



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 28, 2023

CBCA 7710-DBT

In the Matter of KAREN H.

Karen H., Petitioner.

Aaron J. Pound, Office of General Counsel, General Services Administration, Washington, DC, appearing for General Services Administration.

GOODMAN, Board Judge.

This decision is issued in a pre-offset paper hearing pursuant to 41 CFR 105-56.009 (2021), which requires a written decision within sixty days from the date of submission of the employee's (petitioner's) petition for a hearing.

Background

On March 16, 2023, counsel for the General Services Administration (GSA) filed with this Board the employee's petition requesting a pre-offset hearing pursuant to 41 CFR 105-56.006, arising from (1) a letter dated November 9, 2022, from a GSA supervisory accountant advising petitioner of a debt, and (2) a subsequent letter dated January 12, 2023, from another GSA supervisory accountant stating that petitioner's request for reconsideration had been completed and the debt had been determined to exist in the amount previously stated.

On Friday, April 14, 2023, an initial conference was held with the hearing official, petitioner, GSA counsel, the GSA supervisory accountant who signed the November 9, 2022, letter, and two additional individuals from GSA's Office of General Counsel. During the initial conference, the parties summarized their positions and discussed various other matters.

On April 17, 2023, the hearing official issued an order on proceedings, giving notice that a pre-offset paper hearing would be held pursuant to 41 CFR 105-56.008. GSA was directed to file, by April 21, 2023, a written submission that would address all issues raised by petitioner in her request for a pre-offset hearing and include all records on which the determination of the debt was based. Petitioner was directed to file a written response to GSA's submission by April 28, 2023. Once petitioner filed her submission, the record would be closed.

On April 21, 2023, GSA filed its written submission, titled "Notice of Withdrawal of Debt Letter," with a letter attached that withdrew the November 9, 2022, debt letter. The submission, signed by GSA counsel, stated that as a result of withdrawing the original debt letter, "the question of the existence and amount of the debt being considered in this review is moot and, as a result, the process under 41 CFR 105-56 has been canceled by agency action."

The attached letter withdrawing the November 9, 2022, debt letter was signed by the GSA supervisory accountant who had signed the debt letter. It stated:

The General Services Administration (GSA) is rescinding the debt notification letter issued to you on November 9, 2022, in which you were notified of a debt for \$15,464.47 related to retention incentive payments you received while employed with the Federal Permitting Improvement Steering Council (FPISC). Therefore, at this time, you are not required to repay any money as documented in that previous communication and GSA and FPISC will not be taking any action pursuant to that November 9 letter to collect said debt. *Please be aware, however, that GSA and FPISC are re-examining the facts related to your situation and are re-calculating the debt. You should expect a new notification related to this matter in the near future.*

(Emphasis added.)

Shortly thereafter, on April 21, 2023, petitioner filed a response to GSA's submission, reserving her right to file a more complete response by the due date in the order on proceedings and stating:

I request that the judge . . . maintain jurisdiction over this case, as we need to address the significance of GSA's last-minute decision to abandon the debt and pursue a new case. Presumably, had I simply paid the debt, ignoring the lack of any record to support it, GSA would have considered the debt paid and the matter closed. My appeal to this forum, based on the debtor's rights granted by GSA, has led to GSA restarting the process to my disadvantage

without providing any supporting records for their debt determination I argue that I am entitled to a judgment concluding that GSA has not proven I owe a debt, warranting dismissal with prejudice to avoid a never-ending series of modified reviews and debt rulings, perpetuating an arbitrary and capricious cycle that undermines the due process to which I am entitled.

Contrary to GSA's statement that there is no debt, it appears GSA very much still finds there is a debt but are just unsure of what they think it is—which is exactly the record they were ordered to submit in full today. Given that they failed to do so, I must again submit my request for summary judgment on the matter as a whole, and based on the record provided as it stands. GSA states that the question of the existence and amount of the debt being considered is moot as a result of their withdrawal of the debt letter, and as a result, the process under 41 CFR 105-56 has been canceled by agency action. To the contrary, they have not withdrawn the debt but are currently engaged in pursuing a modified debt, as they themselves state This violates the time period . . . under 41 CFR 105-56 and as identified by Judge Goodman to provide the record [in support of the debt] and to resolve this matter. I am entitled to expeditious review of this matter and a final determination of my debt and again request judgment to prevent the process from being allowed to restart and repeat from the very beginning.

In the absence of further discussion with the court, I reserve my right to digest the new information provided by GSA today and to provide a more complete response by the date previously identified by Judge Goodman—April 28, 2023.

On April 21, 2023, soon after petitioner filed her initial response to GSA's submission, GSA filed the following response:

This supplemental response is to address the April 21, 2023 Request for Judgment filed by [petitioner] in the above-captioned matter. [Petitioner] has requested the "Judge to maintain jurisdiction over this case" and states that she is "entitled to Judgment" and a "dismissal with prejudice." This represents a fundamental misunderstanding of the process of a Pre-Offset Hearing.

A Pre-Offset Hearing is not a "case" or "court proceeding." This matter was not before the Civilian Board of Contract Appeals ("CBCA") as a proceeding under its rules and jurisdiction. This matter was simply an administrative

process provided for by 41 CFR 105-56.006(a).^[1] The regulations at 41 CFR 105-56.003(o) specifically define the Pre-Offset Hearing as a review of documentary evidence concerning the existence and/or amount of a debt. *As the demand for payment of this debt has been withdrawn, there is no remaining basis for the administrative review to take place. The regulation also requires that issues be in dispute.* An individual's right to a Pre-Offset Hearing is only triggered when the agency announces its intention to collect a debt through deductions from an employee's pay as described in 41 CFR 105-56.004(b) or makes a demand for repayment as described by 41 CFR 105-56.004(f). *In this case GSA has canceled the debt notice, meaning that no debt currently exists and GSA is not currently demanding repayment, leaving no issues in dispute. As a result, there are no issues or disputes remaining for Judge Goodman to consider or issue a decision on.* Should a new debt letter be issued, the process as described by the regulations will start over and the debtor will have the same opportunity for due process and review.

(Emphasis added.)

Neither the regulations, nor the hearing official's order of April 17, 2023, authorized GSA to respond to petitioner. However, GSA's reply to petitioner's initial submission was included in the record to allow petitioner to address the issues raised, if she filed a further response before the date established to close the record.

On April 26, 2023, petitioner filed an additional response within the time allowed by the hearing official's April 17, 2023, order on proceedings, as she had reserved the right to do in her April 21, 2023, initial response. The additional response stated in part:

I must begin by reiterating that GSA has formally determined this debt's existence and amount twice (initial notification letter dated November 9, 2022 and completion of reconsideration of the debt claim letter dated January 12, 2023).

It is my understanding that once the agency determines a debt exists and notifies the debtor then the debt can only be suspended or terminated, where certain criteria must be met per 41 CFR 105-55.027028. GSA states in its last letter "Response to Request for Judgment" on April 21, 2023 that "In this case, GSA has canceled the debt notice, meaning that no debt currently exists . . ."

¹ The hearing official issues this decision pursuant to the regulations applicable to pre-offset hearings, and not pursuant to other rules or jurisdictions of the CBCA.

Therefore, I believe GSA has “terminated” the debt pursuant to 41 CFR 105-55.028; meaning GSA has now found the debt was either unsubstantiated or without legal merit. However, GSA stated in their letters dated April 21, 2023 that they are currently recalculating the debt—neither of these authorities (41 CFR 105-55.027, 41 CFR 105-55.028) contemplate a debt that simultaneously exists and does not exist. What GSA’s letter appears to do is attempt to get around the deadline established by the judge for GSA to do exactly what they are stating in their letter they are continuing to do; namely, recalculate the amount of the debt. The final calculation of the debt was due at noon on April 21, 2023 per the pre-offset hearing procedures and the judge’s order. Therefore, the debt exists and the ongoing proceedings are NOT moot. The proceeding should therefore continue. GSA did not provide substantiation of the debt by noon on April 21, 2023 per the judge’s order, and therefore has not met its basic burden required by law. I again request that the judge provide a final ruling in my favor with prejudice acknowledging the termination of the debt due to GSA’s continued inability to substantiate the debt or the debt being without legal merit pursuant to 41 CFR 105-56.008.

After receipt of petitioner’s response on April 26, 2023, the hearing official issued an order on that date closing the record, pursuant to the order on proceedings dated April 17, 2023.

Discussion

The regulations at 41 CFR 105-56.003(o) specifically define the pre-offset hearing, in relevant part, “as a review of the documentary evidence concerning the existence and/or amount of a debt.” A paper hearing was scheduled with dates set forth for the parties to submit written submissions. The regulations governing pre-offset paper hearings state:

If a hearing is to be held only upon written submissions, the hearing official will issue a decision based upon the record and responses submitted by both the Agency and the employee. See § 105-56.006 of this subpart. If either party, without good cause as determined by the hearing official, does not provide written submissions and documentation requested by the hearing official, the hearing official will make a determination on the claim^[2] without reference to such submissions and documentation.

² 41 CFR 105-56.003(k) states that the terms “claim” and “debt” are synonymous and interchangeable.

41 CFR 105-56.008.

As 41 CFR 105-56 does not specifically state the burden of proof in the pre-offset hearing procedure, the hearing official applies the burden of proof established for an almost identical hearing for debt procedures pursuant to 41 CFR 105-57.005(f)³:

- (1) GSA will have the burden of establishing the existence and/or amount of the debt.
- (2) Thereafter, if the debtor disputes the existence and/or amount of the debt, the debtor must prove by a preponderance of the evidence that no debt exists or that the amount of the debt is incorrect.

The schedule for the pre-offset hearing established by the hearing official directed GSA to file, on or before April 21, 2023, its written submission addressing all issues raised by petitioner in the request for pre-offset hearing, including all records on which the determination of the debt is based, as required by 41 CFR 105-56.006(d)(2). The hearing official finds that GSA, with adequate time to document the basis of the alleged debt since the issuance of the debt letter dated November 9, 2022, has failed, without good cause, to submit documentation establishing the debt and the amount of the debt and therefore has failed to meet its burden of proof.

GSA attempts to justify its failure to submit documentation to support the debt, and its resulting failure to meet its burden of proof, by characterizing its withdrawal of the notice of debt letter as an agency action which cancels this proceeding and renders this dispute moot because, according to GSA, no issues remain in dispute. GSA's assertions lack merit.

GSA informs petitioner that as the result of withdrawing the debt letter, "at this time, you are not required to repay any money as documented in that previous communication and GSA and FPISC will not be taking any action pursuant to that November 9 letter to collect said debt." This is factually and legally incorrect because the filing of the petition for pre-offset hearing itself stayed the collection process. GSA could not take any action to collect the debt until the debt was determined in this proceeding. Withdrawing the debt letter has no additional effect on the staying of the collection process.

³ Board judges appointed as hearing officials pursuant to those regulations have applied this burden of proof. *See Rico G.*, CBCA 7403-DBT (Nov. 18, 2022); *Lenora A.*, CBCA 7320-DBT (Sept. 19, 2022). Debt decisions issued by this Board and a predecessor board, the General Services Board of Contract Appeals, may be found on the Board's website at www.cbca.gov/decisions/Debt.

GSA stated it “has canceled the debt notice, meaning that no debt currently exists and GSA is not currently demanding repayment, leaving no issues in dispute.” However, GSA also alerted the petitioner “that GSA and FPISC are re-examining the facts related to [this] situation and are re-calculating the debt.” GSA notified petitioner that petitioner “should expect a new notification related to this matter in the near future.”

It is contradictory and disingenuous for GSA to assert that a debt does not exist and there is no issue in dispute while simultaneously asserting that a debt exists, for which no basis has been submitted, which will be recalculated and demanded soon. Clearly, issues remain in dispute. GSA continues to advise petitioner that a debt remains due, but inexplicably asserts, without good cause, that it cannot calculate the debt for purposes of this pre-offset hearing, despite the fact that petitioner received a debt letter in November 2022 calculating the debt.

Petitioner similarly characterizes GSA’s contradictory position as follows:

I believe GSA has “terminated” the debt pursuant to 41 CFR 105-55.028; meaning GSA has now found the debt was either unsubstantiated or without legal merit. However, GSA stated in their letters dated April 21, 2023 that they are currently recalculating the debt—neither of these authorities (41 CFR 105-55.027, 41 CFR 105-55.028) contemplate a debt that simultaneously exists and does not exist. . . . I again request that the judge provide a final ruling in my favor with prejudice acknowledging the termination of the debt due to GSA’s continued inability to substantiate the debt or the debt being without legal merit pursuant to 41 CFR 105-56.008.^[4]

According to GSA, “[a]s a result [of the withdrawal of the November 9, 2022, debt letter], the question of the existence and amount of the debt being considered in this review is moot and, as a result, the process under 41 CFR 105-56 has been canceled by agency action.” GSA’s failure, without good cause, to file a written submission in this proceeding is not agency action that cancels this proceeding. Instead it constitutes GSA’s failure to meet its burden of proof to establish the existence and amount of the debt.

⁴ 41 CFR 105-55.028 lists reasons why GSA may terminate collection activity, including when “[t]he debt is legally without merit . . . [or] the debt cannot be substantiated.” Petitioner alleges that these were the reasons why GSA withdrew the debt letter. The hearing official need not determine why GSA withdrew the debt letter in order to find that GSA has failed to meet its burden of proof in this pre-offset hearing.

It is clear that no additional submission will be forthcoming from GSA in this pre-offset hearing to support the existence and amount of the debt. Also, no additional submissions are permissible, pursuant to the hearing official's order on proceedings, dated April 17, 2023, and the order closing the record in this matter, dated April 26, 2023.

GSA's withdrawal of the letter of debt does not mean that the hearing official is "left without evidence upon which to make a decision," as GSA erroneously asserts. Pursuant to 41 CFR 105-56.008, the hearing official has the authority to "make a determination on the claim without reference to such submissions and documentation" which a party has failed to provide without good cause, and the hearing official exercises that authority by rendering the decision below.

Decision

Based upon the record in this matter, and the regulations applicable to pre-offset hearings, the hearing official determines that GSA has failed to prove the existence and the amount of the alleged debt and therefore finds that no legally enforceable debt exists.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge