



UNITED STATES DEPARTMENT OF EDUCATION

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

1937,

Respondent.

Docket No. 19-37-OF

Overpayment/Pre-offset Hearing

Appearances: 1937, Respondent, pro se.

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

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.¹ Following the issuance of a denial of the Respondent's request for a waiver, on May 30, 2019, the Respondent filed a request for a pre-offset hearing in relation to an overpayment of \$1,760.02, under Debt ID 90851270393.² On June 12, 2019, I issued an Order Governing

¹ 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.)

² Within that waiver decision, the Respondent was advised of the regulatory right to request a pre-offset hearing

Proceeding (OGP), which established a briefing schedule and other filing requirements for the parties. Consistent with the OGP, the Department filed its notice of appearance (OES Document 4) and the Respondent filed the requested documentation related to clarifying the request for a pre-hearing offset, the supplementary declaration, and evidence of extreme financial hardship (OES Documents 4, 5, and 6).

The OGP required 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). The government records supporting the alleged debt and Department brief were to be filed on or before August 2, 2019. The Department made no filing on or before August 2, 2019.³

II. Issue

Whether the Department has established the debt under Debt ID 90851270393 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.⁴

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. § 3711(d)(1) and (2)).⁵

following denial of a request for a waiver (34 C.F.R. § 32.6(b)).

³ Having recognized from filings in other, non-related overpayment cases, I took administrative notice that the general attorney in the Office of the General Counsel, Business and Administrative Law Division, who primarily appeared in these pre-offset hearing cases had recently separated from the Department. Therefore, I instructed that a courtesy email be sent to Ms. Sasser, the Division Supervisor, and attorney of record for the Department. An email was sent to Ms. Sasser on September 27, 2019, asking her to review this record and take appropriate action for the failure to meet the established date for filing the Department's evidence and brief. Despite the reply that the file will be immediately reviewed, to date, no filing has been made.

⁴ This section was subsequently amended by the Debt Collection Improvement of 1996 and the General Accounting Office Act of 1996.

⁵ 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

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

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 how administrative costs and penalties will be assessed (34 C.F.R. § 32.3(a) and (b)). The regulations require the Department to demand repayment while providing the opportunity to enter into a written repayment agreement with the Department (34 C.F.R. § 32.3(c)). The regulations require that the debtor to be advised of the right to request a waiver, if waiver of repayment is authorized by law (34 C.F.R. § 32.3(d)). The regulations require that the Department identify the intention to deduct up to 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 and to specify the amount, frequency, approximate beginning date and duration of the intended deduction (34 C.F.R. § 32.3(e) and (f)). The Department is required to provide the Government records supporting the debt with the notice or advise how those records will be made available to the employee for inspection and copying (34 C.F.R. § 32.3(g)). Lastly, the regulations require that the debtor be informed of 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(h)).

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, although this requirement is rarely followed by the Department.⁶

under the Debt Collection Improvement Act of 1996 and the General Accounting Office Act of 1996.

⁶ Current Department policy and practice shows the Department generally relies on its payroll agent, the Department of Interior, Interior Business Center to issue the required notice. Often this notice is in the form of a "Bill for Collection" (as titled by the payroll agent in some notices), "Bill of Collection" (as titled in the Department's policy), or otherwise referenced as a debt letter.

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)).⁷ 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.⁸ Neither the Department's regulations nor policy provide any rationale or explanation for requiring this standard of review in an administrative proceeding, which generally allows for a *de novo* review.

IV. Analysis

The Respondent submitted evidence that shows following the birth of the Respondent's child, a qualifying life event, the Respondent requested a change in Federal Employees Health Benefit (FEHB). The initial request was submitted on about July 19, 2018 and a subsequent request was

⁷ 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)).

⁸ The Handbook relies on the "clearly erroneous" standard as described in *Anderson v. Bessemer*, 470 U.S. 564, 73-4 (1985).

filed on August 21, 2018 (OES Documents 2, p. 21 and 6, p. 8). On August 22, 2018, using email, a Human Resource Assistant notified the Respondent the changes were processed but proof of birth was required, or coverage would be cancelled (OES Document 2, p. 22). Multiple other emails from the Branch Chief for Benefits Work/Life and a Human Resources Specialist indicate there was a system error that caused cancellation of the Respondent's FEHB (OES Document 2, pp. 2, 9, 11, and 16). The Respondent also submitted what appears to be a partial copy of a March 25, 2019 debt letter from the U.S. Department of Interior, Interior Business Center, the payroll agent for the Department.

The Department was required to submit a complete copy of the notice of overpayment, all Federal government records that support the alleged overpayment, and a brief setting forth its position in relation to the overpayment at issue in this matter. As discussed earlier in this decision, the Department failed to file the notice, government records, or a brief. This failure was not corrected after a courtesy email was provided to the Department's attorney of record despite the acknowledgment and agreement to immediately review the situation.

As such the Department has failed to meet its burden of proof that the alleged debt is valid.

V. Findings of Fact

1. The Respondent timely filed an appeal of this overpayment on May 30, 2019.
2. The Department has failed to provide government records that establish the debt alleged in the March 25, 2019 debt letter. The Department failed to provide payroll records in the form of earnings and leave statements or other personnel related documents that supposedly resulted in the overpayment of \$1,760.02. Therefore, the Department has failed to establish the validity of this alleged debt.

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. While the evidence provided by the Respondent 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 any proof of its claim when it failed to meet the filing requirements of the Order Governing Proceeding.

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 March 25, 2019 debt letter as a valid debt.
2. Having failed to meet its burden, the Department may not require repayment of this alleged debt.

3. The Department shall refrain from any and all collections attempts for this alleged debt, now or in the future.
4. This decision constitutes a final agency decision.

Dated: February 12, 2020

Angela J. Miranda
Administrative Law Judge