an investigation by the Department's Office of Inspector General.
17. On April 6, 2015, the Respondent reported to her office located in Washington, DC, ending her telework agreement to work 100 percent of the time at a location outside the Washington, DC-Baltimore-Northern Virginia locality.
18. On April 8, 2015, a combined Bill for Collection (Debt ID: M1509800004) was served upon the Respondent by the United States Department of Interior. A system generated debt was calculated as $7,827.19 for pay period 5 of 2014 to pay period 6 of 2015. A manual calculated debt of $4,505.16 was identified for pay period 16 of 2013 to pay

[23] The date of the actual letter is January 2, 2013 but it was transmitted by email dated January 2, 2014. Presumably the date on the letter is a common error of using the prior year after January 1, despite the recent change in year.

period 4 of 2014. A total debt was calculated at $12,332.35.

19. On June 19, 2015, an authorized Waiver Official granted a partial waiver as related to the overpayment at issue here. On that same date, the Respondent filed a request that was accepted as a timely request for a pre-offset hearing.
20. On June 30, 2015, the Respondent communicated with the Department of Interior, via email, she needed to arrange for payment of the overpayment but is unable to pay in full and needs a repayment schedule that allows her to pay in the smallest increments possible.
21. Collection of $1xx.xx was deducted from the Respondent's pay during pay periods 15, 16, 17, 18, and 19.
22. The balance due on the debt for the period July 14, 2013 (Pay period 16 of 2013) to March 7, 2015 (Pay period 6 of 2015) is $8,128.70. This is calculated by subtracting $3,598.90 (value of waiver based on June 19, 2015 Waiver Decision granting a partial waiver) and $604.75 (value of authorized repayment deductions) from the total debt of $12,332.35.

VII. Conclusion and Order

Based on the fact and evidence, I find the overpayment of salary for the period July 14, 2013 (pay period 6, 2013) through February 7, 2015 (pay period 6, 2015) resulted in a valid debt and the Respondent must repay the remaining balance of $8,128.70. Based on the financial circumstances of the Respondent, the Department may collect up to 8 percent of disposable pay, not including interest fees, each pay period until the indebtedness is fully paid.

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

Dated: ___November 24, 2015_____