



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF HEARINGS AND APPEALS
OFFICE OF ADMINISTRATIVE LAW JUDGES
400 MARYLAND AVENUE, S.W.
WASHINGTON, D.C. 20202
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In the Matter of

1963,

Respondent.

Docket No. 19-63-OF

Overpayment/Pre-offset Hearing

Appearances: **redacted**, Respondent, pro se.

Tracey Sasser, Office of the General Counsel, U.S. Department of Education¹

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 By letter dated August 26, 2019, the Department of Interior, Interior Business Center, the payroll agent for the Department of Education, issued a letter, hereinafter the debt letter, to

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 re delegated 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 eliminated (*See, https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/omb/foia/gc_dec17.pdf*).

the Respondent (OES Document 3). The debt letter indicated a debt of \$6,614.54 was identified by the Department of Education (Department or Agency) as a result of an adjustment initiated by the Department for pay periods 13 and 14 of 2019, i.e. June 9 to 22, 2019 and June 23, 2019 to July 6, 2019. The debt letter indicates the total gross pay adjustment for these pay periods was \$10,780.80, but the Department was able to recover payments for Federal and State withholding, Medicare, OASDI, Retirement, TSP, and FEGLI, thereby reducing the net to be paid by the Respondent.

On September 10, 2019, the Respondent filed a request disputing the claim of overpayment and requesting a waiver of repayment (OES Document 1). The Respondent stated that until on or about July 21, 2019, he served as a General Attorney in the Department's Office of General Counsel. The Respondent argued he had no knowledge of an overpayment and payroll records do not support the claim of an overpayment. He argued DOI's action yielded a mistaken result and he sought prompt correction. The Respondent further argues the attachment included with the debt letter is not clear and does not specify why he was alleged to have been overpaid.

The Respondent included evidence to support his claim disputing the alleged debt. Evidence included earnings and leave statements from pay periods 11, 13, and 14 of 2019, and copies of emails trails from June 12 to 18, 2019 and September 4 to 5, 2019 (OES Documents 2,4, and 5).

Given the general inadequacy of the notices of overpayment issued by the Department or its payroll agent, the Respondent's request was accepted as timely and as a request for a waiver and a pre-offset hearing.³

Thereafter, on September 12, 2019, I issued a scheduling order (Order Governing Proceeding) requiring that the Respondent file a Declaration in the form an affidavit and to advise the OHA if the Respondent consented to the voluntary use of OES (OES Document 6). I also required the Department to file a Notice of Appearance on or before September 30, 2019 and 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 on or before October 18, 2019 (*Id.*). Upon the Department's failure to make the required filings, I issued an Order to Show Cause on October 24, 2019 (OES Document 8). On October 29, 2019, in response to the Order to Show Cause, the Department filed a Notice of Appearance, Response to Order to Show Cause, and Motion to Dismiss (OES Document 9).

Within the Motion to Dismiss, the Department requests that the information submitted be accepted as the Agency's brief (*Id.*). The Department includes Exhibit ED-1, which is an authorization to cancel the request for bill of collection in relation to Debt ID Q2391637791. This authorization is signed by requestor, Ivan Ruiz, on August 29, 2019, a supervisor, signature unreadable, on September 12, 2019, and an indication it was cancelled by **redacted**, the same contact indicated on the debt letter, on September 20, 2019. Notably, this authorization does not indicate that the Respondent received any notice of this action except for the service of this filing by the Department within the context of this pending matter. Remarkably, this authorization to

³ A Waiver action was docketed under 19-64-WA, and the Waiver Official assigned is Daniel McGinn-Shapiro. On September 10, 2019, the Waiver Official issued an Order staying commencement of collection and interest accruals in this alleged overpayment.

cancel a debt provides no information related to the “recoverables” as indicated in the original debt letter.⁴ Also, notable some of the “facts” recited by the Department in its Motion to Dismiss are inconsistent with the other evidence submitted by the Respondent.⁵

II. Issue

Whether the Department has established the debt under Debt ID Q2391637791 as a valid debt.

III. Legal Framework/Applicable Laws and Regulations

A. Debt Collection and Administrative Offset

The Federal Claims Collection Act of 1966 (Pub. L. 89-905, July 19, 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 attempt to 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 the Handbook for Processing Salary Overpayments (ACS-OM-04), hereinafter referred to as the Handbook.

A. Notice Requirements

⁴ The alleged debt charged to the Respondent was reduced by items termed “recoverables.” These items include payments made on behalf of the Respondent to other entities, including Federal Withholding, State Withholding, Medicare, OASDI, Retirement, TSP, and FEGLI. These “recoverables” totaled \$ 4,165.46.

⁵ There is no evidence that the Respondent ever intended to separate from the Department on June 12, 2019, yet the Department asserts that date as a date of separation, even though that date occurs mid-week in the first week of pay period 13 of 2019. The Department then calculates an overpayment for that full pay period, despite its own presentation that the Respondent was employed by the Department for a portion of pay period 13 of 2019.

⁶ This section was subsequently amended by the Debt Collection Improvement of 1996 and the General Accounting Office 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.

The initiating Federal statute for collection of a claim related to an overpayment to a Federal 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, the right to request a waiver (if waiver of repayment is authorized by law), 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 and imposes additional requirements upon the Department. One such requirement is that the notice of any debt be served by certified mail.

B. 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 the Department or under the supervision or control of the Secretary (34 C.F.R. 32.5(d)). In about

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)).

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 alleged 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 governs appellate review of district court findings.⁹ Neither the Department's regulations nor policy provide any rationale or explanation for requiring a burden of proof different from and contrary to the authorizing statute.

C. Employment and Personnel Management

An executive agency has the general authority to employ individuals consistent with congressional appropriations (5 U.S.C. § 3101). The appointing authority in each executive agency is responsible for notifying the Office of Personnel Management (OPM) of various personnel actions in the competitive service, including, appointment, resignation, and transfer (5 U.S.C. § 2951). The OPM extended this reporting requirement to all civilian employees, whether competitive, excepted, or Senior Executive services (5 C.F.R. § 9.2).

The OPM provides guides for processing personnel actions (<https://www.opm.gov/policy-data-oversight/data-analysis-documentation/personnel-documentation/#url=Processing-Personnel-Actions>) and each executive agency is responsible for preparing and processing those actions consistent with the guide.

IV. Analysis

A. Respondent's Argument

The Respondent reported that he was an employee of the Department until on or about July 21, 2019. In support of that assertion, the Respondent included several emails between a representative of the General Accountability Office (GAO) and the Department, which were also copied to the Respondent. The Respondent argues the attachment to the debt letter fails to provide him with any information as to why the Department has assessed an overpayment for pay periods 13 and 14 when he worked for the Department through the end of pay period 15 of

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

2019. Notably, simultaneously with the filing of his request for a hearing, the Respondent contacted the same employee at the Department who had received and agreed to a release date from the Department of July 21, 2019, with a report date to GAO as of July 22, 2019.

B. Department's Argument

As noted in the Jurisdiction and Procedural History section of this decision, the Department failed to file an agency brief and supporting evidence consistent with the Order Governing Proceeding. Instead, after the issuance of an Order to Show Cause, the Department filed a Motion to Dismiss and one exhibit in support of the Motion.

The Department argues the “alleged overpayment” resulted from a payroll miscalculation, using a separation date of June 12, 2019 instead of the actual separation date of July 20, 2019.¹⁰ The Department asserts the overpayment was generated in pay periods 13 and 14 “and recalculated in pay period 17 of 2019” (August 4 to 17, 2019). The Department submitted one exhibit in support of this argument. That exhibit is an Authorization to Cancel Request for Bill of Collection which was requested on August 29, 2019 and supposedly cancelled, more than three weeks later, on September 20, 2019.

The cancellation of the request for bill of collection includes no evidence that the Respondent was advised on or about September 20, 2019 that the cancellation was processed. Furthermore, the Department has provided no evidence that the “recoverables” which the Department indicated were recovered from various entities and reduced the gross debt alleged against the Respondent were ever properly re-credited to the accounts related to the Respondent's employment.¹¹

C. Analysis of the Evidence

As submitted by the Respondent, the evidence shows that on June 12, 2019, the GAO requested that the Respondent be released from the Department's employ as of July 6, 2019, which is the end of pay period 14 of 2019 (OES Document 4). The GAO requested that the Department provide the completed SF-75 (Request for Preliminary Employment Data) no later than June 17, 2019. The Department was advised a failure to meet that deadline would result in a later report date at the GAO.

On June 18, 2019, the GAO emailed the Department, again providing a copy to the Respondent, confirming the Department failed to timely provide the SF-75 as previously requested, and consequently the requested release date was moved to July 21, 2019 with a report date of July 22, 2019. The GAO again notified the Department that if the SF-75 was not received on or before July 5, 2019, the release date will have to be adjusted again. In an email on July 18, 2019, the Department provided the requested SF-75 to the GAO and advised the release date of July

¹⁰ Notably, the Department has failed to provide any evidence that a personnel action was processed with a separation date of June 12, 2019 and did not provide any evidence that a corrected personnel action was processed.

¹¹ Errors such as the one the Department has acknowledged in this case have a ripple effect that does not seem to be appreciated by the Department. The simple correction provided here by evidence of the cancelling the alleged overpayment provides no assurance to the Respondent the other pay-related payments have been properly adjusted after allegedly recovered.

21, 2019 was approved. Later that same date, the Department acknowledged the updated release date of July 21, 2019.

While the Department's argument suggests the Department made an error, the Department has failed to provide any official personnel documents related to the Respondent's separation from the Department. Additionally, while the Department asserts it corrected its error, the only evidence provided is a statement suggesting the alleged debt has been cancelled. This statement is not notarized or submitted in the form of an affidavit. Without appropriate government records showing the error, which supposedly generated the alleged overpayment, the Department has failed to meet its burden of proving this alleged debt is valid. Furthermore, without providing the appropriate government records showing the error was corrected, the Department has failed to establish it made a correction.

The Department has an obligation to document personnel changes and report those changes to the OPM. That obligation requires that any personnel action be processed properly. When the Department fails to provide the required and appropriate proof to validate a claim of overpayment, the Respondent is entitled to a decision following issuance of the debt letter.

V. Findings of Fact

1. The Respondent was an employee of the U.S. Department of Education (Department) prior to July 21, 2019.
2. The Respondent obtained an offer of employment with the General Accountability Office (GAO) in June 2019.
3. The GAO requested an initial release date of July 6, 2019 on the condition that the Department provide a completed SF-75 no later than June 17, 2019.
4. The Department failed to meet the June 17, 2019 deadline.
5. The GAO again requested a completed SF-75 no later than July 5, 2019, identifying a release date of July 21, 2019 and report date of July 22, 2019.
6. The Department, as evidenced in multiple email communications with the GAO, eventually acknowledged the release date of July 21, 2019 and returned the completed SF-75 on June 18, 2019.
7. The Department's payroll agent, the Department of Interior, Interior Business Center, issued a debt letter to the Respondent which was dated August 26, 2019.
8. The debt letter fails to provide notice to the Respondent consistent with the authorizing statute, the Department's regulations, and the Department policy.
9. The Respondent timely filed an appeal of this alleged overpayment on September 10, 2019.
10. The Department has failed to provide government records in the form of personnel actions (SF-50) that establish the debt of \$6,614.54 alleged in the August 26, 2019 debt letter. Therefore, the Department has failed to establish the validity of this alleged debt.
11. The Department has failed to provide documentation that monies reportedly recovered in advance of issuing the August 26, 2019 debt letter were properly reimbursed to the appropriate entities on behalf of the Respondent.

VI. Conclusion and Order

While the Department is entitled to seek recovery of an established debt, the Department bears the burden of proving the alleged debt existed and the amount of the debt. In failing to establish the alleged debt is valid, the Department is prohibited from collecting any amount from the Respondent. Furthermore, the Department is responsible for making all payments to the appropriate sources that were identified as “recoverables” in the debt letter dated August 26, 2019.

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

1. The Department has failed to meet its burden of proof to establish the debt identified in the August 26, 2019 debt letter is a valid debt or claim against the Respondent.
2. On or before February 6, 2020, the Department shall review all payroll records related to this alleged debt and cancellation of debt to ensure all other payments, i.e. “recoverables” were properly made on behalf of the Respondent for pay period 13 and 14 of 2019.
3. Having failed to meet its burden, the Department may not require repayment of this alleged debt.
4. The Department shall refrain from any and all collections attempts for these alleged debts, now or in the future.
5. This decision constitutes a final agency decision.

Dated: January 28, 2020

Angela J. Miranda
Administrative Law Judge

SERVICE

A copy of the attached document was sent as indicated:

redacted

By automatic email notification generated by OES: **redacted**

By: U.S. Mail, first class, postage paid.

Tracey Sasser

Office of the General Counsel

U.S. Department of Education

400 Maryland Ave, S.W.

Room 6E226

Washington, DC 20202

By automatic email notification generated by OES: Tracey.Sasser@ed.gov

By: U.S. Mail, first class, postage paid.

Courtesy copy to:

Department of Interior, Interior Business Center

Payroll Operations Division

ATTN: Debt Management Branch D-2640

P.O. Box 272030

Denver, CO 80227-9030

By: U.S. Mail, first class, postage paid.

Debt Management Coordinator

Human Resources Services

Office of Finance and Operations

U.S. Department of Education

400 Maryland Avenue, S.W.

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By: U.S. Mail, first class, postage paid.

Debt and Payment Management Group

Office of the Chief Financial Officer

U.S. Department of Education

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