



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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July 19, 2023

CBCA 7706-DBT

In the Matter of JOHN C.

John C., 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)<sup>1</sup> petition for a hearing.<sup>2</sup>

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<sup>1</sup> In this decision, when the employee's name is mentioned in quoted documentation, he is referred to as "petitioner." Some documents were submitted as exhibits multiple times, attached to the parties' submissions before and during the proceedings. References to exhibits are to the first instance of their submission.

<sup>2</sup> The hearing official granted petitioner's request for a delay in proceedings pursuant to 41 CFR 105-56.004(k) to allow for additional time for completion of the written decision.

### Background

Petitioner is an employee of a federal agency, the Federal Permitting Improvement Steering Council (the agency).<sup>3</sup> The agency is represented in this matter by the General Services Administration (GSA).<sup>4</sup> Before the agency's former Executive Director left federal service on January 20, 2021, he had determined that petitioner would be awarded an individual retention incentive bonus<sup>5</sup> that would be paid in the total amount of 25% of petitioner's annual salary during a ninety-day period. His memorandum, dated January 4, 2021, reads in relevant part:

There is a special need for [the agency] to retain [petitioner] for at least 90 days, to ensure adequate transition for the new Administration and new [agency] leadership, and continued execution of [the agency]'s mission critical objectives[.]

....

I approve an individual retention incentive in the amount of 25% (which is less than or equal to 25 percent of basic pay for the individual) according to a service period of 90 days with biweekly installment payments issued at the full retention incentive percentage rate established for this employee (25% and in keeping with the aggregate limitation on pay under 5 CFR part 530, subpart B and 5 CFR 575.314(f)).

GSA Submission, Exhibit 1 at 2.

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<sup>3</sup> The agency is referred to in the documentation in this case as FPSIC or the Permitting Council. For consistency, we use the term "agency" throughout this decision.

<sup>4</sup> GSA is an independent federal agency that provides payroll and other administrative support services to the agency under the authority of a service level agreement.

<sup>5</sup> Individual retention bonuses are governed by 5 U.S.C. § 5754 (2018) and 5 CFR part 575. The regulations provide that an employee may receive a retention bonus if the employing agency determines that (1) the employee has "unusually high or unique qualifications" or there is a "special need" of the agency that "makes it essential" that the agency retain the services of the employee, and (2) "[t]he employee would be likely to leave the Federal service in the absence of a retention incentive." 5 CFR 575.305(a)(1), (2).

A Standard Form 52 (SF-52) was issued with an effective date of January 17, 2021, a not to exceed (NTE) date of April 24, 2021, and a total salary award of \$33,138. Box 5 states that the action was requested, and Box 6 states that the action was authorized by the former Executive Director, whose signature appears in the boxes. Petitioner's Request for Pre-Offset Hearing, Exhibit 1.

The former Executive Director's decision is confirmed and explained in his declaration:

Throughout my tenure as the [agency] Executive Director, I consistently sought to maximize the benefits received by . . . employees for their extraordinary effort and dedication to fulfilling the agency's mission, and to make the [agency] a place where extremely talented and dedicated employees would want to remain. The retention bonuses at issue were a crucial part of my strategy to ensure that the small group of high-performing employees that made the execution of the [agency]'s unprecedented mission possible under difficult and unpredictable circumstances would remain at the [agency] to deliver on the mission, hopefully until December 2022. . . .

. . . .

I discussed several satisfactory approaches to paying those incentives with the Deputy Director, Administration and Chief Human Capital Officer, and the Acting Deputy Executive Director, including "front loading" the entire annual amount or paying it over the course of the full year. I was advised by my Deputy Director, Administration and Chief Human Capital Officer, that I could not pay a retention incentive as an initial lump-sum payment at the start of a service period or in advance of fulfilling the service or installment period for which the incentive is being paid, but that I could specify a service period shorter than a year, during which the entire year's retention bonus would be paid in biweekly installments. This shorter service period appeared to be the best way to ensure that the entirety of the annual bonus that I intended to give was received by each employee. Specifically, the full retention incentive percentage rate established for the employee would mean the full 25% of that employee's annual base salary would be "front-loaded" to the employees over the course of an identified service period – for example, 90 days. That means the employee would be paid the entirety of the 25% or 10%, as applicable, of

each employee's<sup>[6]</sup> annual salary to the employee in the first quarter of the calendar year (i.e., pay the entire annual bonus amount over the first three months of the year). Because this appeared to be the most effective way to ensure that the contemplated retention bonuses were received, I selected this option.

After consulting with, and obtaining approval of, the Office of Management and Budget and the White House Office of Personnel Management for the plan described in [the above paragraph,] I executed the documents presented to me by my Deputy Director, Administration and Chief Human Capital Office to execute that plan. If I recall correctly, such documents included a justification document explaining why I believed the bonuses to be necessary and advisable in consideration of the statutory sunset, and a series of SF-25s for action on each employee executed by the Deputy Director, Administration and Chief Human Capital Officer.

Petitioner's Request for Reconsideration, Exhibit 4, Declaration of Former Executive Director (Nov. 29, 2022) ¶¶ 13, 18, 19.

It is clear from the former Executive Director's contemporaneous memorandum in January 2021 and subsequent declaration in November 2022 that his intent was to pay petitioner a retention incentive bonus in the amount of the entire 25% of his salary in a ninety-day period, with the goal to retain petitioner at the agency through December 2022.

Petitioner did not begin to receive biweekly payments of the bonus in January or early February 2021. In late February 2021, GSA's Deputy Director, Administration and Chief Human Capital Officer, advised the Acting Executive Director of petitioner's agency, who had assumed that position when the former Executive Director left in January 2021, that GSA was not able to process the retention bonus as biweekly payments over a ninety-day period, as envisioned by the former Executive Director, because this was not permitted by regulation. Instead, the total amount of the annual bonus would have to be paid in biweekly payments over the course of the entire year. Petitioner's Request for Reconsideration, Exhibit 5, Declaration of Acting Executive Director (Nov. 29, 2022) ¶ 14.

Petitioner began receiving biweekly bonus payments of 25% of his annual salary beginning on February 24, 2021. Petitioner states that it was his understanding that he was to receive payment of the bonus until the agency's December 2022 sunset date. Consistent

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<sup>6</sup> Other employees of the agency were awarded incentive retention bonuses at the same time as petitioner.

with this understanding, petitioner continued to receive bonus payments through 2021 and into 2022 in his biweekly pay, until he received a demand letter from a GSA supervisory accountant, dated November 9, 2022, alleging a debt due in the amount of \$51,440.25. Petitioner's Request for Reconsideration, Exhibit 1. That letter appeared to refer to the SF-52 previously described, which was not attached:

The Retention Incentive . . . had an end date of April 24, 2021. The payroll system did not capture the end date . . . and the Retention Incentive continued to be paid until pay period ending August 27, 2022. As a result, you were overpaid \$51,440.25 . . . .

By letter dated November 21, 2022, petitioner requested reconsideration of the debt decision and all records pertaining to the debt, as no documentation supporting the debt had been included in the demand letter. Petitioner's Request for Reconsideration, Exhibit 2. By letter dated February 2, 2023, a different GSA supervisory accountant responded to the request for reconsideration, stating:

It has been determined that the debt exists and the amount is correct. . . .

The Request for Personnel Action SF-52 states your retention incentive has "NTE 04-24-2021" (NTE Not to Exceed). The Not to Exceed Date is a condition of the retention incentive payments. You were paid past the Not to Exceed . . . date. Therefore, you owe the retention incentives paid after 04-24-2021.

Petitioner's Request for Pre-Offset Hearing, Exhibit 1. The letter enclosed a copy of the SF-52, but no other documentation.

On March 15, 2023, GSA counsel filed petitioner's petition for a pre-offset hearing with this Board pursuant to 41 CFR 105-56.006, citing the demand letter dated November 9, 2022, and the letter dated February 2, 2023, in response to the request for reconsideration.<sup>7</sup> On Friday, April 7, 2023, the hearing official held an initial conference with petitioner, GSA counsel, and the GSA supervisory accountant who signed the November 9, 2022, letter (the accountant). During the conference, petitioner stated that, except for the SF-52 attached to the November 9, 2022, letter, which he had not seen previously, GSA had not produced any documentation with regard to the alleged debt. GSA counsel and the accountant stated that

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<sup>7</sup> Petitioner attached exhibits to his request for a pre-offset hearing, including the two letters cited and exhibits which were attached to his November 21, 2022, request for reconsideration.

the only basis for the debt was the interpretation of the SF-52. The hearing official's conference memorandum and order dated April 7, 2023, stated in relevant part:

[GSA counsel] and [the accountant] stated GSA's establishment of the debt is based solely on the NTE date on the SF-52. As [the accountant] explained, GSA performed a data "cleanup," focusing on incentive awards. There was no input from [the person whose signature appears on] the SF-52, or anyone else who had personal knowledge of the decision to make the incentive awards to [petitioner] and others.

[GSA counsel] stated that since [the former Executive Director, who signed the SF-52,] is no longer in his previous federal position, input could be possibly sought from the person who is now in his previous position. When [the hearing official] raised the issue that [that] person would more than likely not have personal knowledge of the relevant circumstances, [GSA counsel] stated [that that] is why GSA is relying on the SF-52.

At the conclusion of the initial conference, GSA counsel was directed to submit to the hearing official and petitioner a calculation of the alleged debt no later than April 14, 2023, but GSA did not do so.

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 his 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. The parties timely filed their submissions and the record was closed for decision.

### Discussion

Because 41 CFR 105-56 does not 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),<sup>8</sup> which provides:

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<sup>8</sup> 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). The hearing official applied this burden in a previous pre-offset hearing, *Karen H.*, CBCA 7710 (Apr. 28, 2023). Debt decisions issued by this Board and a predecessor board, the General Services Board of Contract Appeals, may be

- (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.

While GSA's counsel had represented during the initial conference that the sole support for GSA's assertion of the debt was the SF-52, GSA's written submission included additional documentation and arguments. Initially, GSA refers to the former Executive Director's memorandum dated January 4, 2021, stating:

. . . . despite assertions now to the contrary, that the then-Executive Director determined that [the agency] needed to ensure that it could retain the debtor for 90 days and, as a result, a 90 day service period was established. In effectuating this justification, [the agency] created an SF-52 for the debtor dated January 17, 2021 with a "Not to Exceed" date of April 24, 2021. . . . The retention bonus payments started on January 31, 2021, and should have ended on April 24, 2021. While the then-Executive Director may have also intended to provide a retention incentive of 25% of annual salary to the debtor for remaining at [the agency] for the 90 day period, as discussed below such an arrangement was not permissible.

GSA's Submission at 3.

GSA's statement is not accurate. The former Executive Director's declaration does not state his intent to only retain petitioner for ninety days; rather, it states that it was his intent that petitioner and the other employees granted retention incentives would remain at the agency to deliver on the mission, hopefully until December 2022. When the former Executive Director established the ninety-day period to pay the retention incentive, he anticipated the entire 25% of annual salary to be paid within ninety days. The SF-52's NTE date of April 24, 2021, and the total salary award of \$33,138 SF-52 confirm this intent. He was not aware that this method of payment was impermissible before he left office. Thus, the former Executive Director's intent is consistent with petitioner's understanding of the total amount and duration of the bonus to be paid.

However, because petitioner received payments after April 4, 2021, GSA seeks to establish a debt for what it alleges is an overpayment of the retention incentive. Petitioner

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found on the Board's website at [www.cbca.gov/decisions/Debt](http://www.cbca.gov/decisions/Debt).

received a total of \$70,884.80 in payments until August 27, 2022, when GSA terminated his retention incentive. According to GSA, he should have received payments biweekly, effective January 31 through April 24, 2021, amounting to \$9916.80. GSA asserts a gross overpayment of \$60,968.00, with a remaining debt of \$51,440.25 after recovery of total taxes of \$9527.75 (federal, state, social security, and medicare). GSA's Submission at 8.

GSA cites regulatory requirements and circumstances that occurred in 2021 that it believes required the agency to terminate the bonus payments before GSA did so in August 2022. GSA first cites an agency obligation:

[A]n agency must review each determination to pay the incentive at least annually to determine whether payment is still warranted. An authorized agency official must certify this determination in writing.

5 CFR 575.311(f)(1). Based on this regulation, GSA maintains that the ongoing bonus payments to petitioner "should have been caught by the . . . annual review in January 2022" required by this regulation. GSA Submission at 3. However, GSA does not explain how the agency's failure to fulfill its regulatory obligation to perform the review of the retention incentives, which were awarded not only to petitioner but other employees, would create a debt owed by petitioner.

GSA cites another agency obligation in 5 CFR 575.311(f)(3) that requires that an "authorized agency official must reduce or terminate a retention incentive authorization when no service agreement is required whenever conditions change such that the original determination to pay the retention incentive no longer applies." According to GSA, two such changes of condition occurred. In July 2021, the agency completed its transition to a new Executive Director, the completion of which was cited in support of the retention incentives in the Executive Director's January 4, 2021, memorandum. With the transition to new leadership complete, GSA asserts that a particular reason for providing a retention incentive was no longer relevant. Thereafter, in November 2021, Congress repealed the provision in the agency statute sunsetting the agency on December 4, 2022, which GSA asserts eliminated the other original justification for payment of the bonus.

Thus, GSA alleges that both of these events were the types of change in condition that warranted a termination or reduction of the retention incentive because they eliminated the underlying justification. Again, GSA does not explain why it believes the agency's failure to perform its regulatory obligation and review circumstances which may impact the retention incentives, which were awarded not only to petitioner but other employees, would create a debt owed by petitioner.



Also, the former Executive Director's memorandum must be interpreted in light of his intent expressed in his declaration. Petitioner was not retained just until new leadership was in place at the agency but to support the agency's ongoing mission going forward. As stated previously, the memorandum makes clear that it was not the former Executive Director's purpose to retain petitioner only for ninety days but to retain him going beyond that time period.

GSA has submitted a declaration from the agency's current Executive Director, appointed in July 2021, which states that:

[Petitioner] did not inform me he or any other [agency] employees were receiving a retention incentive. Because I was not informed of the existence of the retention incentive, I was unable to conduct the reviews directed by 5 CFR 575.311(f)(1) and 5 CFR 575.311(f)(3) to evaluate whether there was an ongoing need for the retention incentives.

I was not made aware of the existence of [petitioner's] retention incentive payments until September 2022, when . . . GSA Payroll Services Branch brought them to my attention following a routine audit of retention incentives conducted by GSA. At no point between July 2021 and September 2022 did [petitioner] inform me that he or any other employee of [the agency] was receiving retention incentives.

GSA Submission, Exhibit 4.

The current Executive Director does not explain why it was petitioner's obligation to inform her as to the ongoing receipt of a retention incentive that he believed was valid, or why it was his sole obligation to inform her, as there were other employees receiving retention incentives in addition to petitioner. Also, there is no explanation as to why the current Executive Director was not made aware of the fact that a group of employees was receiving retention incentives previously awarded when she assumed office and why she would need these employees to inform her.

The foregoing arguments, which enumerate the agency's failures to perform its regulatory obligations and lack of knowledge of the current Executive Director upon assuming her position, which might have resulted in an earlier termination of petitioner's (and others') retention incentives, do not fulfill GSA's burden of proving a debt owed by petitioner.

GSA additionally argues that a retention incentive cannot be paid for an indefinite period, citing 5 CFR 575.309(b), which provides:

An agency may pay a retention incentive in –

- (1) Installments after the completion of specified periods of service; or
- (2) A single lump-sum payment after completion of the full service period.

GSA states:

Even a basic reading of these regulations makes clear that a retention incentive cannot be paid for an indefinite period; instead, as clearly stated in [5 CFR] 575.309, whether paid by installment or in a lump sum, retention incentives are paid for service during a specified period and cannot be for an amount that exceeds 25% of that employee's basic rate of pay for that service period.

GSA Submission at 4.

GSA misreads the regulation. The regulation does not speak to the duration of payment of the retention incentive. The installments after completion of specified service are in petitioner's case the amounts included in petitioner's salary for each pay period, and the individual pay periods are the specified periods of service.

GSA refers to emails which purportedly show that petitioner was aware that his retention incentive ended in April 2021. The first email, dated December 22, 2020, GSA Submission, Exhibit 5, from the person who became the Acting Executive Director in January 2021, is of no import, as it predates the Executive Director's decision in January 2021. Another, an email string dated March 2, 2022, GSA Submission, Exhibit 6, does not support a ninety-day period for payment but states the calculation actually used:

The full year retention rate should have been divided by 26 to show the amount to pay out biweekly and then that amount multiplied by the number of pay periods to give the total amount to be paid.

Another series of emails, in April 2022, GSA Submission, Exhibit 7, concern the issue of "grossing up" payments before deductions. As petitioner and other employees were receiving retention incentives at this time, the relevance of these emails to the issues in this case is not apparent, as the payments were not "grossed up" before deductions.

In summary, GSA's arguments lack merit, and GSA has not met its burden of proving that petitioner owes a debt. While GSA believes that the agency had reason to terminate petitioner's bonus payments earlier than it did, there is nothing in the regulations that places a penalty on an employee when it is retroactively determined that cause to terminate a bonus previously existed, but the agency did not act to terminate. The agency's failure to perform its regulatory obligations of review of the retention incentives does not create a debt owed by petitioner nor does the current Executive Director's lack of knowledge of the retention incentives of petitioner and other employees upon assuming her position.

Petitioner has received retention incentive payments within the time frame and in the amounts which he was advised, and he expected to receive them until December 2022. The demand letter dated November 9, 2022, gave notice that the agency had terminated his retention incentive as of the pay period ending August 27, 2022. According to 5 CFR 575.311(h), he is at least entitled to the payments he has received:

If an agency terminates a retention incentive service agreement or reduces or terminates a retention incentive paid without a service agreement under this section, the agency must notify the employee in writing. When a retention incentive is terminated under paragraph (f) of this section, the employee is entitled to receive any scheduled incentive payments through the end of the pay period in which the written notice is provided or until the date of separation, if sooner.

The regulation does not address the situation here, where the agency might have terminated a retention incentive earlier but did not. Petitioner is not penalized for the agency's inaction but is allowed to retain any scheduled payments received.

### Decision

The hearing official has determined that GSA has failed to prove the existence of the alleged debt and therefore finds that no legally enforceable debt exists.

Allan H. Goodman  
ALLAN H. GOODMAN  
Board Judge