## Department of Health and Human Services

# DEPARTMENTAL APPEALS BOARD

## Civil Remedies Division

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| In the Cases of: | ) | |
| | ) | |
| Department of Health and Human Services | ) | DATE: August 31, 1994 |
| | ) | |
| - v. - | ) | Docket Nos. C-94-041<br>C-94-047 |
| | ) | |
| | ) | |
| Dennis T. Bennett, | ) | Decision No. CR330 |
| | ) | |
| Respondent. | ) | |
| | ) | |

## DECISION

These Debt Collection Act cases are before me pursuant to the requests for hearing timely filed by Dennis T. Bennett (Respondent). HHS Exs. 14, 18, 20 at 1.[1] The Department of Health and Human Services (HHS) alleges that Respondent is indebted to the United States for $664.79 in salary overpayments due to his unexcused absences from his duty station during prescribed duty hours. According to HHS, such unexcused absences totalled 16.5 hours and occurred on July 31 and August 6, 1992 and during the workdays between September 22 and September 29, 1992. See generally HHS Br.

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[1] Throughout this decision, I use abbreviations to denote the pleadings, briefs, and exhibits the parties have filed. I refer to HHS' motion and brief in support of its request for disposition of the cases without an in-person hearing as "HHS Br. at (page)." I refer to an HHS exhibit as "HHS Ex. (number)." (Respondent did not submit any exhibits.) I refer to Respondent's opposition to HHS' motion and brief as "Respondent Br. at (page)." I refer to HHS' reply to Respondent's opposition as "HHS Reply Br. at (page)."

The cases originally were assigned to Administrative Law Judge Charles Stratton to hear and decide. Judge Stratton held various prehearing conferences with the parties, including those of January 27 and February 24, 1994. On the parties' representations during the conferences that the cases involved similar issues and facts, Judge Stratton ordered consolidation of the cases and scheduled them for an in-person hearing from May 4 through 6, 1994. Also during the prehearing conferences, Respondent agreed to waive the right to have the case decided within the 60 days provided by 45 C.F.R. § 30.15(o).

The cases were reassigned to me on March 1, 1994, for reasons related to Judge Stratton's health. I held a prehearing conference with the parties on March 18, 1994, at which time HHS moved that I issue a decision based on the documentary submissions to be filed by the parties. After considering the parties' positions on HHS' motion, I directed the parties to file their briefs and documentary evidence in support of (or contra) proceeding to decision based on a documentary record. I vacated Judge Stratton's order scheduling an in-person hearing in this case, pending my consideration of whether the cases may be decided on a written record as urged by HHS. Order and Notice of Hearing dated March 30, 1994.

Having considered the briefs and evidence of record,[2] I grant HHS' motion for deciding the cases on a written record. On that basis, I enter judgment in Respondent's favor.

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[2] As noted earlier, HHS has filed two briefs, and Respondent has filed one brief. In addition, HHS has submitted 21 proposed exhibits (HHS Exs. 1 to 21) and a copy of a Departmental Appeals Board Decision (DHHS v. Dolly Jackson), labelled as "DHHS Attachment 1." Some of HHS' proposed exhibits duplicate documents Respondent had attached to his hearing requests.

I have admitted into evidence all of HHS' proposed exhibits because they are relevant to HHS' position and appear to be authentic copies of what they purport to be. I have taken notice also of the Departmental Appeals Board Decision appended to HHS' brief as "Attachment 1."

Respondent has not filed any proposed exhibits or objected to the admissibility of HHS' documents.

## ISSUES

Whether Respondent is indebted to HHS, and, if so, in what amount?

## FINDINGS OF FACT

1. For purposes of this proceeding, a "debt" means an amount of money or property owed to the United States due to a salary overpayment to an employee. 45 C.F.R. § 30.2.

2. The Secretary of HHS, or her designee within any Operating Division or Regional Office, is authorized to collect debts owed to the United States by its employees. See 45 C.F.R. §§ 30.2, 30.11.

3. At all times relevant to this proceeding, Respondent has been employed as an administrative law judge (ALJ) in the San Bernadino, California, Hearing Office of the Social Security Administration (SSA), Department of Health and Human Services. See HHS Exs. 1 - 7.

4. At all times relevant to this proceeding, Larry M. Weber has been employed by SSA as the San Bernadino Hearing Office's Chief Administrative Law Judge (HOCALJ). See HHS Exs. 1 - 7.

5. By memorandum dated August 7, 1992, HOCALJ Weber notified Respondent that someone had reported Respondent for having arrived in and departed from the Hearing Office at the following times:

| | | |
|---|---|---|
| July 31, 1992: | Arrived | 10:45 A.M. |
| | Departed | 11:30 A.M. |
| | Arrived | 12:55 P.M. |
| | Departed | 1:55 P.M. |
| | Arrived | 3:30 P.M. |
| | Departed | 4:30 P.M. |

(HOCALJ Weber noted the receipt of Respondent's request for sick leave for the period from 2:00 P.M. to 3:00 P.M. on July 31, 1992.)

| | | |
|---|---|---|
| August 6, 1992: | Arrived | 10:00 A.M. |
| | Departed | 12:15 P.M. |
| | Arrived | 2:00 P.M. |
| | Departed | 4:40 P.M. |

(HOCALJ Weber noted also the absence of any leave request for August 6, 1992.)

HHS Ex. 1.

6. HOCALJ Weber's memorandum of August 7, 1992 indicates that Respondent was physically present in the Hearing Office for a total of 2 hours and 45 minutes (45 minutes in the morning and 2 hours in the afternoon) on July 31, 1992, and Respondent was known to have been out of the office on approved sick leave for an additional hour that afternoon. HHS Ex. 1.

7. HOCALJ Weber's memorandum of August 7, 1992 indicates that 3 hours and 45 minutes (3.75 hours) of July 31, 1992 were accounted for by Respondent's physical presence in the Hearing Office and by his use of approved sick leave. Finding 5.

8. HOCALJ Weber's memorandum of August 7, 1992 indicates that Respondent was physically in the Hearing Office for a total of 4 hours and 55 minutes on August 6, 1992 and that he used no approved leave that day. HHS Ex. 1.

9. HOCALJ Weber states in his August 7, 1992 memorandum that he would appreciate Respondent's "assistance in resolving these discrepancies" before HOCALJ Weber certified a report on the Respondent's time and attendance. HHS Ex. 1.

10. On August 10, 1992, Petitioner responded to HOCALJ Weber's memorandum by, inter alia, disagreeing with HOCALJ Weber's authority to certify the time worked by ALJs, asserting that he (Respondent) has "regularly worked well in excess of forty (40) hours per week on many occasions," and requesting the name of HOCALJ Weber's "informant," along with the relevant "recorded notes" allegedly used to document his absences from the office. HHS Ex. 2 at 1.

11. Respondent forwarded a copy of his August 10, 1992 memorandum to SSA's Acting Chief ALJ, Jose Anglada. HHS Exs. 2 at 2, 9 at 2.

12. In his memorandum of August 10, 1992, Respondent does not state that he was present in the San Bernadino Hearing Office or that he was performing official work away from the Hearing Office during any or all of the periods in question on July 31 and August 6, 1992. HHS Ex. 2.

13. HOCALJ Weber's memorandum of August 7, 1992 does not question Respondent's total hours of work for any week, but it sets forth concerns about Respondent's alleged

absences from the Hearing Office on July 31 and August 6, 1992. HHS Ex. 1.

14. Some time after August 7, 1992, but before August 12, 1992, HOCALJ Weber certified a Time and Attendance Report prepared for Respondent, which resulted in Respondent's receiving a salary check calculated on the basis of 80 paid hours (including 1.5 hours of annual leave and 17.25 hours of sick leave) during the biweekly payroll period that ended on August 8, 1992. See HHS Exs. 1, 3, 20 at 2.

15. On August 12, 1992, HOCALJ Weber notified Respondent that the Time and Attendance Report would be amended to reflect Respondent's absence from work without leave (AWOL) for 3 hours and 15 minutes (3.25 hours) on July 21, 1992 and for 2 hours and 15 minutes (2.25 hours) on August 6, 1992. HHS Ex. 3.

16. HOCALJ Weber cited Respondent's failure to provide "appropriate documentation" as a basis for concluding that Respondent had been AWOL for the specified periods on July 31 and August 6, 1992. HHS Ex. 3.

17. In his memorandum asking Respondent's assistance in resolving the "discrepancies" ensuing from the reports of Respondent's arrival and departure times during July 31 and August 6, 1992, HOCALJ Weber does not ask Respondent to provide any documentation. HHS Ex. 1.

18. The record does not disclose what is meant by "appropriate documentation" for addressing someone's report to HOCALJ Weber that Respondent had arrived and departed from the Hearing Office at the specified times.

19. The Time and Attendance Report for Respondent covering the payroll period that ended August 8, 1992 was subsequently changed by agency personnel on an unspecified date to show that Respondent was charged 3.25 hours of AWOL for Friday, July 31, 1992 and 2.25 hours of AWOL for Thursday, August 6, 1992. HHS Ex. 11 at 1.

20. On August 12, 1992, Respondent directed a memorandum to HOCALJ Weber in which he protests the alleged illegality of his having been placed on AWOL and indicates his belief that no other ALJ in the Hearing Office was being charged AWOL for leaving the office during the workday. HHS Ex. 4.

21. Respondent forwarded a copy of his August 12, 1992 memorandum to SSA's Acting Chief ALJ Anglada. HHS Ex. 4.

22. In an Earnings and Leave Statement issued by HHS to Respondent for the pay period that ended on September 5, 1992, there appeared 5.5 hours of AWOL. HHS Ex. 21 at 1.

23. The 5.5 hours of AWOL resulted from adding the 3.25 hours of AWOL for July 31, 1992 to the 2.25 hours of AWOL for August 6, 1992. See Findings 5, 22.

24. On September 21, 1992, Acting Chief ALJ Anglada responded to Respondent's memoranda. HHS Ex. 9.

25. Acting Chief ALJ Anglada informed Respondent that HOCALJ Weber is required to certify Respondent's time and attendance, to approve Respondent's use of leave, and to take appropriate action where leave use irregularities or abuses are identified. HHS Ex. 8 at 1.

26. Acting Chief ALJ Anglada also informed Respondent of the following:

> When a judge works less than the prescribed number of hours in a day or week, the judge's non-working time must be recorded as leave. There are no exceptions to this established policy, and it must be applied strictly and uniformly. . . .
> While it is appreciated that you have worked such hours [i.e., late into the night and on weekends], it is irrelevant to the issue of time and attendance during your fixed tour of duty. You may not substitute time spent on such occasions for time during your normal tour of duty. . . .
>
> [I]t is essential, whether you work a fixed tour of duty or an alternate work plan, that all government-wide rules and regulations on time and attendance are followed to certify your actual hours of work.

HHS Ex. 9 at 2.

27. In his memorandum to Respondent, Acting Chief ALJ Anglada does not state that, under SSA's established policy, AWOL would be charged in lieu of leave for a judge's non-working time. HHS Ex. 9 at 2.

28. With respect to SSA's "established policy" referenced in the memorandum to Respondent, Acting Chief ALJ Anglada does not state whether an ALJ who has failed to work the required hours during the workday would be asked to use his accrued (paid) leave for the time he did not work, or whether the same ALJ would be placed on

unpaid leave status for the period he did not work. HHS Ex. 9.

29. Acting Chief ALJ Anglada did not define or otherwise explain the terms "prescribed number of hours in a day or week," "normal tour of duty," and "all government-wide rules and regulations on time and attendance" he used in his memorandum to Respondent. HHS Ex. 9 at 2.

30. On September 30, 1992, HOCALJ Weber notified Respondent by memorandum that he (Weber) had observed Respondent arriving at work at the following approximate times on six consecutive work days:

| | |
|---|---|
| September 22, 1992: | 10:00 A.M. |
| September 23, 1992: | 9:55 A.M. |
| September 24, 1992: | 10:00 A.M. |
| September 25, 1992: | 10:00 A.M. |
| September 28, 1992: | 9:35 A.M. |
| September 29, 1992: | 9:15 A.M. |

HHS Ex. 5.

31. HOCALJ Weber states in his memorandum dated September 30, 1992 that Respondent's "tour of duty" is from 8 A.M. until 4:30 P.M., and, therefore, there appears to be approximately 10 hours and 45 minutes of Respondent's work tour for which he was not present. HHS Ex. 5.

32. In his memorandum of September 30, 1992, HOCALJ Weber asks Respondent to advise him if the information concerning Respondent's arrival times is incorrect. HHS Ex. 5.

33. Some time after September 30, 1992 but prior to October 6, 1992, HOCALJ Weber certified the Time and Attendance Report for Respondent covering the dates of September 22 to 29, 1992, which resulted in Respondent's receiving pay calculated on the basis of his having worked and taken paid leave (1.50 hours of annual leave and 9.25 hours of sick leave) for a total of 80 hours during the biweekly pay period that ended on October 3, 1992. See HHS Exs. 5, 18 at 2.

34. On October 6, 1992, HOCALJ Weber issued a memorandum to Respondent, stating that because Respondent did not timely respond to the inquiry concerning Respondent's arrival times from September 22 to September 29, 1992, HOCALJ Weber had no choice except to find that Respondent was AWOL for the 10 hour and 45 minute period indicated in his earlier letter to Respondent. HHS Exs. 5, 6.

35. HOCALJ Weber did not notify Respondent that October 6, 1992 was the deadline for Respondent to explain his arrival times on September 22 to 29, 1992. HHS Ex. 5.

36. On October 8, 1992, HOCALJ Weber received a letter dated September 30, 1992 from Respondent. HHS Ex. 7.

37. Respondent's September 30, 1992 letter addresses HOCALJ Weber's personal observations concerning Respondent's arrival times at the Hearing Office by stating that, from September 22 to 25, 1992, Respondent had worked 30.50 hours, and from September 28 to 29, 1992, Respondent had worked 16 hours. HHS Ex. 7 at 2.

38. Respondent alleges in his September 30, 1992 letter specifically that no 8:00 A.M. to 4:30 P.M. tour of duty for ALJs was in effect at the San Bernadino Hearing Office because others maintained hours that were different than the asserted tour of duty, and others in the office allegedly had heard HOCALJ Weber say that ALJs are permitted to set their own hours as long as they work a "forty hour work-week." HHS Ex. 7 at 2.

39. After receiving Respondent's letter dated September 30, 1992, HOCALJ Weber did not communicate with Respondent concerning his determination that Respondent was absent for 10 hours and 45 minutes (10.75 hours) for the workdays from September 22 to 29, 1992. See HHS Exs. 5, 6.

40. On a later unspecified date, agency personnel amended the Time and Attendance Report for Respondent covering the payroll period ending October 3, 1992 to show that Respondent was charged 11 hours of AWOL from Tuesday, September 22, 1992 until Tuesday, September 29, 1992. HHS Ex. 11 at 2.

41. A total of "16.50" hours in AWOL appears on the Earnings and Leave Statement issued by HHS to Respondent for the pay period that ended November 28, 1992. HHS Ex. 21 at 2.

42. On February 16, 1993, after having completed a payroll audit, HHS prepared a Certification of Salary Overpayment, informing Respondent that he had received a salary overpayment in the amount of $443.19 due to the 11 hours of AWOL charged to the pay period that ended on October 3, 1992. HHS Ex. 12.

43. The amount of $443.19 was calculated by multiplying Respondent's then hourly rate of pay ($40.29) by 11 hours. See HHS Ex. 18 at 2.

44. Beginning with the pay period that ended on April 17, 1993 and continuing until the pay period that ended on May 15, 1993, HHS made deductions of $36.76 from each of Respondent's pay checks. HHS Ex. 13.

45. On May 5, 1993, HOCALJ Weber was told by the Director of Division of Budget and Financial Management for HHS that the earlier overpayment actions relating to the dates of July 31 and August 6, 1992 had not yet been processed. HHS Ex. 15.

46. By memorandum dated May 5, 1993 to the Director of HHS' Division of Budget and Financial Management, HOCALJ Weber requested that processing begin for the overpayment actions relating to July 31 and August 6, 1992. HHS Ex. 15.

47. HOCALJ Weber states in his memorandum of May 5, 1993 that the Certification of Salary Overpayment dated February 16, 1993 was never received in the San Bernadino Hearing Office until it was transmitted by facsimile on May 4, 1993. HHS Ex. 15.

48. In his May 5, 1993 memorandum, HOCALJ Weber referred to the salary deductions HHS made from Respondent's paychecks as relating to Respondent's "10 hours and 45 minutes of AWOL status from September 1992." HHS Ex. 15.

49. On May 6, 1993, Respondent filed a request for hearing with respect to the $443.19 amount in salary overpayment calculated by HHS and stated that he had not received the Certification of Salary Overpayment dated February 16, 1993. HHS Ex. 14.

50. HHS refunded the previously collected salary deductions of $110.28 and, on October 21, 1993, issued to Respondent the Certification of Salary Overpayment dated February 16, 1993. HHS Ex. 17.

51. On November 5, 1993, Respondent filed another request for hearing with respect to the amount of $443.19 after having received the Certification of Salary Overpayment dated February 16, 1993. HHS Exs. 14, 18.

52. In requesting a hearing concerning the $443.19 specified in the Certification of Salary Overpayment dated February 16, 1993, Respondent claimed as a basis that the Earnings and Leave Statement issued to him for the payroll period ending October 3, 1992 contains the correct information -- that is, he was correctly debited with only 1.50 hours of annual leave and 9.25 hours of sick leave for that pay period. HHS Ex. 18.

53. On January 3, 1994, after having completed a payroll audit, HHS issued a Certification of Salary Overpayment, informing Respondent that he had been overpaid the amount of $221.60 for the 5.50 hours of AWOL charged to the pay period that ended on August 8, 1992. HHS Ex. 19 at 1 - 3.

54. The amount of $221.60 was calculated by multiplying Respondent's then hourly rate of pay ($40.29) by 5.5 hours. See HHS Ex. 20 at 2.

55. The amount of money allegedly owed by Respondent to the United States totals $664.79. Findings 42, 43, 53, 54.

56. On January 18, 1994, Respondent filed his hearing request with respect to the Certification of Salary Overpayment dated January 3, 1994. HHS Ex. 20 at 1.

57. In requesting a hearing concerning the $221.60 specified in the Certification of Salary Overpayment dated January 3, 1994, Respondent claimed as a basis that the Earnings and Leave Statement issued to him for the payroll period ending August 8, 1992 contains the correct information -- that is, he was correctly debited with only 1.50 hours of annual leave and 17.25 hours of sick leave for that pay period. HHS Ex. 20 at 1 - 2.

58. Respondent's position description as an ALJ for SSA states that he is "subject only to such administrative supervision as may be required in the course of general office management." HHS. Ex. 10 at 4.

59. At all times relevant to this proceeding, Respondent has been subject to the administrative supervision of HOCALJ Weber that is concomitant to the latter's general management of the San Bernadino Hearing Office. HHS Ex. 10.

60. As part of his general office management responsibilities, the HOCALJ is authorized to participate in investigations, in coordination with the Regional Chief ALJ, into allegations of improper conduct on the part of any employee, including ALJs, which may be in violation of laws, regulations, or the agency's operating rules. HHS Ex. 10 at 8.

61. The management duties of a HOCALJ include implementing applicable regulations on leave approval and maintaining time and attendance requirements in the Hearing Office. HHS Ex. 10 at 8.

62. The HOCALJ is authorized to certify the accuracy of Time and Attendance Reports for all Hearing Office employees, including ALJs. HHS Exs. 1, 10 at 8.

63. HOCALJ Weber is not precluded from implementing or enforcing time and attendance requirements for all ALJs employed at the San Bernadino Hearing Office. Findings 58 - 62.

64. If SSA or HOCALJ Weber had instituted time and attendance requirements applicable to ALJs at the San Bernadino Hearing Office, then Respondent would have been subject to such requirements. See HHS Ex. 8.

65. HHS calculates Respondent's pay on the basis of 80 hours per 10 workdays. HHS Exs. 11, 20.

66. HHS has accounted for only 7 hours of Respondent's workday on July 31, 1992 by placing Respondent on AWOL status for 3.25 hours on the basis of information indicating that, for a total of 3.75 hours, Respondent was either present in the Hearing Office or used approved sick leave. See Findings 5, 6.

67. HHS has accounted for only 7 hours and 10 minutes of the August 6, 1992 workday by having placed Respondent on AWOL status for 2.25 hours on the basis of information indicating that Respondent was in the Hearing Office (and used no approved leave of any type) for a total of 4 hours and 55 minutes. See Findings 5, 6

68. HHS has introduced no evidence to explain why Respondent was ultimately charged with 11 hours of AWOL for the period from September 22 to 29, 1992, after HOCALJ Weber had repeatedly referred to a lesser period of AWOL for the same period of time. Findings 30 - 34.

69. HHS has not cited or introduced the laws, regulations, or operating rules of the agency that HOCALJ Weber, SSA, or HHS have relied on in charging Respondent with the AWOL hours in issue.

70. HHS has not cited or introduced any law, regulation, or operating rule of the agency that specifies the time ALJs are to arrive at SSA's Hearing Office, take their breaks, or end their workday.

71. HHS has not cited or introduced any law, regulation, or operating rule of the agency that specifies the permissible length of breaks employees of SSA's Hearing Offices (including ALJs) may take during the workday.

72. The only reference to a fixed "tour of duty" or to an 8:00 A.M. to 4:30 P.M. "tour of duty" for Respondent is contained in the September 30, 1992 memorandum HOCALJ Weber issued asking Respondent to explain his arrival time at the Hearing Office during the preceding six workdays. HHS Ex. 5; see also Finding 11.

73. HHS has not cited or otherwise introduced any law, regulation, or operating rule of the agency that sets ALJs' "tour of duty" at 8:00 A.M. to 4:30 P.M.

74. If HOCALJ Weber had set the specific hours of arrival for work, departure from work, and lengths of breaks for all ALJs employed in SSA's San Bernadino Hearing Office, HHS has not introduced any evidence to show the establishment or implementation of such requirements by HOCALJ Weber prior to Respondent's alleged absences without leave on July 31, August 6, September 22 to 25, and September 28 and 29, 1992. Findings 3 - 73.

75. HHS has not cited or introduced any law, regulation, or operating rule of the agency relevant to leave-taking by employees, including ALJs.

76. Respondent's position description as an ALJ does not limit him to performing all his work activities at the Hearing Office site. HHS Ex. 10.

77. A broad scope of technical, legal, medical, and economic knowledge is specified in the position description for SSA's ALJs. HHS Ex. 10 at 5 - 6.

78. HHS has not introduced any evidence relevant to the circumstances and procedures under which ALJs and other employees of SSA's San Bernadino Hearing Office are permitted to be away from the Hearing Office during the workday.

79. HHS has not introduced any policy, regulation, or rule for designating Respondent's status as AWOL because Respondent was suspected to have deviated from a "tour of duty."

80. HHS has not introduced evidence on any policy it or SSA may have promulgated or implemented concerning how a HOCALJ should investigate or evaluate the merits of reports that an employee (including an ALJ) may have been away from the office during his work hours.

81. HHS has not introduced evidence on any policy HOCALJ Weber may have promulgated or established prior to July

31, 1992 concerning how he investigated or dealt with reports that an employee (including an ALJ) may have been away from the office during his work hours.

82. HHS has failed to introduce any evidence to explain why, in charging Respondent with AWOL for July 31 and August 6, 1992, HOCALJ Weber cited as a basis Respondent's failure to provide "appropriate documentation" of his whereabouts when HOCALJ Weber's earlier memorandum to Respondent had sought no documentation. See Findings 69 - 81.

83. If reports concerning Respondent's absences from the Hearing Office constituted allegations that Respondent's conduct was improper and violative of a law, regulation, or agency rule, HOCALJ Weber should have been a participant in an investigation conducted in coordination with the Regional Chief ALJ. HHS Ex. 10 at 8.

84. HHS has not introduced any evidence indicating that HOCALJ Weber participated in any investigation in coordination with the Regional Chief ALJ concerning reports of Respondent's absences from work.

## ANALYSIS OF FACTS AND CONCLUSIONS OF LAW

I. I grant HHS' motion to issue a decision based on the written record and order that judgment be entered in Respondent's favor.

I have summarized the relevant chronology of events in Findings 3 to 57. No real dispute exists concerning what took place. Therefore, I will not repeat the acts that have brought the parties before me for an adjudication concerning the debt allegedly owed by Respondent.

HHS, the Petitioner herein, asked that the case be decided on the written record placed before me. HHS contended that there is no issue of veracity or credibility attendant with Respondent's indebtedness or with HHS' calculations of the amount owed by Respondent. HHS Br. at 2. HHS reasoned that Respondent's debt, which was calculated by mathematically correct means, exists as a matter of law because HOCALJ Weber has already found Respondent to have been on AWOL for the specified periods. HHS contended that I am without authority to readjudicate the merits of a discretionary management function performed by HOCALJ Weber:

> As to the existence of the debt, it is irrelevant whether Respondent agrees with the

> determination to place him in AWOL status. He was so placed, therefore the debt exists. This forum is not constituted to readjudicate the merits of that discretionary management action.

HHS Br. at 10.

Respondent urged me to set the case for an in-person hearing, where HHS presumably would have presented witnesses who allegedly observed Respondent's absences at issue, where Respondent would have had the right to cross-examine such witnesses, and where Respondent and his witnesses would have had the opportunity to rebut HHS' documentary evidence. Respondent Br. at 3. Respondent disputed the factual allegations contained in the HOCALJ's statements of record. Respondent Br. at 4; see also HHS Exs. 18, 20. Respondent noted also the affirmative defenses he might have pursued through witness testimony at an in-person hearing, such as whether the pay of other judges and employees had been "docked" under similar circumstances, whether the management actions taken with respect to the alleged absences were required or appropriate (or constituted interference with the judicial independence of ALJs). Respondent Br. at 3 - 6. Respondent contended that the merits of his case depended in substantial part upon witness credibility. Id.

In its reply brief, HHS continued to argue that the matter before me could be decided on the documentary record because the testimony Respondent presumably would elicit goes to issues beyond the scope of my jurisdiction, and, moreover, I should defer to HOCALJ Weber's adjudication of the AWOL matter under the doctrine of comity:

> In DHHS v. Dolly Jackson, [DAB CR102 (1990)], the Department Appeals Board held in another debt-collection case that it was without authority to reopen or otherwise modify a decision of the MSPB [Merit System Protection Board], the implementation of which resulted in an overpayment to Respondent; . . .
>
> Likewise here, comity urges that the Departmental Appeals Board grant deference to the agency's AWOL decision, made in the legitimate exercise of its administrative management authority.

HHS Reply Br. at 2 - 3. According to HHS, the evidence contained in the written record entitled HHS to judgment

in its favor. E.g., HHS Reply Br. at 5 - 6. HHS continued to re-emphasize its view that the appropriateness or necessity of the AWOL action cannot be challenged in this forum because the Departmental Appeals Board could not intrude into a matter committed to the sole discretion of HHS/SSA.[3] HHS contended that an in-person hearing was not necessary because, in order for HHS to meet its burden of proving that a debt exists, it is necessary for HHS to show only that it "made a determination that Respondent was 'guilty of the offense charged.'" HHS Reply Br. at 5 (emphasis added).

For the reasons that follow, I grant HHS' motion for disposition of the issues based on the documentary evidence. On the basis of that record, I enter judgment in favor of Respondent.

I find that the case need not proceed to an in-person hearing. HHS is the Petitioner in this action, and it bears the burden of proving by a preponderance of the evidence that Respondent is indebted to the United States and in the amount of $664.79 for the reasons contended by HHS. Order and Notice of Hearing dated March 30, 1994 at 2. Nearly two years have elapsed since HOCALJ Weber placed Respondent on AWOL and provided the factual underpinnings for HHS' claim of a debt. HHS has been on notice throughout that Respondent disagreed with the facts asserted by HHS in claiming a debt.

Respondent has consistently asked HHS to prove the accuracy of its determinations. In his correspondence with HOCALJ Weber dated August 10, 1992, Respondent requested the name of the "informant" and a copy of the notes relied upon to lodge the "very serious" allegations against him. HHS Ex. 2. Respondent did not receive the information or documentation he sought. Instead, HOCALJ Weber cited Respondent's failure to provide "relevant documentation" as a basis for placing Respondent on AWOL. HHS Ex. 3. The record reveals that Respondent was disputing the existence of any policy or practice in the San Bernadino Hearing Office that required ALJs to arrive or depart at the same specified hours each workday. HHS Exs. 2 at 1, 7 at 2. In his hearing requests, Respondent

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[3] "The purported issue of appropriateness of the AWOL action and whether it was required to be taken . . . is not relevant here and calls for the Departmental Appeals Board to improperly intrude in matters committed to the sole discretion of the agency in the exercise of its legitimate management authority." HHS Reply Br. at 3.

contended also that he should not have been charged with any unpaid absences during the relevant pay periods. HHS Exs. 18, 20.[4] HHS has chosen to proceed on the documentary evidence it has submitted even after Respondent had suggested to HHS that it should use the testimony of eye-witnesses to prove that Respondent incurred the unexcused absences that resulted in the indebtedness at issue. See Respondent Br. at 3.

II. I have the authority to review the legitimacy and merits of the management actions that gave rise to the debt in issue.

Respondent is entitled to an impartial evidentiary hearing on "the administrative determination of the existence or amount of the debt." See 45 C.F.R. §§ 30.15(l), (n), (o). Hearing means either a review of the documentary evidence of record or an in-person hearing. 45 C.F.R. § 30.15(b)(2). My responsibility is to decide, based on the evidence presented by the parties, whether and to what extent a debt exists. 45 C.F.R. §§ 30.15(l), (n), (o).

Here, the debt would not exist but for the AWOL designation. The dispute concerning the existence of a debt (i.e., a salary overpayment) arose only because HOCALJ Weber had decided to certify retrospectively for Respondent's Time and Attendance Report that Respondent was AWOL during the dates in question. The administrative determination at issue is HHS' finding that Respondent owes $664.79 in salary overpayments due to his having been absent from the office without leave for a total of 16.50 hours.

HHS' arguments that I am obliged to refrain from reviewing the merits of the administrative determination at issue are without parallels.[5] There would be no point

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[4] Respondent alleged in his hearing requests that the Earnings and Leave Statements reflecting no AWOL hours contain the correct information for the relevant time periods. Therefore, I construe his hearing requests as challenging HHS' contentions as to the 16.5 hours of AWOL and authorizing me to review the AWOL issue under 45 C.F.R. §§ 30.15(n)(3)(vi) and (o).

[5] For example, in cases brought under sections 1128 and 1156 of the Social Security Act, the Inspector General of HHS will not prevail at hearing if, like here, the Inspector General merely proves that she has been delegated the authority to impose sanctions as part of

for any debtor to seek review under HHS' regulations if, as HHS suggests, HHS is entitled to prevail at hearing whenever it shows that an agency manager has determined for reasons not of record that the debtor was "guilty of the offense charged." See HHS Reply Br. at 5. Contrary to HHS' argument that "this forum is not constituted to readjudicate the merits of that administrative agency action" (HHS Reply Br. at 2), HHS' own regulations constituted this forum to adjudicate the merits of the administrative agency action finding Respondent indebted for $664.79 in salary overpayments due to HHS' having charged him retroactively with 16.50 hours of AWOL. What this forum was not constituted to do was to rubber-stamp HHS' administrative or management actions.

I reject also as a matter of law the doctrine of comity urged by HHS, as well as HHS' efforts to characterize its actions under review in this forum as the equivalent of a decision issued by the MSPB. I represent the Secretary of HHS in the present proceeding for deciding whether Respondent owes the debt claimed by HHS. HHS' status before me is that of the litigant, and HHS' managers and officials involved in this action have the status of witnesses (or potential witnesses) before me.[6] HOCALJ Weber's determination of Respondent's AWOL status is not conclusive or of dispositive weight. Nor is his determination the equivalent of a final agency determination. The Jackson decision cited by HHS is inapposite because neither the MSPB nor any lawfully authorized adjudicator has upheld the AWOL determination

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her administrative responsibilities for HHS and she made a determination that a particular individual is subject to a sanction that she has imposed. Even though the Inspector General's status is that of a respondent in such cases, the fact that the Inspector General received a delegation of authority and the fact that she made an administrative determination would not meet her burden of showing that her determination in issue is factually and legally valid. Here, I note especially that HHS is the Petitioner in the present debt collection case. As Petitioner, HHS has the ultimate burden of persuasion on all material issues of fact as well as the initial burden of moving forward with evidence sufficient for showing that a debt exists for the reasons alleged by HHS.

[6] Even though HHS argued against having an in-person hearing, nothing contained in my prehearing order precluded HHS from introducing the affidavits or written statements of its managers and employees to explain the information contained in other submissions.

pursuant to an on-record review of the relevant evidence.

HHS contended that Respondent should have invoked the agency's grievance procedures under 5 C.F.R. Part 771, if Respondent wished to challenge the merits of the AWOL action. HHS Br. at p. 6, n.4 (citing also Matter of Perry, 39 M.S.P.R. 446, 449 n.2). The regulation on the agencies' administration of a grievance system provides as follows in relevant part:

> (c) Discretionary matter. This part does not apply to the following matters unless the agency extends coverage to any aspect of them:
>
> > (3) A matter meeting the definition of a grievance but in which the employee files a complaint or other challenge under another review procedure, reconsideration, or dispute resolution process within the agency.

5 C.F.R. § 771.201(c). But Respondent has properly filed a request for hearing in the present forum, and HHS has not introduced any evidence showing that HHS affirmatively extended coverage to any aspect of the debt collection action (e.g., the validity or legitimacy of the AWOL charge that gave rise to the debt) under the grievance system it has set up. Nothing of record indicates that, when the AWOL determinations were made, HHS informed Respondent of any rights under a grievance process. Moreover, the portion of the MSPB decision cited by HHS does not support the conclusion that employees dissatisfied with management decisions must resort to the grievance system and can have no recourse outside of the grievance system.[7] If HHS' arguments on

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[7] The Perry case involved MSPB's determination that the management actions cited by ALJ Perry did not attain the results that would invoke MSPB's jurisdiction. In the portion of the Perry case cited by HHS, the MSPB was discussing the frivolous nature of the action brought by ALJ Perry against SSA, which involved ALJ Perry's allegation that the agency's issuance of a single reprimand to him due to certain pending travel voucher disputes constructively removed him from his position and constructively reduced his pay. The MSPB found that the agency actions at issue did not amount to a "sufficiently pernicious agency conduct" for invoking the MSPB's jurisdiction. Id. at 449.

deferral or comity are based on a theory that Respondent has lost his right to challenge the correctness of the AWOL determinations because he failed to timely file a grievance, then I find that HHS has not provided the appropriate factual or legal support for such a theory.

Respondent has made me aware that he has filed a complaint with the MSPB, alleging that some of the management actions at issue here were initiated against him in retaliation for his whistleblowing activities. Respondent Br. at 2. Respondent asserts also that he has filed a Report of Prohibited Personnel Practice or Other Prohibited Activity with SSA's Office of Hearings and Appeals' Special Counsel to challenge many of the same facts involved in the present debt dispute. Id. However, Respondent's filings in the other forums do not preempt me from deciding whether a debt exists for the reasons and in the amounts alleged by HHS.

My jurisdiction is different than that of the MSPB and the Special Counsel. Respondent is not precluded from seeking to invoke the jurisdiction of other forums in his quest for different types of relief based on the same set of facts.[8] If HHS wishes to be bound by any finding

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Even though the MSPB pointed out in footnote 2 of its decision that dissatisfied employees are permitted to utilize the grievance process to seek review of the appropriateness of "minor management actions, like the issuance of reprimands," id., the MSPB was not suggesting that it or any other adjudicator should refrain from reviewing all management actions for which there exists a grievance process. The MSPB noted at the outset of its decision that its jurisdiction extends to reviewing certain types of management actions, and it will take jurisdiction over a "'constructive removal' . . . [where the agency's conduct] has a pernicious effect on the complaining judge's qualified independence." Id. at 448. The MSPB refused to exercise jurisdiction to review the management actions involved in the Perry case only because the management actions (a single reprimand and disputes over travel vouchers) did not have the consequences (e.g., constructive removal or constructive reduction in pay) required for invoking the MSPB's jurisdiction.

[8] The regulation that provides for Respondent's hearing rights "does not supersede or require omission or duplication of administrative proceedings required under contract, statute, regulation or other agency procedures." 45 C.F.R. § 30.4.

which may be made by the MSPB or the Special Counsel on potentially overlapping issues of fact, HHS has the option to delay its efforts to collect the alleged debt owed by Respondent. However, having chosen to proceed, HHS should not have rested its position on the fact that HOCALJ Weber made the AWOL determination as a manager and that no employee should be absent from his or her work without appropriate leave.

Without doubt, HOCALJ Weber has been delegated the responsibility for performing certain general office management responsibilities, which include determining whether any ALJ assigned to his Hearing Office has been absent from work without leave and for what amount of time. HHS Ex. 10. However, he does not have the unfettered discretion to place an employee on AWOL merely because he is a manager. As acknowledged also in HHS' arguments, HOCALJ Weber's determinations on Respondent's AWOL status need to constitute and reflect the legitimate discretionary exercise of agency managerial authority. E.g., HHS Br. at 6; HHS Reply Br. at 2 - 3.

I agree fully with the view that all employees, including ALJs, should follow the work rules set by an employer. Unless otherwise mandated by laws such as the Fair Labor Standards Act, no employer needs to pay its employees, including ALJs, compensation not provided for by the employer's rules and policies. Thus, for example, if an employer has rules requiring its employees to be at the office during certain set hours, then the employees, including ALJs, must comply. If the employer has rules requiring employees to seek leaves of absences when they depart from the work site during the required hours of work, then all employees, including ALJs, must follow the procedures set by those rules. If the employer has rules governing the procedures for investigating whether its employees have deviated from any of the foregoing types of rules, then the employees, including ALJs, are subject to them. If the employer has rules setting forth the consequences to employees when they are not present for work during the required hours or fail to obtain leave approval as required by the employer, then the employees, including ALJs, are subject to the consequences. However, in addition to binding the employees, the existence of such rules would obligate also the employer and its managers to follow them as well.

In this case dealing with a debt created by the HOCALJ's determination that Respondent was absent from the office without management approval when he should have been present, HHS was required to provide proof for its contention that the debt claimed by HHS arose from the

legitimate and proper exercise of managerial authority as HHS claimed. If HHS is of the view that the exercise of managerial authority was legitimate because the HOCALJ was administering and enforcing established, pre-existing rules, regulations, or policies of the agency, then HHS needed to introduce such rules, regulations, or polices as part of its prima facie case. If HHS is of the view that the exercise of managerial authority was legitimate for reasons other than the enforcement of established, pre-existing rules, regulations, or policies of the agency, then HHS needed to introduce such reasons into the record as part of its prima facie case.

My role is not to preempt HOCALJ Weber's managerial responsibilities or make managerial decisions for HHS. However, I will not accept on faith HHS' unsupported representations that the HOCALJ's actions were consistent with or authorized by his delegated managerial responsibilities. In sum, HHS should have adduced the necessary proof to support its theory of legitimacy instead of seeking to bar me from reviewing the factual and legal underpinnings of the AWOL determinations, asking me to defer to HOCALJ Weber's decision to place Respondent on 16.50 hours of AWOL, or urging me to presume that the HOCALJ's actions were valid.

III. HHS has failed to establish which, if any, agency regulations, policies, or rules have been applied in finding Respondent AWOL.

The problem with HHS' case does not lie with HOCALJ Weber's position as a manager, but with inadequacies and unexplained inconsistencies in HHS' proof. At the very least, HHS' evidence should have addressed the threshold issues of what hours Respondent was required to be present in the office unless he had received approval to the contrary, and, if he had been absent without permission, what consequences were provided for by law, regulations, rules, or policy.

However, having shown that a HOCALJ is authorized to perform general office management tasks, HHS has introduced no evidence showing what relevant agency rules, regulations, or policies were in place at the San Bernadino Hearing Office on the dates in issue. For example, HHS offered no evidence to show what rules or policies may have existed concerning any of the following: the schedules ALJs are required to work; if or how ALJs are to account for their whereabouts during the workday; when or for what amount of time ALJs are permitted to take breaks from their work. Nor did HHS prove when such work rules were established and by whom.

HHS did not disclose whether any relevant work rules that may exist at the San Bernadino Hearing Office were established by agency-wide regulations, SSA's Office of Hearings and Appeal, or HOCALJ Weber. Instead, HHS posited some general allegations and conclusions that Respondent violated time and attendance rules or policies on the dates in issue.

HHS has not shown the existence of any policy, regulation, or rule that would put Respondent in AWOL status because Respondent was suspected to have worked less than the hours required by his "tour of duty." I make this finding not because I believe ALJs should be beyond the reaches of any pre-existing AWOL policy the agency may have, but in light of what is contained (and not contained) in Acting Chief ALJ Anglada's letter to Respondent dated September 21, 1992. HHS Ex. 9. Acting Chief ALJ Anglada informed Respondent that "[w]hen a judge works less than the prescribed number of hours in a day or week, the judge's non-working time must be recorded as leave." HHS Ex. 9 at 2 (emphasis added). The Acting Chief ALJ further informed Respondent that "[t]here are no exceptions to this established policy, and it must be applied strictly and uniformly." HHS Ex. 9 at 2 (emphasis added).

Acting Chief ALJ Anglada made no mention of any policy to record an ALJ's time as AWOL when the ALJ fails to work the requisite hours.[9] Acting Chief ALJ Anglada made no mention of any policy to place a judge on AWOL status even though he was responding to Respondent's August 12, 1992 memorandum, in which Respondent raised the issue of "unauthorized absences" and Respondent cited the example of another ALJ in the San Bernadino Hearing Office who was leaving the office for one to two hours every afternoon. HHS Exs. 4, 9. In fact, the very term AWOL (i.e., absent without leave) does not appear to be consistent with the stated policy of recording ALJs' non-working time as leave.

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[9] Since an ALJ is "subject only to such administrative supervision as may be required in the course of general office management" (HHS Ex. 10 at 4), I interpret the established policy of recording as leave ALJs' non-working time as being applicable to situations where an ALJ is not present to perform work when he or she should be present to perform work. I do not construe this policy as being limited to those situations where the ALJ was present in the office but was not engaged in activities related to the official responsibilities of an ALJ.

According to the evidence introduced by HHS, HOCALJ Weber's memorandum dated September 30, 1992 contains the first and only mention that Respondent is obligated to work a "tour of duty" from 8 A.M. to 4:30 P.M. each day. HHS Ex. 5. However, in this same memorandum, the HOCALJ was asserting also that Respondent failed to arrive on time for his "tour of duty" during six previous work days. HHS Ex. 5. In addition, the record shows that before there was an 8 A.M. to 4:30 P.M. "tour of duty," the HOCALJ had already charged Respondent with a total of 5.5 hours of AWOL for July 31 and August 6, 1992 due to reasons that included Respondent's failure to provide the "appropriate documentation." HHS Exs. 1, 3. HHS did not establish that the HOCALJ had ever sought the documentation.

Even though Acting Chief ALJ Anglada referred to "time and attendance requirements," "fixed tour of duty," "normal tour of duty," and "all government-wide rules and regulations on time and attendance," he made no mention of any tour of duty for ALJs that spans the hours from 8 A.M. to 4:30 P.M. each day. If the 8:00 A.M. to 4:30 P.M. "tour of duty" had been contained in a policy, employment rule, or agency regulation, HHS should have been able to prove the relevant details concerning its origin and existence. Yet, HHS has cited no rule or regulation of general applicability setting those particular work hours as all government employees' "tour of duty." The record is devoid of any evidence showing how, when, or if such a fixed tour of duty came into existence for all ALJs at the San Bernadino Office, as intimated by HHS.

HHS has not provided any evidence to show that, prior to September 30, 1992, there existed a policy, rule, or regulation in place at the San Bernadino Hearing Office (whether promulgated by SSA/HHS or the HOCALJ) that had required Respondent or any other ALJ to work a "tour of duty" from 8 A.M. to 4:30 P.M. each day. If these particular "tour of duty" hours had been announced to Respondent for the first time in the September 30, 1992 memorandum, HHS has not explained how a debt can be legitimately created through the retroactive application of these hours. I note, too, that Respondent has never conceded the existence of any fixed "tour of duty" hours established for ALJs by management's policies or practices in the San Bernadino Hearing Office. See HHS Exs. 4, 7. HHS had notice that the existence of a fixed "tour of duty" rule, as well as any rule concerning working from 8:00 A.M. to 4:30 P.M., was in controversy.

IV. Inconsistencies in HHS' evidence do not give rise to the implication that HHS properly applied or enforced any relevant pre-existing rule or policy.

Inconsistencies in the evidence introduced by HHS do not permit me to discern any relevant policy or rule governing the ALJs' hours of work, the length or timing of the breaks they are permitted to take, or how the agency computes the time periods attributable to AWOL. For example, HOCALJ Weber only mentioned 10.45 hours of AWOL during the period from September 22 to September 29, 1992.[10] Yet HHS' payroll office employees repeatedly computed 11 hours of AWOL for the same period of time. HHS Ex. 12; see also HHS Ex. 21 at 2. HHS has not explained to Respondent or me why this difference exists.

In addition, HHS' evidence shows that on July 31, 1992, Respondent was present in the Hearing Office and used approved sick leave for a total of 3.75 hours, and on August 6, 1992, Respondent was present in the Hearing Office (and used no approved leave) for a total of 4 hours and 55 minutes. See HHS Ex. 1. However, HHS' charging Respondent with 3.25 hours of AWOL for July 31, 1992 accounts for 7 hours of the time Respondent was supposed to have been working, and HHS' charging Respondent with 2.25 hours of AWOL for August 6, 1992 accounts for 7 hours and 10 minutes of the time Respondent was supposed to have been working. See HHS Exs. 3, 21. HHS has not explained this discrepancy.

I find HHS' actions for July 31 and August 6, 1992 especially problematic given that HHS was ostensibly calculating Respondent's pay on the basis of 80 hours per 10 workdays (HHS Exs. 11, 20) and claiming also that Respondent's fixed "tour of duty" spanned from 8:00 A.M. to 4:30 P.M. If ALJs of the San Bernadino Hearing Office were entitled to take daily work breaks in an amount of time equal to 1 hour and 30 minutes to 1 hour and 20 minutes as suggested by HHS' evidence concerning July 31

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[10] On September 30, 1992, HOCALJ Weber stated "[i]t appears that there is approximately 10 hours and 45 minutes of your work tour that you were not present." HHS Ex. 5. On October 6, 1992, he stated "I have no choice but to find you were absent from work without leave for the periods indicated in said letter." HHS Ex. 6. Then on May 5, 1993, HOCALJ informed the Division of Budget and Financial Management that "salary adjustments have apparently started relative to Judge Bennett's 10 hours and 45 minutes of AWOL status from September 1992." HHS Ex. 15.

and August 6, 1992, this possibility still does not explain for which periods of time on those days Respondent was charged with AWOL because, in HHS' view, he was not entitled to be away on a work break and not using approved leave. Nor does the possible aggregate length of all daily breaks help prove that the 11 hours of AWOL HHS imposed for the period from September 22 to 29, 1992 were calculated pursuant to the same policies, practices, or considerations as for July 31 and August 6, 1992.

Even if I were to assume that certain unspecified agency policies, rules, or regulations required ALJs in the San Bernadino Hearing Office to work a fixed "tour of duty," HHS' evidence remains inadequate for its failure to explain how such policies, rules, or regulations are applied in the context of its employees' different work responsibilities and its employees' status under the Fair Labor Standards Act. A "tour of duty" need not necessarily connote the requirement that all employees remain in the hearing office throughout the designated hours, for example. According to their job description, the ALJs employed by SSA are expected to exercise initiative in managing and deciding the cases assigned to them, and the agency expects them to acquire current knowledge on a broad range of complex medical-legal matters involved in their adjudicative responsibilities. HHS Ex. 10. Therefore, even if all employees in the San Bernadino Hearing Office have the same "tour of duty," the office need not require ALJs to remain in the office throughout the workday or to make others aware of their whereabouts to the same extent that, for example, a security guard or receptionist employed by the office may have a need to do so, due to the nature of that person's job responsibilities.

In addition, Respondent's job description establishes that he and other ALJs are "exempt" employees under the Fair Labor Standards Act. HHS Ex. 10 at 1. There are agency employees who are "nonexempt" under the Fair Labor Standards Act. See id. HHS has not shown that, even though the agency classified its employees into "exempt" and "nonexempt" categories, the agency or the HOCALJ requires all employees to keep track of their work hours and to keep their supervisors apprised of their whereabouts to the same extent.

Here, nothing even indicates that employees of an SSA hearing office are required to seek approval from a management official whenever they wish to leave the office for any period of time not coinciding with their break periods. Even though the HOCALJ is the official

from whom leave should be sought by an ALJ, the HOCALJ must use his time also to hold hearings and to perform all the other duties of an ALJ. HHS Ex. 10 at 7 - 8. HHS has not shown under what circumstances ALJs must seek leave from a HOCALJ for absences during routine workdays.

If what occurred in Respondent's situation was unique, then HHS should have used evidence to explain why its actions were reasonable and why they were not applicable to other ALJs. HHS has not shown or explained those parameters on requesting leave that were allegedly exceeded by Respondent. The absence of relevant evidence does not permit me to conclude that HHS determined Respondent to have been AWOL pursuant to a proper exercise of its management discretion.

V. <u>There is nothing inherently persuasive in the findings that Respondent was absent from the office without leave on the days in issue or absent from the office without leave for a total of 16.50 hours</u>.

To show that its determination of Respondent's AWOL status constituted a legitimate exercise of management discretion, HHS could have introduced evidence that its manager used a fair process reasonably calculated to secure all relevant facts, and he reached a conclusion reasonably consistent with the facts before him. I emphasize that the test is not how I or another individual not employed as a manager by HHS would decide a question de novo. HHS' determination can reflect a legitimate exercise of its managerial discretion if the facts relied upon by its manager appear reasonably complete and can be fairly construed to give rise to the conclusion reached by the manager.

HHS has not proven the reasonableness of its process for concluding that Respondent had been absent without leave for a total of 16.50 hours. Even though the HOCALJ is authorized to help investigate allegations of possible misconduct on the part of any employee (HHS Ex. 10 at 8), HHS has not shown that the manner in which it investigated Respondent's alleged absences or the conclusions reached by HHS are within the proper exercise of managerial discretion. For example, HHS has not shown how its managers generally handle similar charges pursuant to agency rules, regulations, or policies. If the manner for conducting investigations of alleged time and attendance problems is left to the discretion of managers on a case by case basis, then HHS has failed to answer many of the questions left open in the circumstances surrounding the determination of the 16.50 hours of AWOL in issue.

According to HHS' evidence, the investigation of alleged time and attendance infractions consisted of the HOCALJ's written inquiries to Respondent and the latter's answers. I found Respondent's written communications with HOCALJ Weber highly inappropriate in tone and containing several misstatements of law.[11] Whatever the history between these two individuals, Respondent should have been mindful that he was communicating with the Chief ALJ of his hearing office on official agency matters, and Respondent should have tempered his answers to the HOCALJ's questions accordingly. This is not to imply, however, that because Respondent's tone was belligerent and he failed to indicate any sincere willingness to cooperate with the HOCALJ's request, HHS is therefore justified in claiming a debt by putting him on AWOL status. As recapitulated in one of the MSPB cases HHS cited:

> placement in AWOL status for pay purposes is not a disciplinary action. Rather, it is a purely remedial action taken to avoid compensating an employee for time not worked. Unexcused failure to report for duty is an offense against the employment relationship. . . .

Office of Hearings and Appeals, SSA v. John Whittlesey, 59 M.S.P.R. 684, 690 (1993) (citation omitted).

Especially with respect to the allegations concerning Respondent's absences on July 31 and August 6, 1992, I have earlier noted that Respondent asked HOCALJ Weber for the "informant's" identity and a copy of all documents used by HOCALJ Weber to address the merits of the allegations. HOCALJ Weber did not provide the requested information but, instead, placed Respondent on AWOL for failing to provide documentation, although the HOCALJ had not sought that documentation. Respondent then objected to the HOCALJ's statement "you have not provided appropriate documentation." HHS Ex. 4. Even though Respondent objected due to his incorrect belief that HOCALJ Weber was not his supervisor, he did object and raise the issue of whether he should have been required to provide documentation that he was in the office or not otherwise AWOL. See id. If the existence of documentation was to form a basis of the administrative

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[11] For example, there is no legal merit to Respondent's claim that the HOCALJ is without the responsibility or right to certify Time and Attendance reports for ALJs. See HHS Ex. 2; Finding 62.

determination on whether Respondent had arrived at or departed from the office at the hours reported by an unidentified person, then Respondent should have been so informed in advance, and HHS should have explained to what documents the HOCALJ was referring in finding Respondent AWOL.

HHS has not adequately or directly addressed the question of whether, during an investigation of possible time and attendance infractions, the burden is on the accused to prove the absence of wrongdoing, or on the agency manager to prove the occurrence of wrongdoing.[12] Moreover, whether or not the HOCALJ was entitled to withhold the information requested by Respondent and place the consequences of non-production and non-response on Respondent during an investigation, the same approach cannot be taken in this proceeding. Here, HHS bears the burden of persuasion and the burden of moving forward with the evidence in support of its claim that a debt was created because Respondent was AWOL.

In addition to the previously noted deficiencies and contradictions, the evidence HHS introduced does not show that the unidentified person's allegations on Respondent's absences for July 31 and August 6, 1992 are inherently credible. The person merely reported having seen Respondent arrive and depart from the office at the specified times. HHS submitted no evidence to show, for example, that the reporting individual was in a position to see all of Respondent's movements or that the person's statements were reliable by virtue of his or her job

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[12] Nothing introduced by HHS indicates whether the agency has regulations, rules, or policies that place the burden on its "exempt" employees (see HHS Ex. 10 at 1) to either prove that they were present during any specified period of a workday or have their pay docked. Given the remedial nature of the AWOL designation, the absence of any sign-in/sign-out requirements for ALJs like Respondent, and HOCALJ Weber's having certified Respondent's Time and Attendance Reports for 80 hours of pay while awaiting responses from Respondent concerning his whereabouts (see Findings 5 - 17), there exists an inference that the agency presumes Respondent and other ALJs to have worked during the hours they were supposed to unless the agency can prove the contrary. HHS suggests a different allocation of the burden by its evidence indicating that the AWOL determination was reached because Respondent did not answer or did not answer appropriately the inquiries made by his HOCALJ. However, HHS provided nothing in support of its position.

responsibilities or other reasons. Therefore, there is also insufficient evidence for showing that HOCALJ Weber reached a reasonable conclusion with respect to the 5.5 hours of AWOL notwithstanding his reliance on the absence of documents never requested of Respondent.

With respect to the AWOL hours for September 22 to 29, 1992, Respondent challenged HOCALJ Weber's personal observations by contending that HOCALJ Weber probably could not have seen whether Respondent arrived at the office by 8:00 A.M., alleging that HOCALJ Weber rarely arrives by that time of the morning. Respondent alleged also that the HOCALJ told the other judges that they could set their own work hours, so long as they worked a total of 40 hours a week. HHS Ex. 7.[13] By the time Respondent's response letter to HOCALJ Weber's observations was received in the Hearing Office, HOCALJ Weber had already decided to place Respondent on AWOL for 10.45 hours because Respondent had not responded by October 6, 1992. HHS Ex. 6. HOCALJ Weber had not set October 6, 1992 as a deadline for receiving Respondent's answer. See HHS Ex. 5.

Moreover, there is no evidence that, after Respondent's answers to HOCALJ Weber's personal observations were received in the San Bernadino Hearing Office, any HHS management official had reviewed the merits of Respondent's answers (including his additional assertion that HOCALJ Weber told the judges in the office that they may set their own hours in order to work 40 hours each week) before declaring that Respondent owed a debt. The record does not indicate that HOCALJ Weber reviewed Respondent's answers even after October 6, 1992 or considered Respondent's claim that, in the exercise of the HOCALJ's managerial discretion, he had exempted all ALJs in the Hearing Office from a fixed tour of duty. For these reasons, the process by which the 11 hours of AWOL was determined is not inherently reasonable. At the very least, HHS' evidence indicates that its determination of the total 16.50 hours of AWOL was based on an incomplete review of Respondent's position, the absence of documents not sought from Respondent, and the use of a timetable not disclosed to Respondent.

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[13] Also, Respondent alleged that the HOCALJ's memorandum had been placed on his desk and that he had been convalescing from surgery (and using annual and sick leave) until September 22, 1992. HHS Ex. 7.

VI. Respondent need not present his proof at an in-person hearing where, as here, HHS has failed to prove a prima facie case that Respondent owes a debt to the United States.

For the reasons explained above, I find HHS' arguments untenable as a matter of law and HHS' evidence inadequate for proving a prima facie case of indebtedness by Respondent. HHS cannot establish the existence of a debt by showing that HHS has found Respondent "guilty of the offense charged" for reasons not of record. HHS Reply Br. at 5. Even though I cannot order HHS to delete the AWOL from Respondent's records or set aside HHS' determination of Respondent's "guilt" on the AWOL charge, I cannot also give any legal effect to a debt claimed by HHS as a consequence to its having found Respondent "guilty" for reasons HHS has not adequately or persuasively set forth in the record before me.

In the absence of a prima facie case by HHS, the burden of moving forward with evidence does not shift to Respondent. Therefore, I do not find it necessary to grant Respondent's motion to have an in-person hearing so that Respondent may present witnesses to rebut HHS' evidence or prove that his versions of the underlying facts are more credible than HHS'.

Even if an in-person hearing might now be of benefit to HHS, I am not giving HHS another opportunity to prove a prima facie case against Respondent. HHS, as the Petitioner, chose the method for presenting its case against Respondent. HHS has repeatedly and unequivocally chosen to prove its case on a documentary record. HHS has had a full and fair opportunity to present its position in this case. I am therefore ruling against HHS on the basis of the record before me. HHS is not entitled to collect any debt from Respondent pursuant to its having placed Respondent on AWOL status for a total of 16.50 hours.

/s/

Mimi Hwang Leahy
Administrative Law Judge

## APPENDIX

### RECITATION OF THE RECORD THAT WAS REVIEWED

I admitted the following exhibits in this case:

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| DHHS Ex. 1: | August 7, 1992 memorandum to Dennis T. Bennett, Office of Hearings and Appeals, Administrative Law Judge from Larry M. Weber, Office of Hearings and Appeals, Chief Administrative Law Judge. |
| DHHS Ex. 2: | August 10, 1992 letter to Larry M. Weber from Dennis T. Bennett. |
| DHHS Ex. 3: | August 12, 1992 letter to Dennis T. Bennett from Larry M. Weber. |
| DHHS Ex. 4: | August 12, 1992 memorandum to Larry M. Weber from Dennis T. Bennett. |
| DHHS Ex. 5: | September 30, 1992 letter to Dennis T. Bennett from Larry M. Weber. |
| DHHS Ex. 6: | October 6, 1992 letter to Dennis T. Bennett from Larry M. Weber. |
| DHHS Ex 7: | September 30, 1992 letter to Larry M. Weber from Dennis T. Bennett. |
| DHHS Ex. 8: | January 11, 1993 opinion and order in the case of Office of Hearings and Appeals, Social Security Administration, Agency, v. Arthur F. Bronczyk, Respondent. |
| DHHS Ex. 9: | September 21, 1992 memorandum to Dennis T. Bennett from Jose A. Anglada, Acting Chief Administrative Law Judge. |
| DHHS Ex. 10: | April 10, 1985 standard position description for an Administrative Law Judge (Licensing & Benefits). |
| DHHS Ex. 11: | Undated time and attendance reports of Dennis T. Bennett (pay periods ending August 8, 1992 and October 3, 1992). |

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| DHHS Ex. 12: | February 16, 1993 certification of salary overpayment to Personnel Office from Joseph V. Colantuoni, Assistant Director for Personnel and Pay Systems Division, with attachments. |
| DHHS Ex. 13: | Undated earnings and leave statements for Dennis T. Bennett (pay periods ending April 17, 1993, May 1, 1993, and May 15, 1993). |
| DHHS Ex. 14: | May 6, 1993 letter to Joseph V. Colantuoni, with attached May 7, 1993 request for hearing from Dennis T. Bennett. |
| DHHS Ex. 15: | May 5, 1993 memorandum to Sharon Coulter, Director, Division of Budget and Financial Management from Larry M. Weber. |
| DHHS Ex. 16: | Undated earnings and leave statement of Dennis T. Bennett (pay period ending October 2, 1993). |
| DHHS Ex. 17: | October 21, 1993 memorandum to Larry M. Weber from Sharon J. Coulter, with attachments. |
| DHHS Ex. 18: | November 5, 1993 response of Dennis T. Bennett and an undated earnings and leave statement of Dennis T. Bennett (pay period ending October 3, 1992). |
| DHHS Ex. 19: | January 6, 1994 memorandum to Larry M. Weber from Sharon J. Coulter, with attachments. |
| DHHS Ex. 20: | January 18, 1994 response of Dennis T. Bennett and an undated earnings and leave statement of Dennis T. Bennett (pay period ending August 8, 1992). |
| DHHS Ex. 21: | Undated earnings and leave statements of Dennis T. Bennett (pay periods ending September 5, 1992 and November 28, 1992). |