

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**

**Department of Employment Services**

MURIEL BOWSER  
MAYOR



DEBORAH A. CARROLL  
DIRECTOR

**COMPENSATION REVIEW BOARD**

**CRB No. 15-044**

**TYRONE BRYANT,  
Claimant–Respondent,**

**v.**

**DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,  
Employer–Petitioner.**

Appeal from a February 24, 2015 Compensation Order by  
Administrative Law Judge Fred D. Carney, Jr.  
AHD No. PBL 07-064B, DCP No. 30080962811-001

(Decided October 9, 2015)

Kirk D. Williams for Claimant  
Andrea G. Comentale for Employer

Before JEFFREY P. RUSSELL, LINDA F. JORY and HEATHER C. LESLIE, *Administrative Appeals Judges.*

JEFFREY P. RUSSELL for the Compensation Review Board.

**DECISION AND ORDER**

**FACTS OF RECORD AND PROCEDURAL HISTORY**

Claimant filed an Application for Formal Hearing (AFH) seeking a review of a Final Decision on Reconsideration (FDR) upholding a Notice of Overpayment (NOP) previously issued and which Claimant sought to be reconsidered.

At the time of the formal hearing, neither the FDR nor NOP were made a part of the record, nor were there any stipulations entered into regarding their contents.

Employer filed a Motion to Dismiss, arguing that the Department of Employment Services (DOES) and the Administrative Hearings Division (AHD) therein lacked jurisdiction to hear Claimant’s challenge to the FDR and NOP.

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At the time of the hearing, the administrative law judge (ALJ) denied the Motion to Dismiss. Following the hearing, on February 24, 2015, the ALJ issued a Compensation Order (CO) holding that AHD and by implication DOES have jurisdiction over disputes concerning overpayments and recoupment, and further concluding that the NOP was “issued in error”.

Employer appealed the CO by filing an Application for Review and Memorandum in support thereof (Employer’s Brief). Employer abandoned its challenge to DOES’s and AHD’s jurisdiction, and based the appeal upon the argument that the basis of the denial, that the recoupment of the overpayment would be “contrary to the humanitarian purposes” of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, D.C. Code, as amended, §§ 1-623.1 *et seq.*, (the Act), and would be “against equity and good conscience” and hence waiver of repayment was compelled under the, was unsupported by substantial evidence.

Claimant filed nothing in opposition to the appeal.

Because this appears to be a case of first impression<sup>1</sup> we consider the question of jurisdiction, and conclude that DOES and AHD have jurisdiction over disputes concerning overpayment and recoupment. Because the record fails to contain substantial evidence establishing the elements required in pursuing recovery, that is, the fact and amount of an alleged overpayment, Employer has not made a *prima facie* showing of entitlement to recovery or recoupment. Accordingly, the ALJ’s conclusion that “the Overpayment Notice is not upheld” is in accordance with the law.

#### ANALYSIS

As an initial matter we must respectfully disagree with the ALJ’s characterization of Employer’s issuing the notice of overpayment as “making an award unto itself”. CO p. 5. If it has followed the procedures outlined in the Act to seek recoupment of what it deems an overpayment, it has not made an award to itself. Rather, it has followed the recoupment requirements of the Act, which will be discussed below.

Second, we must respectfully disagree with the ALJ that “overpayment implies that something was owed”, and since Employer now maintains that, in light of the reversed award, everything it paid it did not owe, there has been no “overpayment.” CO p. 5. We reach this conclusion for two reasons.

The first is that in our view, the term “overpayment” means paying more than is owed. If nothing is owed, then anything paid is an overpayment.

The second is that, under the Act, unless a stay has been entered, payments made pursuant to a compensation order are due during the pendency of an appeal, and that status only changes if on appeal the award is overturned. Until an award is either stayed or vacated, it is “owed”.

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<sup>1</sup> The CO states that the CRB addressed this section of the Act in *Mason v. D.C. Armory*, ECAB No. 89-2, DDCC No. 324982) (1994). The CRB did not come into existence until 2005. ECAB, or the Employee’s Compensation Appeals Board, is an administrative appeals board in the United States Department of Labor. ECAB was the appellate body that reviewed compensation decisions under the predecessor statute to the Act.

Turning to the question of whether DOES and AHD have jurisdiction to consider this matter, we agree with the ALJ that issues of recoupment or recovery of an overpayment are within the scope of Agency review.

We start by considering the language in the Act governing the procedures with respect to recovery of overpayments by Employer. That section reads in pertinent part:

§ 1-623.29. Recovery of overpayments.

(a) When an overpayment has been made to an individual under this subchapter because of an error of fact or law, under rules and regulations prescribed by the Mayor, either recovery of the overpayments shall be required of the individual or adjustment shall be made by decreasing later payments to which the individual is entitled. ...

(a-1) Before seeking to recover an overpayment or adjust benefits, the District government shall advise the individual in writing:

(1) That the overpayment exists, and the amount of the overpayment;

(2) That a preliminary finding shows that the individual either was or was not at fault in the creation of the overpayment;

(3) That the individual has the right to inspect and copy government records relating to the overpayment; and

(4) That the individual has the right to request a waiver of the adjustment or recovery and to present evidence that challenges the fact or amount of the overpayment or the preliminary finding that he or she was at fault in the creation of the overpayment.

(b) (1) Adjustment or recovery by the District government shall be waived when incorrect payment has been made to an individual who is without fault and recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

(2) (A) For the purposes of this subsection:

(i) The term "at fault" means that an individual has made an incorrect statement as to a material fact that he or she knew or should have known to be incorrect; failed to provide information which he or she knew or should have known to be material; or accepted a payment which he or she knew or should have known to be incorrect.

(ii) The term "without fault" means an individual is receiving benefits pursuant to a good faith dispute as to whether his or her medical condition entitles him or her to receive those benefits.

(iii) The phrase "recovery would defeat the purpose of this subchapter" means that recovery would cause hardship to a current or former claimant or other

beneficiary because he or she needs substantially all of his or her current income, including compensation to meet current ordinary and necessary living expenses which shall include:

(I) Fixed living expenses such as food, housing, utilities, maintenance, insurance, and taxes;

(II) Medical, hospitalization, and related expenses;

(III) Expenses for the support of others for whom the individual is legally responsible; and

(IV) Expenses that may be reasonably considered as part of the individual's standard of living.

(iv) The phrase "against equity and good conscience" means that recovery would cause severe financial hardship to an individual to make the overpayment.

(B) The determination of whether an individual was at fault regarding an overpayment shall depend upon the totality of circumstances surrounding the overpayment including the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid. The government shall consider all pertinent circumstances including the individual's age, intelligence, and any physical, mental, educational, or linguistic limitations including any difficulty with the English language.

(b-1) (1) Before the District government may seek to recover an overpayment or adjust benefits, the government must allow the individual the opportunity to present evidence to the government in writing or at a pre-recoupment hearing. The evidence must be presented or the hearing requested within 30 days of the date of the written notice of the overpayment. The 30-day requirement can be waived for good cause including mental or physical incapacity of the individual or lack of timely receipt of the notice of adjustment or recoupment.

(2) An individual shall be required to provide relevant information and documentation to support his or her claim of severe financial hardship or that the individual needs substantially all of his or her current income to meet current ordinary and necessary living expenses. Failure to submit the requested information within 30 days of the request shall result in denial of a request for a waiver and no further request for a waiver shall be considered until the requested information is furnished.

This is a complex provision which has, to our knowledge, never been addressed by the CRB or the District of Columbia Court of Appeals.

In the penultimate paragraph quoted above, reference is made to "the government must allow the individual the opportunity to present evidence to the government in writing or at a pre-recoupment hearing."

The Public Sector Workers' Compensation Program (PSWCP) which administers the Act has no separate internal process by which it can conduct "hearings". The only statutorily-based hearings related to the Act and the PWCSA are those conducted by ALJs in DOES as set forth in D.C. Code § 6-123.24, which reads in pertinent part:

(b)(1) Before review under § 1-623.28(a)<sup>2</sup>, a claimant for compensation not satisfied with a decision of the Mayor or his or her designee under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on the claim before a Department of Employment Services Disability Compensation Administrative Law Judge. At the hearing, the claimant and the Corporation Counsel are entitled to present evidence. Within 30 days after the hearing, the Mayor or his or her designee shall notify the claimant, the Corporation Counsel, and the Office of Personnel in writing of his or her decision and any modifications of the award he or she may make and the basis of the decision.

From the structure of the statutory provision governing recoupment as well as the entire Act, and considering the large number of factual determinations that might be required in a dispute over an overpayment, such as fault, waiver, financial hardship and necessity, equity and "conscience", etc., it is impossible to conclude that the legislature contemplated that a "pre-recoupment hearing" be conducted by some other, unspecified administrative or judicial body. The existence of a hearing procedure in DOES under the Act for review of denials of claims strongly implies that DOES is the agency that the legislature contemplated would be the forum for administrative adjudication of disputes arising under the Act. While we recognize that the hearings and appeals provisions of the Act are phrased in terms of "compensation awards" (either the making or denial of such awards), and that under a technical reading of the recoupment provision, there is no "award" being made or denied, the failure to identify any alternative forum wherein such adjudication is to occur leads us to conclude that the hearing contemplated is to be conducted by the same forum that is established for resolution of disputes *concerning* awards. Although the recoupment notice is not an award, it does *concern* an award and a dispute arising as a result of an award having been made in the first instance.

Having reached this conclusion, we now consider whether the CO under review reached the proper conclusion under the statute.

Subsection (a-1) (4) provides "That the individual [employee from whom recoupment is sought] has the right to request a waiver of the adjustment or recovery and to present evidence that challenges the fact or amount of the overpayment or the preliminary finding that he or she was at fault in the creation of the overpayment." Thus, if there has been an overpayment and an employee seeks to have the overpayment forgiven, the employee must request a waiver.

Whether or not such a waiver was requested by Claimant from the PSWCP is not discussed in the CO. However, Claimant did seek a formal hearing contesting the Notice of Overpayment by filing an AFH as prescribed by the Act in its Notice of Appeal rights, and we shall deem that AFH to constitute a request for a waiver, as well as an appeal of any findings (such as the alleged

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<sup>2</sup> D.C. Code § 1-623.28 (a) governs review of decisions and awards made by the ALJ by the Director of DOES, a function that is now within the responsibility of the CRB.

amount of the overpayment, and the lack of a basis for a waiver) contained in or implied by the issuance of the Notice of Overpayment.

Further, the first subsection of the statute provides “(a) When an overpayment has been made to an individual under this subchapter because of an error of fact or law, under rules and regulations prescribed by the Mayor, either recovery of the overpayments *shall be required* of the individual or adjustment shall be made by decreasing later payments to which the individual is entitled” (emphasis added).

Subsection (b)(1) provides “Adjustment or recovery by the District government *shall be waived* when incorrect payment has been made to an individual who is without fault and recovery would defeat the purpose of this subchapter or would be against equity and good conscience” (emphasis added).

The mandatory nature of the recovery process implies that Employer is obligated to pursue such overpayments, and the mandatory nature of the waiver provision requires that an employee have an opportunity to challenge the recoupment.

From these two provisions, it appears that, where there is a dispute over a Notice of Overpayment, and a “pre-recoupment hearing” is sought by an employee, the burden at the formal hearing is first upon Employer to demonstrate, by a preponderance of the evidence, that there has been an overpayment and the amount of that overpayment. In order for a party to meet this burden, it, of course, must make a *prima facie* showing of the overpayment.

Thereafter, assuming Employer has adduced sufficient evidence to prove entitlement to recovery and the amount of that entitlement, the provision provides a two-part affirmative defense consisting of (1) the absence of fault on the part of the employee, and (2) a showing that recovery (or recoupment) would (i) “defeat the purpose of this subchapter [i.e., the Act] *or* (ii) “be against equity and good conscience” (emphasis added). The provision goes on to define the elements of the second two possible, alternative parts of the affirmative defense.

Although the ALJ makes a number references to the amount of the alleged overpayment as set forth in the NOP and FDR denying Claimant’s request that the recoupment decision be reconsidered, none of these documents are in the record, and none of the stipulations entered into at the formal hearing stipulate to their contents. Thus, nothing in the findings concerning an overpayment or the amount thereof is supported by substantial evidence in the record at the hearing.

Further, although the legal basis for Claimant’s assertion at the time of the formal hearing that his claim for relief was for an award that would include temporary total disability for the dates for which the prior award had been vacated is not clear, it is evident that he was not conceding that an overpayment had been made, because he contended that he was entitled to the monies that were paid pursuant to the vacated Compensation Order. HT p. 14, lines 8 – 10; p. 15, line 20 – p. 16, lines 1 - 12.

The CO is also silent with respect to the remaining matters that the statute requires be considered: whether recovery or recoupment would defeat the purpose of the Act (as that phrase is defined elsewhere in the provision) or would be against equity and good conscience (also, as defined elsewhere in the provision).

The CO contains the following language:

Here, it is uncontroverted that the creation of the payment was not Claimant's fault. It is also uncontroverted that the Claimant was terminated, and there has been no showing of other income. In such a case, recovery would defeat the humanitarian purpose of the subchapter because recovery would constitute a hardship on Claimant who is unemployed and needs the compensation to meet his ordinary and necessary living expense. Employer's Overpayment Notice, therefore, required waiver where Claimant was not at fault and recovery would defeat the humanitarian purpose of the subchapter.

CO, p. 5.

Employer argues that "The record in this case contains absolutely no evidence, documentary or testimonial, that support's the ALJ's finding that 'Claimant is unemployed and needs the compensation to meet ordinary and necessary living expenses'. Simply stated, there is no record evidence of Claimant's employment status or his financial status" Employer's Brief, p. 5.

As noted above, Claimant has filed nothing in opposition to this appeal, and therefore, we have not been directed to anything in the record that addresses Claimant's "(I) Fixed living expenses such as food, housing, utilities, maintenance, insurance, and taxes; (II) Medical, hospitalization, and related expenses; (III) Expenses for the support of others for whom the individual is legally responsible; and (IV) Expenses that may be reasonably considered as part of the individual's standard of living" or whether "recovery would cause severe financial hardship to an individual to make the overpayment."

Our own review of the record likewise fails to identify any such evidence offered by Claimant relevant to the issue, with the exception of the excluded CX 1, the letter terminating Claimant's employment. Even had the letter been admitted, it would only demonstrate that Claimant is no longer employed by Employer. It sheds no light upon the other required inquiries.

Most significantly, however, Employer offered no evidence at the hearing whatsoever concerning the amount of the claimed overpayment, or that it followed the procedures set forth above concerning seeking recoupment. While we could resort to the DOES administrative record to establish that a Compensation Order was issued awarding benefits, and that that Compensation Order was subsequently vacated, our agency records do not include the NOP or the FDR. It was Employer's burden, in making a *prima facie* showing, to offer evidence of the fact of overpayment and the amount thereof. Without offering the NOP and FDR, Employer has not established the required elements for an overpayment recovery order.

Otherwise put, the record fails to contain substantial evidence establishing the elements required in pursuing recoupment, that is, the fact and amount of an alleged overpayment.

On this record, therefore, the ALJ's conclusion that "the Overpayment Notice is not upheld" is in accordance with the law.

CONCLUSION AND ORDER

The finding that Employer has failed to establish entitlement to recovery of an overpayment that has been made to Claimant is in accordance with the law and is affirmed.

*So ordered.*