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

1818,

Respondent.

Docket No. 18-18-OF

Overpayment/Pre-offset Hearing

Appearances: redacted, 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] The Respondent is a former employee of the Department of Education (Department),

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

having retired from the Department on September 30, 2017 (OES Document 1, p. 3).
On April 10, 2018, the Respondent filed a request for a waiver of overpayment and a pre-offset hearing (OES Document 1). While the request provided some background information about an overpayment and other documentation, it did not include a copy of any notice related to an overpayment.[3] 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.[4]

Upon receipt of the copy of the purported notice from the Department's payroll agent, it was determined that on November 6, 2017, the Department of Interior (DOI), Interior Business Center, issued a Bill of Collection for Debt ID 73110044670 to the Respondent (OES Document 21). That Bill of Collection, hereinafter the debt letter, advised the Respondent that she had received a Federal Salary payment in excess of the amount to which she was entitled (*Id.*). The debt letter further advised the Respondent the overpayment resulted from a time sheet correction that was processed for pay periods 18 of 2017 (August 6 to 19, 2017) and 19 of 2017 (August 20, 2017 to September 2, 2017). The amount of the overpayment was $118.02, but the net to be paid by the Respondent was $102.16 because the Department was able to recover payments to Medicare, OASDI, Roth savings plan, and Retirement payments (*Id.*). This debt letter included some general information in relation to debt collection, including some information for requesting a waiver (*Id.*). Lastly, the debt letter references the right to petition for a hearing, but the information provides no further clarification that such a hearing is available to challenge the validity of the debt, the amount of the alleged debt, or to establish extreme financial hardship to be relieved of involuntary collection by the Department in the absence of an acceptable voluntary repayment agreement (*Id.*).

Also, on November 6, 2017, the DOI sent a letter identified as a Bill for Collection, with the same debt identification number (OES Document 2). This letter informed the Respondent that the debt was transferred to the Department of Education for collection (*Id.*).[5]

Thereafter, on April 17, 2018, 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 3).

Following issuance of the April 17, 2018 Order Governing Proceeding and the issuance of an Amended Order Governing Proceeding on April 24, 2018, it was brought to the attention of this Tribunal that the Department had issued an additional debt notification to the Respondent.

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[3] Although employees appealing an overpayment are required to include a copy of the overpayment notice with the request, historically that has not always been done. In the past, as a matter of administrative efficiency, when a Respondent did not include a copy of the notice, OHA requested a copy of overpayment notices from the Department's payroll agent and that was done upon receipt of the request in this matter.
[4] In a separate action, the Respondent's request for a waiver is proceeding under Docket Number 18-17-WA and has been assigned to a Waiver Official. On April 17, 2018, an order was issued in that matter to stay collection of this debt that remains in effect until the hearing process is completed.
[5] While no explanation was provided, it is presumed this transfer was due to the issuance of the November 6, 2019 debt letter occurred after the Respondent's retirement date of September 30, 2019.

On April 3, 2018, the Department's Debt Management Coordinator issued a memorandum, hereinafter the debt memorandum, to the Respondent identifying a debt in the amount of $3,791.53, resulting from advanced sick leave balance of 116 hours at the time of the Respondent's retirement (OES Documents 5and 9). This debt memorandum advised the Respondent of the right to request a waiver as well as a hearing to challenge the existence or amount of the debt, or to establish extreme financial hardship that prevents "making payment in full within 30 days" (*Id.*).

On April 27, 2018, I issued a Second Amended Order Governing Proceeding (OES Document 6). This Order advised the parties that it is reasonable to hear the challenge to the validity of these debts in one proceeding. The Department was ordered to file a complete copy of the Notices provided to the Respondent along with **all** *(emphasis added)* Government records supporting the alleged debts along with its brief. This Order provided the Respondent an opportunity to submit a narrative or brief in response to the Department's brief.

II. Issue

Whether the Department has established the debts under Debt ID 73110044670 and the debt identified in the debt memorandum dated April 3, 2018, are valid debts.

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 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

[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.

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.

B. Notice Requirements

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.

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 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 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.

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.

[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)).

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

E. Accrual of Leave

A Federal employee accrues annual leave based on years of service (5 U.S.C. §6303). An employee with less than three years of services accrues one-half day each full biweekly pay period, an employee with three years but not more than 15 years of service accrues three-fourth day for each full biweekly pay period except the last full biweekly pay period in a year when one and one-fourth days of leave accrue, and an employee with 15 years of service or more accrues one full day for each full biweekly pay period (5 U.S.C. §6303(a)(1)-(3)). A Federal employee accrues one-half day sick leave for each full biweekly pay period (5 U.S.C. §6307(a)).

Non-pay status affects the accrual of annual and sick leave. If a full-time employee accumulates a total of 80 hours of non-pay status from the beginning of the leave year, neither annual nor sick leave will accrue in the pay-period when 80 hours of non-pay status occurs (5 C.F.R.§630.208). An employee earns leave on a pro rata basis for each fractional pay period when service is interrupted by a non-leave-earning period 95 C.F.R. §630.204).

F. Advancing Sick Leave/Advanced Sick Leave upon Separation from an Agency

The administration of sick leave for Federal employees is controlled by Federal statute and Federal regulations. In addition to the law and regulations, certain Federal employees may be subject to collective bargaining agreements negotiated with an executive agency that also address sick leave. An executive agency may implement policy regarding sick leave within the agency and lastly, the Office of Personnel Management provides additional direction guidance for executive agencies related to leave administration and the processing of certain personnel actions.

By Federal statute, an agency has the discretion to advance a maximum of 30 days (240 hours) of sick leave with pay if an employee has a serious disability or ailment (5 U.S.C. §6307(d)). The applicable regulation identifies specific circumstances when exigencies of the situation allow the agency to advance sick leave, including when an employee is incapacitated for the performance of his or her duties by physical or mental illness, injury, pregnancy, or childbirth, has a serious health condition, or has been exposed to a communicable disease (5 C.F.R. § 630.402(a)(1)(i)-(iii)).

Except in limited circumstances, a Federal employee who has been advanced leave is indebted to the agency (and the United States) for unearned leave when that employee is separated from service (5 C.F.R. §630.209). Upon separation the agency shall require the employee to refund the amount previously paid for unearned leave or shall deduct that amount from any pay that is due[10] (*Id.*).

The Office of Personnel Management (OPM) provides a variety of fact sheets on issues of concern to Federal employees. One such fact sheet explains advanced sick leave (https://www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/advanced-sick-leave/). Therein, OPM explains that advanced sick leave may be liquidated

[10] This requirement does not apply if the separation is due to the death of an employee, or the employee retires for disability or resigns or is separated because of disability.

by subsequently earned sick leave, by a charge against annual leave, or by refund upon separation, though the specifics of liquidation by subsequently earned sick leave are not enumerated in this fact sheet.

During the relevant time period, the Respondent was an employee covered by the Collective Bargaining Agreement (CBA) between the Department of Education and the National Council of Department of Education Locals American Federation of Government Employees Council 252. The applicable CBA was ratified December 17, 2013 and was in effect until about March 11, 2018. Article 39 of this CBA addressed Leave Policy and Section 39.06 addressed Advanced Sick and Annual Leave. The contract provisions were consistent with the applicable Federal law and regulations as well as Department policy. The Department policy in place at the relevant time period was Human Capital Policy (HCP) 630-1. Notably, the applicable CBA and the Department policy are silent on how advanced leave will be liquidated upon return to work and how deductions will be made upon separation.

G. Voluntary Leave Transfer Program

Each Federal agency is required to administer a Voluntary Leave Transfer Program (VLTP). The VLTP allows a covered Federal employee to donate annual leave directly to another employee who has a personal or family medical emergency and who has exhausted all available paid leave (5 U.S.C.§§ 6331 – 6340). The administration of a VLTP is regulated and requires a leave recipient to apply for participation, be approved for participation, specifies the transfer of annual leave, the accrual of annual and sick leave, and how transferred annual leave is used (5 C.F.R. §§ 630.901-603.913). The regulations allow transfer of leave to be retroactively substituted for a period of LWOP or used to liquidate an indebtedness for advanced annual or sick leave under certain circumstances (5 C.F.R. § 630.906(e)). The recipient employee is required to use any accrued annual or sick leave prior to using transferred annual leave (5 C.F.R. § 630.909(b)). With some exception, an employee who is in shared leave status accrues annual and sick leave in the same manner as employee in paid leave status (5 C.F.R. § 630.907(a)). The Department policy related to VLTP follows the statute and regulations (HCP 630-10).

IV. Analysis

A. Respondent's Argument

The Respondent appealed, arguing undue hardship to repay the alleged debt and disputing the amount that was owed (OES document 1). She explained that medical "complications" were aggravated by work related stress and her doctor "removed her from work." The Respondent explained she requested and was granted advanced sick leave and she also applied for participation in the Voluntary Leave Bank Program (VLBP)[11]. Her request indicates her application to the VLBP was approved in 2016.[12] She relies on her recitation of a portion of the

[11] The VLBP is different from VLTP. The VLBP, authorized under 5 U.S.C. §§6361-6373, is a leave banking program where employees of an agency may contribute accrued leave to a leave bank operated by the employing agency. The agency is required to establish a Leave Bank Board to administer the leave bank and employees who have contributed the minimum number of hours required by statute, may apply for distribution of leave bank hours.
[12] In her request, the Respondent may have confused the VLBP and the VLTP. The record includes no evidence that the Respondent was a participant in the VLBP but there is some evidence that indicates she applied for and qualified

Department's policy for the VLBP to establish that she had been entitled to earn annual and sick leave at the same rates as if she were in paid leave status while in a shared leave status. The Respondent further reports she twice requested a reasonable accommodation but when the requests were denied she had no other recourse except to retire, which she did on September 30, 2017. Lastly, the Respondent indicates she has "very little retirement income" and she is "paying out" more than she receives. (OES Document 1).

B. Department's Argument

The Department asserts in its brief that both debts are valid, and the Department is correct in pursuing collection (OES Document 8). The Department indicates the Respondent was employed by the Department as a Loan Analyst, GS-1102-11, step 10, a bargaining unit position, until she retired on September 30, 2017.

In its brief, the Department recites that the Respondent was advanced eight (8) hours of sick leave on May 18, 2015 and she was advanced 92 hours of sick leave on May 22, 2015. In pay period 24 of 2016, the Respondent requested and was granted 24 hours advanced sick leave. Without specifying a date or pay period, the Department then recounts a request for an additional 116 hours of advanced sick leave were approved. The Department reports the advances were in pay periods 13 of 2015 through 15 of 2015 (May 31, 2015 to July 11, 2015) and again in pay period 24 of 2016 (October 30, 2016 to November 12, 2016), which were advanced at the pay rate of $38.12 (for 92 hours) and $38.59 (for 24 hours), respectively. Lastly, the Department narrates the Respondent was erroneously overpaid for two (2) hours annual leave in pay period 18 of 2017 (August 6 to19, 2019) and one (1) hour of annual leave in pay period 19 of 2017 (August 20, 2017 to September 2, 2017), but the errors were corrected in pay period 23 of 2017 (October 15 to 28, 2017), a period of time after the Respondent had separated by voluntary retirement.

In its brief, the Department declares that management advanced the leave in good faith, believing the Respondent would repay the advanced leave, but this did not occur prior to the Respondent's retirement on September 30, 2017 and the debt was identified upon an audit of the Respondent's sick and annual leave balances as a result of the Respondent's retirement application.[13] The Department recites that Respondent had a balance of seven (7) hours of annual leave at her retirement and that was applied to offset her sick leave balance and the 2017 debt was the result of an erroneous allowance of three (3) hours of annual leave.

Based on all these recitations, the Department requested that the Respondent be ordered to pay both debts, totaling $3,893.69, along with any interest.[14]

Except for limited WebTA or payroll records that are discussed later in this decision, neither the

for the VLTP in about July 2015.

[13] The Department provides no explanation why the Department took five (5) months after the Respondent's retirement to complete the audit or why it took approximately six (6) additional weeks to prepare and issue the debt memorandum.

[14] The Department also requested that the Tribunal "address whether the Respondent has established extreme financial hardship" to be relieved of collection of these debts until satisfied in full, however it is aright that the Respondent may assert.

Department nor the Respondent submitted official contemporaneous pay records, leave records, or records associated with the Respondent's participation in the VLTP or VLBP. In support of its narrative, the Department relies on the "notices"[15] that were sent to the Respondent as the evidence of the debt along with numerous email communications and some summary type documents included with the debt memorandum.

One summary document included with the debt memorandum was a Request for a Bill for Collection, dated February 20, 2018, prepared by redacted, identified as the Payroll Initiator (OES Document 4, p. 4).[16] This document mirrors the recitations in the Department's brief but does not include any actual time records or an affirmation/declaration by the Payroll Initiator as to which payroll records were reviewed to compile this Request for Bill for Collection. Also included with the debt memorandum was a Record of Leave Data, dated February 22, 2018, prepared by redacted (no identification of position title) (*Id.*at pp.5-6). This document indicates the Respondent's date of separation was September 30, 2017 by voluntary retirement with a carryover sick leave balance of negative 116 hours at the salary rate per hour of $39.34. In item 24 of the Record of Leave Data, which allows remarks to be entered, it is indicated that a bill of collection was issued for 116 hours of advanced sick leave and 7 hours of annual leave lump sum was applied to bill of collection (*Id.*). Again, this document mirrors recitations in the Department's brief but does not include any actual time records or an affirmation/declaration by Ms. redacted as to which payroll records were reviewed to compile this Record of Leave Data.

The "notices" sent by the Department's payroll agent (the debt letter dated November 6, 2017) and the memorandum issued by the Department's Debt Management Coordinator (dated April 3, 2018) are deficient in relation to the applicable Federal statue, the Department's regulations, and the Department policy. While the requirements of the Federal statute that notices be in writing and identify the type and amount of the claim are met with each of these documents, they both lack in providing a clear explanation of the debtor's rights, which is essential to due process.

Neither of these "notices" provide an adequate explanation of the right to a hearing before administrative offset is commenced. The debt letter from the Department's payroll agent mentions the right to request a hearing but fails to explain a hearing may be requested to challenge the debt, to challenge the amount of the alleged debt, or to obtain relief from an involuntary collection schedule. The debt memorandum from the Department's Debt Management Coordinator advises the Respondent that a waiver may be requested if the Respondent had no reason to recognize this as an erroneous payment and that collection would be against equity and good conscience and further advises the Respondent that a hearing may be requested to contest the existence or amount of the debt. Lastly, the debt memorandum advises the Respondent that a hearing may be requested if making "payment in full within 30 days will cause extreme financial hardship" however this statement as related to extreme financial hardship is not in compliance with the Federal statute, Department regulations, or Department policy. Neither of these "notices" follow the Department's regulations that require advising how interest is charged and administrative costs and penalties will be assessed, that the Department

[15] As discussed later in this decision, the "notices" fall far below the statutory, regulatory, and Department policy requirements necessary to provide adequate and proper notice.
[16] This Request for Bill for Collection is also signed by an Approving Payroll Work Leader and an Approving Payroll Supervisor, both signatures are illegible.

has the right to involuntarily collect if the debt is not paid and the debtor has not entered into a written repayment agreement, or specifically how that collection will be implemented.

The Federal statue and the Department regulations require that government records supporting the determination that a debt is owed be included with the notice or alternatively advise the Respondent how those records may be obtained. Both the debt letter and debt memorandum identify the circumstances resulting in the debt determination but neither of these notices provide adequate government records that support the determined debts, nor do they provide information on how to obtain copies of the government records.

These "notices" have other deficiencies that do not require further discussion herein.[17] These deficiencies establish the Department failed to provide adequate and proper notice. While failure to provide proper notice operates as a toll to the appeal period, once an appeal is filed, the evidence of failure to provide proper notice does not render the alleged debt invalid. A fair and impartial decision on the merits of the appeal is required. Consequently, this analysis must evaluate the evidence of record and arguments presented to render a decision on the merits.

The Department's evidence includes emails dating to May 2012 (OES Document 14). This evidence discusses the advancement of sick leave to the Respondent in or about May 2012. This evidence is not relevant to either of the alleged overpayments and will not be further discussed in this decision.

C. Analysis of Evidence Related to the April 3, 2018 Debt Memorandum

The Department provides evidence of emails exchanged in May 2015 (OES Documents 11, 12, 19, and 20). These emails generally indicate the Respondent requested sick leave beyond what had been accrued by the Respondent. These emails indicate the Respondent was eligible for an advance of sick leave and provided acceptable documentation from a treating source in support of her request for an advance of sick leave (*Id.* and OES Document 10).

On May 18, 2015, numerous emails were exchanged between the Respondent, the Respondent's supervisor, and other employees or contractors at the Department. The emails reveal the Respondent requested advanced sick leave by submitting a leave request for absences on or about May 15, 2015 (pay period 11 of 2015) and May 18, 2015 (pay period 12 of 2015) (OES Document 20, pp. 1-3). One of the emails exchanged on this date (at 4:17pm) includes a barely readable copy and scan of a submitted leave request summary from WebTA and the message of the email indicates the leave request for these days needs to be deleted and resubmitted due to use of an incorrect leave code.[18] The total hours requested is 72, but the evidence as submitted makes it impossible to identify the dates of the leave that was requested. While this is evidence

[17] For example, the debt memorandum advises the Respondent that a request for a waiver or hearing may be submitted to the U.S. Department of Education, Office of Hearings and Appeals, but provides an address and telephone number that has not been current since about December 2015. This memorandum provides a telephone number for an "OHR Waiver Official" which is not the main number to the Office of Hearings and Appeals. Also, Department policy requires that these notices be mailed by certified mail, return receipt and neither of these notices were mailed in that manner.

[18] The request used code 30F, which is the code for sick leave advance of leave share or leave bank and the Respondent was instructed that the proper code should have been 030, which is the code for sick leave.

the Respondent intended to request advance sick leave in the amount of 72 hours for some period of time probably in or around May 2015, there is no other documentation of approved leave request and no documentation of earnings and leave records that show the request was granted and charged to the Respondent.

In an email dated June 8, 2015, the Respondent questions her supervisor about a report from payroll that there was no timesheet submitted and why she did not get paid for the last pay period (OES Document 16).[19] In response to that inquiry, the supervisor provided a screen shot of a partial record in WebTA showing that the timesheet was validated by the timekeeper, certified by the supervisor, pre-processed and processed on June 1, 2015 and that the supervisor made an inquiry if the expected pay would be delivered on the scheduled pay date (*Id.*) In response to the supervisor's inquiry, it was explained that the advanced leave that had been requested was only included on the leave slips and not included on the timesheet (OES Document 17). The supervisor was instructed that a correction needs to be processed requesting supplemental pay for the missing hours[20] (*Id.*).

In another string of emails dated August 5, 2015 to August 6, 2015, an inquiry is made for assistance in reconciling the Respondent's WebTA records, which reportedly show "72 hours use of VLTP" in pay period 16 of 2015 (July 12 to 25, 2015) against the earnings and leave statement for that same pay period (OES Document 18). A screen shot of the Federal Personnel/Payroll System (FPPS) for pay period 16 of 2015 is embedded in that email string. That screen shot shows the Respondent:

- Carried over 41 hours and 15 minutes of annual leave from the prior leave year, accrued 104 hours of annual leave to date, and used 145 hours and 15 minutes to date.
- Accrued 52 hours sick leave to date, used 288 hours sick leave to date, and had an advance balance of 236 hours.
- Was approved for 16 hours of leave without pay in this pay period and was approved for 41 hours and 30 minutes of leave without pay to date.

This evidence, from an official pay roll record, established that at the end of pay period 16 of 2015, i.e. July 25, 2015, the Respondent had received advanced sick leave in the amount of 236 hours. However, the record is devoid of any other official pay roll records (whether from FPPS or an earnings and leave statement) that establish the Respondent was carrying a balance of advanced sick leave at any of the critical points necessary to establish the validity of the debt alleged in the debt memorandum, i.e. pay period 26 of 2015, pay period 26 of 2016, or pay period 21 of 2017 (ending on September 30, 2017, the date of the Respondent's retirement).

Except for notations in the summary documents Request for Bill for Collection and Record of Leave Data (OES Documents 5 and 9, pp. 4-5), the Department offers no evidence, in the form of emails or official pay roll records, that 24 hours of sick leave were advanced to the Respondent in pay period 24 of 2016 (October 30, 2016 to November 12, 2016).

[19] While these emails lack specific reference to the pay period in question, the pay date for pay period 12 of 2015 was June 9, 2015.

[20] While "missing hours" was not clearly defined it may be a reference to advanced leave that was requested and approved but not included as payable leave in the processed pay period.

Notably, there were 57 pay periods between July 26, 2015 and September 30, 2017, when the Respondent voluntarily retired. During that time period, the Respondent had the potential to accrued 228 hours of sick leave and 456 hours of annual leave. Given that advanced sick leave may be liquidated by subsequently earned sick leave, by a charge against annual leave, or by refund upon separation, it is obvious that the Department had the opportunity to, and did in fact, liquidate some of the advanced leave during the period July 26, 2015 to September 30, 2017. The Department in its brief alleges advancement of sick leave up to 240, but then concludes at retirement, the Respondent has a sick leave advance of 116 hours. Nonetheless, the Department fails to provide official payroll records supporting its narrative argued in its brief. It is also obvious that the Department should have official payroll records to support the alleged advanced balance and alleged debt that would prove that the other summary documents submitted are properly prepared and calculated.[21] The Department provides no rationale for failure to submit official payroll records and instead offers information that the Respondent's official personnel file was transferred to the Records Center following her retirement and therefore the Department is relying only on the summary documents generated "via the leave audit performed on retirees." As indicated previously those summary documents are not supported by any affirmation that identifies what official government records were reviewed in the production of those summary documents. Consequently, while the Department asserts the Respondent had a balance of advanced sick leave at retirement resulting in an alleged debt, the Department has failed to prove that the balance of advanced sick leave was 116 hours at her retirement on September 30, 2017 and that the debt owed is $3,791.53.

The Respondent's argument that she was entitled to continue to accrue leave because she was approved for participation in the VLBP does not need further evaluation, because the Department has failed to properly establish the amount of the hours that were advanced to the Respondent prior to the Respondent's retirement and not liquidated at the time of the Respondent's retirement.

D. Analysis Related to the November 6, 2017 Debt Letter

This debt letter asserts an overpayment of $102.16, after applicable "recoverables." The debt letter indicates this overpayment was assessed after a time sheet correction was processed. An attachment included with this debt letter asserts annual leave of two (2) hours was used in pay period 18 of 2017 and one (1) hour of annual leave was used in pay period 19 of 2017, but was not processed until pay period 23 of 2017, a pay period occurring two full pay periods after the Respondent's retirement.

The Department asserts this is a valid debt by restating this information in its brief. The record includes no payroll or time and attendance records for pay periods 18 and 19 of 2017. The record does not include any evidence of leave requests submitted or approved for these absences. The Department does not submit any evidence that corrected timecards were processed. The mere assertion by the Department without evidence to support the assertion does not establish this alleged debt to be valid.

[21] Official payroll records that would establish the alleged advance balances and alleged overpayment include earnings and leave statements or records from the Federal Personnel/Payroll System for pay periods 26 of 2015, 24 of 2016, 26 of 2016, and 21 of 2017.

V. Findings of Fact

1. At all times relevant to the periods when the alleged overpayments were incurred, the Respondent was an employee of the Department of Education.
2. On May 14, 2015, a medical doctor completed a verification of treatment on behalf of the Respondent and certified the Respondent was unable to work due to the severity of her symptoms (OES Document 10).
3. On or about May 15, 2015, the Respondent requested sick leave by submitting a leave request in WebTA. A series of emails on that date show there were multiple problems with the request, one being that the Respondent's request exceeded the number of hours of sick leave that the Respondent had accrued and were available at the time of the request. (OES Document 11)
4. On May 18, 2015, the Respondent's supervisor had been directed to grant the Respondent's request for advanced sick leave. (OES Document 11)
5. Also, on May 18, 2015, the Respondent's supervisor was informed the leave slip was submitted with an incorrect code of 03F and an imprint of the requested leave slip, showing 72 hours of sick leave was requested, was copied into the email to the supervisor. (OES Document 20)
6. On or about May 19, 2015, the Respondent resubmitted a leave request that followed the directions that were given (*Id.*).
7. On May 26, 2015, the Respondent's supervisor was directed to approve the Respondent's request for advanced sick leave and was advised with that approval, the Respondent will exhaust the amount of sick leave that may be advanced. (OES Document 12)
8. In an email dated July 27, 2015, the Respondent was again informed her July 13, 2015 application to participate in the "VLT Program" was accepted. (OES Document 18)
9. A screen shot from the Federal Personnel/Payroll System for processing pay period 16 of 2015 was copied into an email dated August 6, 2015. This official payroll record shows that as of the end of that pay period, i.e. July 25, 2015, 236 hours of sick leave was advanced to the Respondent. (*Id.*).
10. The Respondent voluntarily separated by retirement from the Department on September 30, 2017. (OES Documents 1 and 9, p.5).
11. On November 6, 2017, the Department's payroll agent, notified the Respondent that an overpayment of $102.16 was assessed following the processing of timecard corrections for pay periods 18 and 19 of 2017. (OES Document 21) This debt letter fails to meet the Department's regulatory and policy notice requirements. Also, on November 6, 2017, the Department's payroll agent sent notification that this debt was being transferred to the Department of Education (OES Document 2).
12. On April 3, 2018, the Department's Debt Management Coordinator issued a memorandum indicating a debt of $3,791.53 was identified due to advanced sick leave balance of 116 hours (OES Document 9). This debt memorandum fails to meet the Department's regulatory and policy notice requirements.
13. The Respondent filed an appeal of an overpayment with the Office of Hearings and Appeals on April 10, 2018 (OES Document 1). The Respondent's appeal is deemed timely filed as the Department has failed to provide notice that is consistent with the Department's own regulatory and policy requirements.

14. The Department has failed to provide government records that establish the debt alleged in the November 6, 2017 debt letter. The Department failed to provide payroll records in the form of earnings and leave statements, timecards, or leave requests to support the alleged time sheet corrections that supposedly resulted in the overpayment of $102.16. Therefore, the Department has failed to establish the validity of this alleged debt.
15. The Department has failed to provide government records that establish the debt alleged in the April 3, 2018 debt memorandum. The Department failed to provide payroll records in the form of earnings and leave statements, WebTA records, or other records from the Federal Personnel/Payroll System that show the overpayment of $3,791.53 was validly established. While the Department provided two summary documents in the form of a Request for Bill for Collection and Record of Leave Data, the Department provided no source documents from which these summary documents were prepared.

VI. Conclusion and Order

The official government records do establish 236 hours of sick leave were advanced to the Respondent prior to July 25, 2015. The Department was entitled to liquidate the advancement of sick leave with subsequently earned sick leave, by a charge against annual leave, by substitution of donated annual leave if the employee is a participant in an agency's leave transfer or leave bank program, or by refund in cash upon separation. The Department had a period of 57 pay periods to liquidate at least some, if not all, of those advanced hours prior to the Respondent's retirement on September 30, 2017.

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. While the Department's evidence and argument suggests there may be a debt, fundamental fairness, the statutes, the Department's regulations, and the Department's policy, mandate more than showing that the debt is a mere possibility. The unfortunate truth here is that the Department has failed to provide adequate proof of its claim.

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 alleged debt identified in the November 6, 2017 debt letter (Debt ID: 73110044670) as a valid debt.
2. The Department has failed to meet its burden of proof to establish the alleged debt identified in the April 3, 2018 debt memorandum as a valid debt.
3. Having failed to meet its burden, the Department may not require repayment of these alleged debts.
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 15, 2020

_digitally signed_____
Angela J. Miranda
Administrative Law Judge