



UNITED STATES DEPARTMENT OF EDUCATION

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

Docket No.: 16-09-OF

D,

Overpayment/Pre-offset
Hearing

Respondent.

Decision and Order of Dismissal

The Office of the Administrative Law Judges has current jurisdiction over the above referenced matter. On December 8, 2015 a timely written request was filed and a Waiver Proceeding was docketed in response to a Bill of Collection, dated November 9, 2015, issued by the Department of the Interior.¹ Given the nature of the written request, clarification from the Respondent was sought by the assigned Waiver Official. The Respondent timely submitted a supplemental request to her initial request, asking for a pre-offset hearing, alleging financial hardship, but also maintaining she wanted to “work together to get this paid.”

By Order dated March 3, 2016, I was designated the Hearing Official for this pre-offset hearing. Accordingly, pursuant to the appeal procedures set out in 34 C.F.R. Part 32 and the U.S. Department of Education, HANDBOOK FOR PROCESSING SALARY OVERPAYMENTS, ACS OM-04 (Handbook), a hearing was commenced consistent with the regulatory and Department policy requirements. An Order Governing Proceeding, dated March 4, 2016, and an Amended Order Governing Proceeding, dated April 27, 2016, was issued by this Tribunal whereby General and Specific Instructions were provided to regulate the processing of this pre-offset hearing request. Consistent with the regulations and Department policy, the Order Governing Proceeding and Amended Order Governing Proceeding ordered the Department to cease collection of the alleged

¹ The Request appears to have been submitted by email to the Department of Interior and subsequently forwarded to the Office of Hearings and Appeals. The Request for Waiver is being processed under Docket No. 16-06-WA and is assigned to another person to act as the Waiver Official in that matter.

overpayment while this proceeding was pending.

Pursuant to the Amended Order Governing Proceeding, the Department timely provided a copy of all records on which the determination of overpayment and any involuntary repayment schedule were based. Upon review of the proffer of evidence, it was immediately clear the Department had continued collection of the alleged debt contrary to the regulations, Department policy, and the Orders governing this proceeding. It is also clear to me, that the Department's representative, who should have been able to identify this violation of regulations, Department policy, and the Orders of this Tribunal, took no action to correct this serious violation until given specific directives by this Tribunal. The Respondent is without representation in this matter.²

On June 29, 2016, the Respondent sent an email communication indicating she is "dropping her case" and confirming that the Department has continued to collect on this debt throughout the pending of this proceeding. By email communication on July 5, 2016 the Respondent further explained she pursued this appeal because of her need for assistance resulting from the Department's error, her desire to have the Department admit the error, her personal financial situation, and complications related to health problems. The Respondent explains the Department denied her that assistance when the Department continued collection from her pay.

At my direction, the Respondent, a pro se litigant, was contacted by telephone to insure she was making an informed decision to withdraw her appeals. While I am convinced the Respondent is making an informed decision, it appears the decision is based in part due to the Department's disregard of the Orders of this Tribunal and the disregard of the Department's regulations and policy. I will briefly examine the events that transpired in this proceeding and will provide the Respondent with the information she was entitled to receive pursuant to the regulatory requirements, but to date has not been provided to the Respondent by the Department.

This examination begins with the understanding that the Department of Interior (DOI) provides payroll and debt services to the Department of Education, and is therefore the Department's agent in these matters. Despite this relationship, the Department 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. Prior to initiating a deduction from the disposable pay of an employee, the Secretary of Education is responsible for sending a written notice to the employee (34 CFR §32.3). The regulations enumerate the requirements of the notice (34 CFR §32.3 (a)-(k)). Department policy directs that once the DOI identifies a salary overpayment, a Bill of Collection is generated and forwarded to the responsible office³ within the Department for initial intake and investigation. According to published Department policy, the responsible office should then conduct an investigation and determine whether further collection action is justified. If collection is justified, the Department's responsible office issues the written regulatory notice (Handbook, Section VII, Debt Management Process).

² The evidence/information submitted by the Respondent suggests this process, beginning with the Notice to the Respondent, has been overwhelming to the Respondent and her participation throughout this process has been further complicated by personal health concerns.

³ The responsible office is a human resources division in the Office of Management.

The evidence in this case establishes the Department failed to follow its own policy when it deferred to the payroll and debt servicing agent, DOI, who issued the Bill of Collection and a form of notice directly to the Respondent. Study of the form of notice that was provided to the Respondent raises serious questions whether the notice meets the mandatory regulatory requirements. As an example, although the regulations require that the notice provide specific details of the amount, frequency, approximate beginning date, and duration of intended deductions, the Respondent was not provided with that information. Furthermore the form of notice provided raises questions of the overall understandability of the regulatory appeal options. Notably the form of the notice provided to the Respondent discusses waiver and pre-offset hearings, but the language lacks clarity and therefore further compromises the Respondent's due process rights. This lack of clarity inhibits the Respondent's ability to make informed decisions regarding appeal options. Despite the failure of the Department to proper notice to the Respondent, a request for a pre-offset hearing was timely file and this proceeding was commenced.

Once the appeal was commenced, the response by the Department revealed a lack of coordination further compromising the protections that are to be provided to the Respondent. Having considered the Department's policy that the Office of the General Counsel is responsible only for providing legal advice on the processing of salary overpayments but not explicitly stating the Office of General Counsel will represent the Department in pre-offset hearings, the Department's Chief Human Capital Officer (CHCO) was served with the March 4, 2016 Order Governing Proceeding. When the CHCO was served with the Order Governing Proceeding, she failed to secure representation for the Department and failed to file a Notice of Appearance as directed in the Order Governing Proceeding. Once legal representation for the Department was secured and the representative made a proper appearance, no corrective action was taken by the Department to comply with the regulations or Orders Governing Proceedings to cease collection from the Respondent. The legal representative argues justification by blaming the payroll and debt servicing agent due to a suspected human error and the Respondent for not complaining that the regulations or Orders were not being followed. These actions by the Department have deprived the Respondent of relief to which she was entitled and has deprived her of fundamental due process. Furthermore the lack of proper notice deprived the Respondent of the ability to make informed decisions as related to repayment if this debt was deemed a valid debt.⁴

⁴ The regulations are very specific as to deductions that are allowed to recover an overpayment. More specifically, installment deductions by voluntary agreement may not be less than \$25.00 from biweekly earnings unless there is a very unusual circumstance. Installment deductions should be of an amount that will liquidate the debt in no more than three years. In this particular case, the debt would be liquidated in three years with biweekly payments of about \$67.00 (Based on \$5,215.91 divided by 78 (26 pay periods times 3), which equals \$66.87.) An employee may agree to installment deductions greater than the amount the Department may collect imposing an involuntary repayment schedule. In the absence of a voluntary agreement, the Department may impose an involuntary repayment schedule of up to 15% of disposable pay. Based on disposable pay as evidenced by the Respondent's Earnings and Leave Statement for pay period ending April 16, 2016, the Department may impose an involuntary repayment schedule of up to \$308.60 from biweekly earnings. The Department is entitled to collect interest on the outstanding debt and there may be tax consequences if repayment of the debt extends beyond a single tax year.

The payroll and debt servicing agent reports that as of June 26, 2016, the Order staying collection is now being honored and collection has been stopped pending the resolution of this matter. The original alleged debt was calculated at \$5,215.94 and the DOI collected a total of \$3,750.00 as of June 26, 2016. Of that amount, the DOI reported it collected \$18.90 in interest. The collection of interest is contrary to the information in the form of notice provided by the DOI, which specifically states interest accruals and collections will stop until “the waiver and/or hearing process has completed.” Therefore the payroll and debt servicing agent had no authority to charge and collect interest during the pending of this proceeding. Consequently, interest collected shall be credited as payment toward the principal amount of this debt.

While this Tribunal has no regulatory authority to compel the Department to follow its own regulations and published Department policy, it seems it would be appropriate for the Department to review current practices and comply with its own regulations and policy. Such a review may be a means to avoid potential investigations as a response to complaints that may be filed with an appropriate investigative body such as the Inspector General.

Notwithstanding this explanation and upon acceptance of the Respondent’s informed decision to withdraw this appeal, the Department may recommence collection on this debt subject to this Decision and Order of Dismissal.

THEREFORE, IT IS ORDERED:

1. The matter on this pre-offset hearing is dismissed.
2. The Respondent shall be allowed 10 days from the date of receipt of this dismissal to submit an updated voluntary agreement election form to the appropriate office.⁵
3. The collection of interest during the pending of this proceeding is prohibited and therefore, the payroll and debt collection servicing agent, shall credit the Respondent for \$18.90 as payment toward the principal of this overpayment. The remaining principal balance of this debt is \$1,465.94 (which is \$5,215.94-3,750.00).
4. The Department, through the payroll and debt servicing agent, DOI, may recommence collection on this debt upon receipt of a voluntary agreement election. If the Respondent fails to timely file a voluntary agreement election form within 10 days from the date of

⁵ For the convenience of the Respondent, a blank copy of the Payment Agreement Form from the November 9, 2015 correspondence to the employee is provided. Instructions for submission are included on that form. Notably the repayment options do not completely track the regulations and the failure to provide adequate notice impairs the ability for the Respondent to make an informed decision as to the repayment of this debt. Because of these failures, a brief explanation of the regulatory requirements as to the deduction process is provided at footnote 4 so the Respondent may make an informed decision regarding submission of an updated voluntary payment agreement.

receipt of this Decision and Order of Dismissal, the payroll agent may resume collection based on the agreement signed by the Respondent on December 8, 2015.

Dated: July 27, 2016

Angela J. Miranda
Administrative Law Judge