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

1864

Docket No. 18-64-OF

Overpayment/Pre-offset Hearing

Respondent.

Appearances: 1864, Respondent, pro se.
Tracey Sasser, Office of the General Counsel, U.S. Department of Education[1]

Before: Angela J. Miranda, Administrative Law Judge

DECISION

I. Jurisdiction and Procedural History

The Office of Administrative Law Judges has current jurisdiction over the above referenced matter.[2] With an effective date of October 16, 2016, a personnel action (SF-50) was issued,

[1] The Department was initially represented by another attorney of the Office of the General Counsel. After the Department's brief was filed, that attorney separated from the Department of Education and a Change in Counsel was filed.

[2] The Department's policy is set forth in the U.S. Department of Education's Administrative Communications System, Handbook for Processing Salary Overpayments (ACS-OM-04, last revised January 19, 2012). An erroneous payment to a Federal employee, or former Federal employee, creates a debt to the United States that requires collection or, in certain instances, allows waiver and various laws are available to the United States to administratively collect or waive these types of debts (5 U.S.C. §§ 5514 and 5584, 31 U.S.C. §§3711 and 3716. *See also,* Debt Collection Act of 1982 (Pub. L. 97-365, October 25, 1982), Federal Debt Collection and Procedures Act (Pub. L. 101-647, Title XXXVI, November 29, 1990), and Debt Collection Improvement Act of 1996 (Pub. L. 104-134, Section 31001, April 26, 1996)).

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

establishing that the Respondent's duty station was reassigned from Washington, DC to Atlanta, GA (OES Document 6, Respondent Attachment D to Appeal Letter and OES Document 17, pp.19-20, Agency Exhibit 4). This personnel action was approved on October 14, 2016 (*Id.*).

About eight months later, the Respondent signed an Employee Agreement for Voluntary Temporary Change in Duty Station (OES Document 4, Respondent Attachment B to Appeal Letter and OES Document 17, pp. 17-18, Agency Exhibit 3). The reason for the request was so the Respondent could continue to work at his "current temporary duty station" through January 15, 2018. The agreement further indicated the Respondent would continue to reside at his elderly mother's home, providing her with "additional medical help and resources while she is on hospice care" and to allow the Respondent to work from a Department of Education office in Atlanta, GA (*Id.*). Further, under this agreement and Department policy, Respondent was to be paid at the locality rate for employees in the Atlanta, GA area instead of the higher Washington, DC area locality pay rate. While that change was initially made by the proper processing of a personnel action, this debt arises from the Department's error when the Respondent was converted to the Washington, DC pay rate beginning in pay period 7 of 2017 and in pay period 8 of 2017paid the Washington, DC pay rate retroactively to pay period 23 of 2016.

On September 24, 2018, the United States Department of the Interior, Interior Business Center issued a debt letter (Debt ID redacted) that advised the Respondent a review of his payroll record was conducted and it was determined he was overpaid (OES Document 3, Respondent Attachment A to request for review and OES Document 17, pp. 8-14, Agency Exhibit 1). The debt letter further advised that the overpayment was a result of a correction to a personnel action that was processed by the Department of Education for pay period 23 of 2016 (October 16, 2016 to October 29, 2016) through pay period 19 of 2018 (August 5, 2018 to August 18, 2018). The total gross pay adjustment was identified as $13,789.86, but the net amount to be paid by the Respondent was identified as $12,350.65.[3]

On November 14, 2018, the Respondent submitted an appeal letter with supporting documentation (OES Documents 1 to 6). The Respondent's appeal letter indicated he was requesting a waiver of repayment for this debt because he had no reason to recognize the additional funds in his paycheck as an erroneous payment and repayment would result in hardship.

Given the general inadequacy of the notice of overpayment to the Respondent, his request was accepted as timely and as a request for a waiver and a pre-offset hearing.[4] Thereafter, a scheduling order (Order Governing Proceeding) was issued requiring the Department to file a complete copy of the notice provided to the Respondent and all government records supporting the alleged overpayment determination along with the Department's brief (OES Document 9).

The scheduling order also advised the Respondent that the Department's regulations allowed the

[3] The Department of Education was able to recover moneys from state withholding, Medicare, OASDI, retirement, and the Thrift Savings Plan.

[4] In a separate action, the Respondent's request for a waiver is proceeding under Docket Number 18-63-WA and has been assigned to a Waiver Official. On November 19, 2018, an order was issued in that matter to stay collection of this debt. That stay shall remain in effect until the issuance of the decision in the waiver proceeding.

imposition of an involuntary repayment schedule of 15% of disposable income from each pay period until any established debt is paid in full (*Id.*). Therefore, the scheduling order allowed the Respondent an opportunity to submit a narrative or brief in response to the Department's brief and to also submit financial information in support of his claim that repayment at the involuntary repayment schedule of 15% of disposable income would result in extreme financial hardship.[5]

II. Issues

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

III. Legal Framework/Applicable Laws and Regulations

A. Debt Collection and Administrative Offset

The Federal Claims Collection Act of 1966 (Pub. L. 89-905, July19, 1966) was enacted to avoid unnecessary litigation for the collection of claims of the United States. In its initial form, it required heads of agencies to attempt collection of all claims for money or property arising out of the activities of, or referenced to, the agencies. A subsequent act revised, codified, and enacted, without substantive change, general and permanent laws related to money and finance (Pub. L.97-258, September 13, 1982) wherein the Federal Claims Collection Act was merged into title 31 of the United States Code, specifically, 31 U.S.C. §3711, collection and compromise.[6]

Consistent with the original intent of the Federal Claims and Collection Act of 1966, the current statute requires the head of an executive agency to try and collect a claim of the United States Government for money or property arising out of the activities of, or referred to the agency (31 U.S.C §3711(a)(1)). The head of the agency must act under regulations prescribed by the head of the agency and the standards that the Attorney General and the Secretary of Treasury prescribe (31 U.S.C. §(d)(1) and (2)).[7]

The Department's regulations are found at Part 32 of Title 34 of the Code of Federal Regulations. In about 2005, using the Administrative Communications System (ACS), the Department established policy in relation to salary overpayments with the issuance of Handbook

[5] Extensions of time were granted and while the dates of submissions in the initial scheduling order were changed, the general requirements were not.
[6] This section was subsequently amended by the Debt Collection Improvement of 1996 and the General Accounting Act of 1996.
[7] The Attorney General and Secretary of Treasury published a notice of proposed rulemaking on December 31, 1997 (62 FR 68476-01) and the final rule was published on November 22, 2000 (65 FR 70390-01). The regulations for Federal Claims Collection Standards (FCCS) are found at 31 C.F.R. Parts 900-904. The final rule revised the FCCS issued by the Department of Justice and the General Accounting Office on March 9, 1994 and reflected changes under the Debt Collection Improvement Act of 1996 and the General Accounting Office Act of 1996.

for Processing Salary Overpayments (ACS-OM-04), hereinafter referred to as the Handbook.

B. Notice Requirements

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

The Department regulations provide that the pre-offset notice be in writing, establish the origin, nature, and amount of the overpayment, how interest is charged and administrative costs and penalties will be assessed, demand repayment while providing the opportunity to enter into a written repayment agreement with the Department, if waiver of repayment is authorized by law, the right to request a waiver, the intention to deduct 15% of the employee's disposable pay to recover the overpayment if a waiver is not granted and the employee has not entered into a written repayment agreement, the amount, frequency, approximate beginning date and duration of the intended deduction, provide the Government records with the notice or advise how those records will be made available to the employee for inspection and copying, and the right to request a pre-offset hearing concerning the existence of, the amount of the overpayment, or seek relief from an involuntarily imposed repayment schedule (34 C.F.R. §32.3). The Department policy, which is mostly consistent with the requirements of the applicable statutes and Department regulations, provides further instruction as to how the Department will process salary overpayments.

C. Requirement for a Hearing

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

The authorizing statute demands that the hearing be conducted by an individual who is not under the supervision or control of the head of the agency and does not prohibit the appointment of an administrative law judge as the hearing official (5 U.S.C. §5514(a)(2)(D)).[8] The Department's regulations require that the hearing be conducted by a hearing official who is not an employee of

[8] This statute does not prevent a Federal agency from appointing an administrative law judge employed by that Federal agency from presiding over pre-offset hearings for an employee at that Federal agency (*See,* 7 C.F.R. § 1951.111(b)(5) (defining the Hearing Officer for cases involving USDA employees as an Administrative Law Judge of the USDA or another individual not under the supervision or control of the USDA)).

the Department or under the supervision or control of the Secretary (34 C.F.R. 32.5(d)). In about 2005, with the implementation of the Handbook, the Department established policy interpreting this regulation and authorized an administrative law judge employed by the Department to preside over pre-offset hearings. This policy interpretation of the Department's regulation is consistent with the intent of the initiating statute.

The authorizing statute's provision for a hearing on the existence or amount of the debt requires that the agency provide government records to establish the agency's claim for the debt (5 U.S.C. § 5514(a)(2)(B)). The Department's regulation requires that a copy of the government records on which the determination of overpayment was made be included with the pre-offset notice or the employee be informed how those records will be made available to the employee (34 C.F.R. §32.3(g)). As such, the agency carries the initial burden of proof to establish the existence of and amount of the debt. The Department's regulations require the hearing official to decide whether the Secretary's determination of the existence or amount of the debt is clearly erroneous (34 C.F.R. § 32.9). The Department's policy describes the "clearly erroneous" standard by referencing a standard of review that generally governs appellate review of district court findings.[9] The Department's policy offers no additional explanation for requiring the hearing official to apply an appeals level standard of review to an initial administrative proceeding challenging the validity or amount of an alleged overpayment.

D. Involuntary Collection and Extreme Financial Hardship

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

The Department's regulations are consistent with the authorizing statute (34 C.F.R. §§ 32.3(e) and 32.2). The regulations require a showing of extreme financial hardship to obtain relief from an involuntarily imposed repayment schedule (34 C.F.R. §§ 32.4(c) and 32.5(a)(2)). The regulation requiring a showing of extreme financial hardship was found to be consistent with the authorizing statute (*See, Sibley v. United States Department of Education,* 913 F. Supp. 1181 (N.D. Illinois (1995)). The Department's policy as described in the Handbook is generally consistent with the authorizing statute and the Department's regulations.

E. 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

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

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 in specified areas, based on metropolitan statistical areas or combined statistical areas as defined by Office of Management and Budget (5 C.F.R. §§531.602 and 531.603). Each locality pay area has its own locality payment and locality pay percentage (5 C.F.R. §531.602). One such locality pay area is Washington, DC-Baltimore-Arlington (5 C.F.R. §531.603(52)). Another such locality is Atlanta-Athens-Clarke County-Sandy Springs, GA (5 C.F.R. §531.603(4)). 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(33)).

The first factor an agency considers in determining the applicable locality pay rate and percentage is identifying the employee's official worksite (5 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 (5 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 (5 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 (5 C.F.R. §531.605(d)(2)). The regulation provides enumerated examples of appropriate situations when an official may make an exception (5 C.F.R. §531.605(d)(2)(i)-(v)).[10] One such situation is when the employee is affected by an emergency situation that temporarily prevents an employee from commuting to the regular worksite (5 C.F.R. §531.605(d)(2)(ii)). The regulations require exceptions be determined on a case-by-case basis (5 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 (5 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 (5 C.F.R. §531.609(a) and (c)(1)).

F. Telework/Flexiplace[11]

[10] 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/

[11] Flexiplace, flexible workplace, work-at-home, telecommuting, and teleworking are interchangeable terminologies

In response to an October 21, 1993 Office of Personnel Management Memorandum for Personnel Directors, the Department of Education developed policy related to flexiplace (PMI 368-1, dated August 30, 1995). On December 9, 2010, Congress passed the Telework Enhancement Act of 2010 (Pub. L. 111-292). 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)). With passage of that Act, each executive 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).

In response to the passage of that Act, the Department revised its telework policy on June 9, 2015 (HCP 368-1(REVISED)).[12] The Department again revised its telework policy on October 1, 2018 (HCP 368-1), this time reducing the number of days an employee may telework to one day each week. Nonetheless, this revised policy allowed two exceptions to this new limitation. First an employee who was working outside the local commuting areas of Washington, D.C. or a Department Regional office with an approved 100% telework agreement that was signed prior to May 31, 2018, was excluded from the one workday per week limitation. Second, an employee was excluded from the one workday per week limitation if the additional telework days were allowed as a reasonable accommodation.

Since the inception of the flexiplace policy, the Department policy defined the "official duty station" of the employee as the employee's regular, on-site office.[13] In all versions of the flexiplace/telework policy, the Department's policy was consistent with 5 C.F.R. § 531.605(d), and an employee working a flexiplace schedule or under a telework agreement, was required to report to the regular on-site office at least once a week on a regular and recurring basis, and if that requirement was not met, and the flexiplace or telework site is located in a different locality pay area, then the employee's pay must be adjusted for the new locality pay area.

IV. Analysis

In his initial request filed with the OHA, the Respondent argues: 1) he had no reason to recognize the additional funds in his pay check as an erroneous payment as he has been a GS 14, step 10 since September 2009, 2) his official change in duty station from Washington, DC to Atlanta, GA was signed and made effective on June 23, 2017, 3) repayment of $12,350.00 would result in a hardship, 4) he was unaware that his grade changed to a lower grade,[14] and 5) the

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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, until superseded on June 9, 2015 by PMI 368-1 (REVISED)).

[12] In this revision, the Department renamed the Flexiplace Program to the Telework Program.

[13] Initially pay issues related to duty station were addressed in Appendix A, Section 6 of PMI 368-1. Upon approval on June 9, 2015 of HCP 368-1(REVISED), the policy defined "official duty station" and "official worksite." The October 1, 2018 revision of HCP 368-1, expanded the definitions of "official duty station" and "official worksite" but limited teleworking to a maximum of one work day per week unless the employee was previously residing outside the local commuting area of Washington, DC or an Education Regional office with an approved 100% telework agreement or telework based on a reasonable accommodation.

[14] The evidence of record does not establish the Respondent's grade was ever changed to a lower grade. While the

situation is a result of an administrative error in which he had no cause to recognize (OES Document 2, Respondent's Appeal Letter). Although specifically given an option to file a reply brief or narrative to the Department's brief, the Respondent did not file any such reply.

Additionally, the initial Order Governing Proceeding provided specific information on the Department's right to impose an involuntary repayment schedule and the Respondent was directed to submit a written explanation and financial information under oath or affirmation if alleging extreme financial hardship to obtain relief from the maximum collection of 15% of disposable income from each pay period until the debt is satisfied (OES Document 9). Other than the statement of hardship included in the initial request, the Respondent provided no statement or other financial information to establish extreme financial hardship.

In its brief, the Department's reports the Respondent's duty station was changed, first informally and then formally. The Department indicates that since about October 16, 2016, consistent with the policy in place at that time, the Respondent was permitted to perform 100% telework from his mother's redacted, GA home while she received hospice care. The Department further explained the telework policy permitting telework 100% of time was changed as of October 1, 2018, reducing telework to only one day per week unless additional telework is allowed as an accommodation. The Department suggests that change in policy prompted a review which revealed the Respondent had been teleworking from the Atlanta, GA locality but had been paid at the rate for the Washington, DC locality. The Department explained that on September 10, 2018, FSA's Office of Human Resources processed a change of duty station effective from October 16, 2016, which resulted in the assessed overpayment based on locality pay (OES Document 17, pp. 1-7).[15]

The Department argues that the Respondent began teleworking 100% of the time from redacted, GA as of October 16, 2016 and did not report to the Washington, DC duty station for work-related reasons during the period of the overpayment. Despite commencement of teleworking 100% of the time outside the Washington, DC locality, there was no formal request for a temporary change in duty station until June 23, 2017. The Department further argues that even after the Respondent signed the agreement for voluntary temporary change in duty station, the Department erred because it did not process the proper personnel action in June 2017. In conclusion, the Department argues that since the Respondent did not report to the DC duty station at least once per biweekly pay period since October 16, 2016, the Respondent's correct locality pay should have been Atlanta, GA effective October 16, 2016.

I have considered the arguments presented by the Respondent and the Department in view of the evidence. Following receipt of the Respondent's initial request, the Respondent was asked to

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locality pay changed, there was no grade change. The Respondent was employed at grade 14, step 10 for the entire duration of the alleged overpayment period.

[15] The Department cites two exhibits in support of this argument. First it cites Agency Exhibit 2 (OES Document 17, pp.15-16). This personnel action was approved on September 10, 2018 by SS and changed the Respondent's duty station from Washington, DC to Atlanta, GA, effective October16, 2016. Second, the Department cites Agency Exhibit 4 (OES Document 17, pp. 19-20), which is also Respondent's Attachment D (OES Document 6). This personnel action was approved on October 14, 2016, by JG and changed the Respondent's duty station from Washington, DC to Atlanta, GA effective October 16, 2016.

submit a specified sample of earnings and leave statements (OES Document 8).[16] As an exhibit to its brief, the Department submitted earnings and leave statements for pay periods 23 of 2016 through pay period 20 of 2018 (Agency Exhibit 5, OES Document 17, pp. 21 to 41 and OES Document 18, pp. 1-30). Each of these earnings and leave statements were carefully reviewed to identify the pay rates at which the Respondent was paid during this period of overpayment.[17]

In the pay period immediately prior to the first pay period in which an overpayment is assessed, pay period 22 of 2016, which ended on October 15, 2016, the evidence shows the Respondent was paid at the Washington, DC locality for his grade and step, GS 14, at step 10 (OES Document 8, p. 1, Respondent's select earnings and leave statements). The earnings and leave statement for pay period 22 of 2016 showed the Respondent's duty station as DC and that taxes for District of Columbia were being deducted (*Id.*).

On October 14, 2016, a personnel action was approved by JG, effective October 16, 2016, and the personnel action was processed due to a reassignment (OES Document 6, Respondent's Attachment D to Appeal Letter and OES Document 17, pp. 19-20, Agency Exhibit 4). Although the Respondent's organization's location was identified as Washington, DC, the duty station was identified as Atlanta, Fulton, Georgia and the Respondent's adjusted basic pay was reduced from $141,555 (the 2016 locality pay for Washington, DC) to $135,656 (the 2016 locality pay for Atlanta, GA) (*Id.*). The earnings and leave statement for pay period 23 of 2016 shows the Respondent was paid consistent with the personnel action approved by Ms. G (OES Document 8, pg. 2 and OES Document 17, p. 22, Agency Exhibit 5). The earnings and leave statement for pay period 23 of 2016 shows the Respondent's duty station was GA, was paid at the 2016 locality rate for Atlanta, GA, and taxes for the state of Georgia were deducted (*Id.*). The evidence shows the Respondent was initially paid the 2016 Atlanta, GA locality rate for pay periods 24 of 2016 through pay period 2 of 2017 (OES Document 17, pgs. 23-27, Agency Exhibit 5).

Beginning in pay period 3 of 2017 through pay period 6 of 2017, the Respondent was initially paid at the 2017 Atlanta, GA locality rate (*Id.*, pgs. 28-31). Again, these earnings and leave statements show the Respondent's duty station was Atlanta, GA, the pay rate is consistent with the 2017 Atlanta, GA locality, and state of Georgia taxes are being deducted (*Id.*). Although the record does not include a personnel action documenting this change, the increase is consistent with the cost of living increase for 2017.

Beginning in pay period 7 of 2017, the Respondent was paid at the 2017 locality rate for Washington, DC (*Id.*, pg. 32). The earnings and leave statement show the Respondent's duty station was listed as DC but the Department continued to deduct taxes for the state of Georgia (*Id.*). The record does not include a personnel action documenting this change and the earnings and leave statement for pay period 7 of 2017 does not include any remark indicating a change was processed (*Id.*). Despite this change, the record is devoid of any evidence that the

[16] The statement issued directly to an employee is titled as earnings and leave statement, but the statement's reissued by the Department as exhibits to the Department's brief are titled as leave and earnings statement.
[17] The earnings and leave statements are considered the best evidence of salary payment made to the Respondent for this entire period of overpayment as each earnings and leave statement identifies the salary paid (annual and hourly rates), the payment plan, grade, and step, the duty station, and whether state or District of Columbia taxes were deducted from gross pay. Often, the earnings and leave statements include remarks that help to identify additional information necessary to understand the earnings and leave statement.

Respondent returned to an official worksite in Washington, DC. The evidence shows the Respondent was paid at the 2017 locality rate for Washington, DC through pay period 2 of 2018 (*Id.*, pp. 33-41 and OES Document 18, pp. 1-12). Again, in each of these earnings and leave statements, the Respondent's duty station was listed as DC, but the Department continued to deduct taxes for the state of Georgia (*Id.*).

Beginning in pay period 3 of 2018 the Respondent was paid at the 2018 locality rate for Washington, DC (OES Document 18, p. 13). The record does not include a personnel action documenting this change but the remarks on this statement includes a notation that a pay adjustment was processed in this pay period and that adjustment is consistent with the cost of living increase for 2018 (*Id.*). The Respondent was paid the 2018 locality rate for Washington, DC through pay period 19 of 2018 (*Id.*, pgs.14-29). Again, the Respondent's duty station is listed as DC, but the Department continued to deduct taxes for the state of Georgia (*Id., pgs. 13-29*).

With a notation in the remarks section of the earnings and leave statement, the record shows that in pay period 8 of 2017, in addition to being paid the 2017 locality rate for Washington, DC, a re-computation adjustment and leave adjustment was processed during this pay period (*Id.,* pg. 18). The calculations show the Respondent was paid retroactively the Washington, DC locality rates for ten pay periods, pay period 23 of 2016 through pay period 6 of 2017.[18] As indicated previously, the record does not include a personnel action changing the Respondent's duty station back to Washington, DC in pay period 7 of 2017. Neither the Department nor the Respondent discussed the retroactive salary payment or the change in duty station reflected in pay period 7of 2017.

Having determined that the Respondent was paid the locality rate for Washington, DC during the period from October 16, 2016 (pay period 23 of 2016) through September 1, 2018 (pay period 19 of 2018), the next step is to determine if that was the proper rate of pay for this period. A proper determination requires identification of where the Respondent performed work.

The Department attests the Respondent was approved for telework 100% of the time beginning October 16, 2019. In support of that attestation, the Department submits an email dated March 13, 2019 from HT, identified as the Acting Director of Workforce Relations Division, redacted (OES Document 18, pp. 31-41, Agency Exhibit 6). Embedded in the email is a copy of a telework agreement for the Respondent.[19] Although approved by the Respondent's supervisor on August 16, 2018, this embedded agreement shows it was created by the Respondent on June 16, 2016. The agreement shows the Respondent works a compressed schedule but does not identify the days the Respondent worked in the office and the days working at the alternate worksite. It does include two addresses for where the work will be performed, both are addresses in the state of Georgia and neither are addresses of any business offices of the U.S. Department of Education. The Respondent does not dispute the attestation that he was teleworking 100% of his time since October 16, 2019 nor does he dispute that his telework site was in Georgia.

[18] This calculation of retroactive pay resulted in an adjusted gross pay increase of $2,481.60.

[19] I note that the Department automated the process for requesting and approving telework agreements in about March 2016. This embedded copy appears to be the electronic telework agreement for the Respondent. Unfortunately, the exhibit does not include all the variables that are required to complete the telework agreement and it cannot be determined whether the agreement as initially created in the electronic format was incomplete or if the process of embedding the electronic copy of the agreement failed to capture the variable information.

Instead the Respondent argues he did not have cause to identify the incorrect payment, his duty station did not "officially" change until he signed the Employee Agreement for Voluntary Temporary Change in Duty Station, and the error was the result of an administrative error (OES Document 2, Appeal Letter). Even if an employee does not have reason to believe there was an incorrect payment and even if the incorrect payment was the result of an administrative error due to no fault of the employee, the incorrect payment is a debt of the United States and the head of the Agency is required to attempt collection. While those two equitable arguments are considered in a request for a waiver of the debt, they are not part of the critical analysis of whether a debt due to an overpayment is a valid debt.

The argument about the date the Respondent's duty station was officially changed is relevant to determine the validity of the assessed debt. The Respondent and the Department submitted the Employee Agreement for Voluntary Temporary Change in Duty Station, signed on June 23, 2017 (OES Document 5, Attachment C to the Appeal Letter and OES Document 17, pp. 17-18, Agency Exhibit 3). The rationale provided in this request is to allow **continuance** [*emphasis added*] of working at the current temporary duty station. This rationale necessarily implies the Respondent had been working in the Atlanta, GA locality prior to the signing date. Furthermore, this narrative implies the Respondent began working from an Atlanta, GA Department of Education office, when not teleworking.[20] This narrative is consistent with the personnel action approved by JG on October 14, 2016, indicating a reassignment of the Respondent's Duty Station from Washington, DC to Atlanta, Fulton, GA that was effective as of October 16, 2016, the beginning of pay period 23 of 2016, notwithstanding that the Respondent's position continued to be affiliated with an office located in Washington, DC (OES Document 6, Respondent's Attachment D to Appeal Letter and OES Document 17, pp. 19-20, Agency Exhibit 4). The reassignment of duty station is also consistent with the Department's attestation of 100% telework in the Atlanta, GA locality beginning in pay period 23 of 2016.

Whether the Respondent was teleworking 100% or working from the Atlanta, GA Education office and teleworking less than 100% while remaining in his position with the Washington, DC office, this record establishes the Respondent's change of duty station occurred with an effective date of October 16, 2016 was a correct and proper change (*Id.*).

If it is presumed the reassignment was due to the Respondent's 100% telework as of pay period 23 of 2016, then the telework policies in place during the alleged overpayment period are critical. The Department policy related to the telework program that was in place in October 2016 was HCP 368-1 (REVISED). On October 1, 2018, the telework policy was revised (HCP 368-1). The most significant change beginning October 1, 2018 is that, in most instances, telework was limited to a maximum of one workday per week. The policy as of October 1, 2018 has two exclusions to the one workday per week maximum and they are: 1) an employee outside the local community area of Washington, DC or a Department Regional office with an approved 100% telework agreement that was signed prior to May 31, 2018, and 2) telework based on a reasonable accommodation.[21]

[20] This implication may indirectly challenge the allegation that the Respondent was teleworking 100%, but it does support the evidence that the employee's duty station was the Atlanta, GA locality prior to signing the agreement.
[21] The Department's argument that the Respondent did not allege 100% telework was based on a reasonable

Both versions of the telework policy in place during this alleged overpayment period state the official worksite is the official duty station unless the employee reports fewer than twice each biweekly pay period to that duty station (HCP368-1 (REVISED), Section VII (P) and HCP 368-1 Section VII (S)).[22] The Department asserts the Respondent was approved for 100% telework outside the Washington, DC locality. The Respondent does not dispute that assertion and there is no evidence that the Respondent reported to the official worksite in Washington, DC at least twice each biweekly pay period. Under those circumstances, the Respondent's duty station should have been reassigned to the Atlanta, GA locality as of October 16, 2016, as was done via the personnel action approved by JG.

Review of this record in its entirety establishes the Respondent did have a change in duty station effective October 16, 2016, which should have continued for the duration in which the Respondent was working within that locality. The personnel action, as approved by JG on October 14, 2016 properly documented the change in duty station from Washington, DC to Atlanta, GA. Review of the Respondent's earnings and leave statements establish that while a proper adjustment to pay was made beginning on October 16, 2016 (changing the duty station from Washington, DC to Atlanta, GA), there was another change in pay rates beginning March 5, 2017, which changed the Respondent's rate of pay back to Washington, DC locality pay. This event, seemingly undocumented by an appropriately processed personnel action is the error creating this overpayment. This error was made worse in the very next pay period, when the Respondent's earning and leave statement shows the Respondent was retroactively paid the rate for the Washington, DC locality back to pay period 23 of 2016. Neither the Respondent nor the Department submitted evidence of a personnel action authorizing the change in duty station to Washington, DC.[23] Neither the Respondent nor the Department provided an explanation why the Department made the change to pay the Respondent the rate of pay for the Washington, DC locality beginning in pay period 7 of 2017.

Continued review of the earnings and leave statements show the Respondent was paid at the rate for the Washington, DC locality through pay period 19 of 2018. On September 10, 2018, SS approved two personnel actions (OES Document 17, p. 16, Agency Exhibit 2 and OES Document 5, Respondent's Attachment C to Appeal Letter). The first of these is a correction with an effective date of October 16, 2016 and changes the rate of pay from the 2016 locality rate for Washington, DC to the 2016 locality rate for Atlanta, GA. The second of these is a correction with an effective date of January 7, 2018 and changes the rate of pay from the 2017 locality rate for Atlanta, GA to the 2018 locality rate for Atlanta, GA. It is the processing of these two corrections that resulted in the calculated overpayment.

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accommodation, is irrelevant to this analysis and is therefore not addressed further in this decision.

[22] The actual telework agreement in place as of October 16, 2016 and following the revision on October 1, 2018, specifically note an employee's official duty station is typically not changed by his/her participation in the Program. However, the agreement further explains, that consistent with Part 531of Title 5 of the Code of Federal Regulations, if an employee on a telework schedule is not scheduled to report to the official worksite at least twice each biweekly pay period on a regular and recurring basis, then the telework site becomes the official worksite and duty station.

[23] It is unknown if a personnel action was authorized for this change. Even if there was an authorized personnel action processed, it would not change the outcome of this decision, as the evidence of record establishes the Respondent continued to work in the Atlanta, GA locality for the duration of the alleged overpayment period.

Considering the evidence, it is established the Respondent was employed in a principal office with a location in Washington, DC and beginning on October 16, 2016, the Respondent continued the work of his principal office, but was allowed to perform that work from a work site outside of Washington, DC, namely in the Atlanta, GA locality. This arrangement was either through the operation of a telework agreement that allowed the Respondent to telework 100% of his time outside the Washington, DC locality,[24] or allowed him to work in some combination from a Department office in Atlanta, GA and an alternate telework worksite in the Atlanta, GA locality.[25] If the Respondent was teleworking 100% of the time, the record is devoid of any evidence that establishes the Respondent reported to his principal office located in Washington, DC at least twice each biweekly pay period on a regular and recurring basis. Therefore, considering the evidence, applicable law, regulations, and Education policy, the Respondent was entitled to pay consistent with the Atlanta, GA locality beginning October 16, 2016.

Upon reassignment, as of October 16, 2016, a personnel action was correctly processed adjusting the Respondent's locality pay from Washington, DC to Atlanta, GA. Beginning on March 5, 2016, without explanation and possibly without the processing of a personnel action, the Department began to pay the Respondent at the Washington, DC locality rate and then, in pay period 8 of 2017, retroactively paid the Respondent the Washington, DC rate back to October 16, 2016. That error was adjusted with the proper processing of two corrected personnel actions by SS authorized on September 10, 2018. One of these corrected personnel actions identifies an effective date of October 16, 2016 (correcting the duty station to Atlanta, GA) and the other identifies an effective date of January 7, 2018 (indicating the general adjustment from the 2017 Atlanta, GA locality pay to the 2018 Atlanta, GA locality pay). Consequently, these corrections establish a valid overpayment for the period October 16, 2016 through September 1, 2018.

Upon notice and in the absence of a voluntary repayment agreement, the applicable statutes and regulations, allow the Department to administratively offset up to 15% of disposable pay in collection of a valid overpayment to an employee. Relief from the involuntary administrative offset is allowed upon the showing of extreme financial hardship. The Department regulations require a written explanation and financial statement, signed under oath or affirmation, to establish extreme financial hardship (34 C.F.R. §32.4(c)).

The Respondent alleged, in his initial request, that repayment of this debt would cause financial hardship to him and his family. The Respondent was given an opportunity to provide a written explanation and a financial statement to support his contention. The Respondent failed to provide any further explanation and provided no financial statement, despite given the clear opportunity to do so. Consequently, the Respondent has failed to establish administrative offset at the rate of 15% of disposable pay will result in extreme financial hardship.

V. Findings of Fact

1. At all times relevant to this matter, the Respondent was a contract specialist with the U.S. Department of Education, redacted. At all times relevant to this matter, the Respondent

[24] This is the Department's contention that is not denied by the Respondent.
[25] This contention is implied by the language included in the rationale of the June 23, 2017, Employee Agreement for Voluntary Temporary Change in Duty Station.

was a full-time employee, paid on the General Schedule (GS), grade 14, step 10.

2. The Respondent had a telework agreement that identified his telework duty stations as a residence in redacted, Georgia and a residence in redacted, Georgia. The telework agreement was created by the Respondent on June 16, 2016, modified by the Respondent on August 16, 2018, and approved on August 16, 2018. Other information related to the specifics of the telework schedule is not indicated on the submitted document.
3. Prior to October 16, 2016, the Respondent's duty station was Washington, DC.
4. A personnel action (SF-50) with an effective date of October 16, 2019, established that the Respondent's duty station was reassigned to Atlanta, GA. That same SF-50 established the Respondent's adjusted basic pay was changed from $141,555 (the 2016 locality pay for Washington, DC) to $135,656 (the 2016 locality pay for Atlanta, GA).
5. Consistent with that personnel action, the Respondent was paid the 2016 locality pay for Atlanta, GA for pay periods 23 of 2016 (October 16 to 29, 2016) through 2 of 2017 (December 25, 2016 to January 7, 2017).
6. Beginning with pay period 3 of 2017 (January 8 to 21, 2017) and continuing through pay period 6 of 2017 (February 19, 2017 to March 4, 2017), the Respondent was paid at the 2017 locality pay for Atlanta, GA.
7. In pay period 7 of 2017 (March 5 to 18, 2017), the Respondent was paid at the 2017 locality pay for Washington, DC. Neither the Respondent nor the Department submitted evidence that a personnel action was processed to effectuate this change.
8. In pay period 8 of 2017 (March 19, 2017 to April 1, 2017), the Respondent was paid at the 2017 locality pay for Washington, DC and he was paid an additional gross pay of $2,481.60. This additional gross pay was re-compensation (retroactive pay) that is equivalent to the pay the Respondent would have received if he had been paid the locality rates for Washington, DC during pay periods 23 of 2016 through 6 of 2017. Notably, neither the Agency nor the Respondent provided evidence of an SF-50 that would justify this change in locality pay from Atlanta, GA to Washington, DC.
9. Thereafter, the Respondent was paid the applicable locality pay for Washington, DC beginning pay period 9 of 2017 (April 2 to 15, 2017) through 19 of 2018 (August 19, 2018 to September 1, 2018).
10. On June 23, 2017, the Respondent signed an "Employee Agreement for Voluntary Temporary Change in Duty Station." The agreement shows the Respondent formally requested that he **continue** (*emphasis added*) to work at his "current Temporary duty station, located in Atlanta, Georgia from 20 June 2017 to 15 January 2018." This agreement established the Respondent made the request so he could continue to reside at his elderly mother's home in redacted, GA and the "continual change in duty station to Atlanta" will allow him to work with FSA from the Atlanta, GA FSA Office.
11. On September 10, 2018, two SF-50s were approved, and both were identified as corrections. One has an effective date of October 16, 2016 and establishes the Respondent's adjusted basic pay was changed from $144,555 (the 2016 locality pay for Washington, DC) to $135,656 (the 2016 locality pay for Atlanta, GA). The second has an effective date of January 7, 2018 and establishes the Respondent's adjusted basic pay was changed from $138,296 (the 2017 locality pay for Atlanta, GA) to $140,756 (the 2018 locality pay for Atlanta, GA).
12. By letter dated September 24, 2018, the Agency's payroll agent, The United States Department of the Interior, Interior Business Center, issued a debt letter to the

Respondent. An overpayment in the amount of $13,789.86 was established following review of the Respondent's record following a correction to a personnel action for pay period 23 of 2016 through 19 of 2018 (October 16, 2016 to September 1, 2018). The debt letter establishes the Agency was able to recover certain payments that had been made for state withholding, Medicare, Old-Age Survivors, and Disability Insurance, retirement, Thrift Savings Plan, Federal Employee's Group Life Insurance - Regular, and Roth Savings Plan in the amount of $1,439.21. Therefore, the debt letter informed the Respondent the debt he owed was $12,350.65.

13. The Respondent timely filed an appeal of this overpayment on November 14, 2018.
14. The debt as indicated is a valid debt that the Respondent must repay.

VI. Conclusion and Order

Based on the foregoing findings of fact and conclusions of law, it is **HEREBY ORDERED:**

1. The Respondent shall pay to the U.S. Department of Education, in a manner as required by law, the sum of $12,350.65;

2. The Respondent shall have fifteen (15) days from receipt of this decision to complete and submit a Payment Agreement Form consistent with the instructions in the September 24, 2018 debt letter.[26] The signed form shall be submitted to the to the designated Payroll Operations Division, indicating a voluntary onetime payment agreement (by check or money order) or authorizing biweekly payroll deduction in a specific dollar amount which is less than, equal to, or greater than 15% of disposable income, and which will be deducted until the debt is fully paid;

3. If the Respondent fails to timely submit a signed voluntary payment agreement pursuant to this decision, which is acceptable to the Department, the Department is authorized to collect through payroll deduction an amount equal to 15% of disposable income, until the debt is fully paid.[27]

Dated: November 4, 2019

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Angela J. Miranda
Administrative Law Judge

[26] For the convenience of the Respondent, a copy of the Agency's Payment Agreement form included with the September 24, 2018 debt letter is forwarded with this decision.
[27] Collection under this paragraph is stayed, pursuant to the Order Governing Proceeding, dated November 4, 2019, issued under Docket Number 18-63-WA.