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DEPARTMENT OF EDUCATION

34 CFR Parts 31 and 32

[Docket ID ED-2021-OFO-0083]

RIN 1880-AA90

Permissibility of Administrative Law Judges Presiding Over Salary Pre-Offset Hearings

AGENCY: Office of Finance and Operations (OFO), Department of Education.

ACTION: Final regulations.

SUMMARY: The Department of Education (Department) amends its regulations regarding salary pre-offset hearings to expressly permit administrative law judges (ALJs) to act as the presiding officers.

DATES: These final regulations are effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION: As explained more fully below, the Department is revising its regulations in 34 CFR parts

31 and 32 to permit ALJs to preside over salary pre-offset hearings.

Statute: Under 20 U.S.C. 1221e-3, the Secretary is vested with broad authority to make, promulgate, issue, rescind, and amend rules and regulations governing the manner and operation of, and governing the applicable programs administered by, the Department. This provision is mirrored in 20 U.S.C. 3474, providing the Secretary authority to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department. In particular, under 20 U.S.C. 1234(f)(1), the Secretary shall prescribe by regulation the rules for conducting proceedings within its Office of Administrative Law Judges (OALJ). Such rules must conform to the Administrative Procedure Act (APA) at 5 U.S.C. 554, 556, and 557.

Under 5 U.S.C. 5514(a)(1), the Secretary may collect debts owed to the United States by employees of the Federal Government. Such debts are commonly recoupment of overpayments made by the Department to an employee due to a miscalculation of the employee's level of pay or a failure of the Department to correctly calculate a deduction to the employee's pay. To collect these debts, the Secretary generally imposes deductions to the employee's pay in

regular installments. This process of debt collection is referred to as administrative offset. 31 U.S.C. 3716.

Prior to implementing an administrative offset, an employee is entitled to, among other things, a minimum of 30 days' written notice, informing the employee of the nature and amount of the indebtedness and the agency's intention to initiate an administrative offset. 5 U.S.C. 5514(a)(2)(A). After receipt of the notice, the employee is entitled to request a hearing on the agency's determination concerning the existence or the amount of the debt or to challenge the terms of any nonvoluntary repayment schedule the agency intends to implement. 5 U.S.C. 5514(a)(2)(D).

A hearing conducted under the authority of 5 U.S.C. 5514(a)(2)(D) may not be conducted by an individual under the supervision or control of the head of the agency, except that nothing in this sentence shall be construed to prohibit the appointment of an ALJ. 5 U.S.C. 5514(a)(2).

The Secretary is required to establish regulations to carry out the statutory provisions for administrative offsets described above. 5 U.S.C. 5514(b)(1); 31 U.S.C. 3716(b)(2).

Current Regulations: Under 34 CFR 31.7(a), a hearing conducted for a salary offset for a current or former Federal employee indebted to the United States under a program administered by the Secretary is conducted by a

hearing official who is neither an employee of the Department nor otherwise under the supervision or control of the Secretary.

Under 34 CFR 32.5(d), a salary pre-offset hearing held to recover overpayments of pay or allowances paid to a current or former Department employee is conducted by a hearing official who is not an employee of the Department or under the supervision or control of the Secretary.

New Regulations: Revised §§ 31.7(a) and 32.5(d) expressly provide that ALJs are not prohibited from presiding over hearings for the collection of debts owed to the United States by current or former employees of the Federal Government.

Reasons: The Department employs ALJs within OALJ. Congress established OALJ to consider cases before the Department involving hearings for recovery of funds, withholding hearings, cease-and-desist hearings, and other proceedings designated by the Secretary. 20 U.S.C. 1234(a); 34 CFR 81.3. The Secretary appoints ALJs to OALJ in accordance with 5 U.S.C. 3105 and 20 U.S.C. 1234(b).

The statutory authority for salary pre-offset hearings prohibits individuals under the supervision or control of an agency head from presiding but specifically excepts ALJs from that prohibition. 5 U.S.C. 5514(a)(2). However, a review of the Department's regulations revealed a disconnect between the regulations and the statute.

Sections 31.7(a) and 32.5(d) mirror the statutory prohibition on individuals under the supervision or control of the Secretary presiding over hearings, but they do not include the statute's exception, allowing ALJs to preside over such hearings.

The omission in §§ 31.7(a) and 32.5(d) of the exception for ALJs was likely due to a drafting oversight. This amendment of the regulations harmonizes the regulations with the express statutory exception that ALJs are not prohibited from presiding over pre-offset hearings involving collection of indebtedness to the United States from Federal employees.

As contemplated in the statutory exception, the Department's ALJs are well-suited for the task of presiding over such hearings because they act with impartiality and independence. ALJs are subject to less supervision and control by the Secretary than ordinary Department employees. For example, pursuant to 5 CFR 930.206, ALJs may not be rated on their job performance and may not receive a monetary or honorary award or incentive. Similarly, pursuant to 5 U.S.C. 7521, ALJs may not be removed from their positions or have other specified actions taken against them except by the independent action of the Merit Systems Protection Board.

Therefore, the Department is revising its regulations to correct the drafting oversight and expressly permit ALJs to preside over salary pre-offset hearings.

Waiver of Proposed Rulemaking and Delayed Effective Date

Under the APA (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed regulations. These regulations only govern the procedures for conducting administrative offset hearings to which the parties are the Department and current or former employees. As such, these regulations make procedural changes only and do not establish substantive policy. The regulations are, therefore, rules of agency practice and procedure and exempt from notice and comment rulemaking under 5 U.S.C. 553(b) (A). Moreover, the APA provides that an agency is not required to conduct notice and comment rulemaking when the agency for good cause finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b) (B). Rulemaking is "unnecessary" when "the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001), quoting *U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act* 31 (1947) and *South Carolina v. Block*, 558 F. Supp. 1004, 1016

(D.S.C. 1983). Because we are amending these procedural regulations to align them more closely with the applicable statutory provision, under 5 U.S.C. 553(b) (B), the Secretary has determined that proposed regulations are unnecessary.

The APA generally requires that regulations be published at least 30 days before their effective date, unless the agency has good cause to implement its regulations sooner (5 U.S.C. 553(d) (3)). As previously stated, because the final regulations merely reflect an applicable statutory provision and address agency procedure, there is good cause to waive the delayed effective date in the APA and make the final regulations effective upon publication.

#### Executive Orders 12866 and 13563

#### Regulatory Impact Analysis

Under Executive Order 12866, the Office of Management and Budget (OMB) must determine whether this regulatory action is "significant" and, therefore, subject to the requirements of the Executive order and subject to review by OMB. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of \$100 million or more, or adversely affect a sector of the economy, productivity, competition, jobs, the environment,

public health or safety, or State, local, or Tribal governments or communities in a material way (also referred to as an "economically significant" rule);

(2) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles stated in the Executive order.

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f)(1) of Executive Order 12866.

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency –

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);



(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account – among other things and to the extent practicable – the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives – such as user fees or marketable permits – to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.”

In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on the analysis that follows, the Department believes that these final regulations are consistent with the principles in Executive Order 13563. We also have determined that this regulatory action does not unduly interfere with State, local, and Tribal governments in the exercise of their governmental functions.

In accordance with both Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department's programs and activities. Because this regulatory action does not implicate any new process or other financial commitment or burden, this regulatory action will not create any new costs.

#### Regulatory Flexibility Act Certification

Because notice-and-comment rulemaking is not necessary for this procedural rule, the Regulatory Flexibility Act (96 Pub. Law 354, 5 U.S.C. 601-612) does not apply.

#### Paperwork Reduction Act of 1995

The final regulations do not create any new information collection requirements.

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List of Subjects

34 CFR Part 31

Claims, Government employees, Grant programs-  
education, Loan programs-education, Student aid, Wages.

34 CFR Part 32

Claims, Government employees, Wages.

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Denise L. Carter,  
*Acting Assistant Secretary for  
Finance and Operations.*

For the reasons discussed in the preamble, the Secretary amends parts 31 and 32 of title 34 of the Code of Federal Regulations as follows:

PART 31-SALARY OFFSET FOR FEDERAL EMPLOYEES WHO ARE INDEBTED TO THE UNITED STATES UNDER PROGRAMS ADMINISTERED BY THE SECRETARY OF EDUCATION

1. The authority citation for part 31 continues to read as follows:

AUTHORITY: 5 U.S.C. 5514; 31 U.S.C. 3716.

2. Section 31.7 is amended by revising paragraph (a) to read as follows:

§31.7 Hearing procedures.

(a) *Independence of hearing official.* A hearing provided under this part is conducted by a hearing official who is not under the supervision or control of the Secretary, except that this prohibition does not apply to the Department's administrative law judges.

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PART 32-SALARY OFFSET TO RECOVER OVERPAYMENTS OF PAY OR ALLOWANCES FROM DEPARTMENT OF EDUCATION EMPLOYEES

3. The authority citation for part 32 continues to read as follows:

AUTHORITY: 5 U.S.C. 5514; 31 U.S.C. 3716.

4. Section 32.5 is amended by revising paragraph (d) to read as follows:

§32.5 Pre-offset hearing-general.

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(d) The hearing is conducted by a hearing official who is not under the supervision or control of the Secretary, except that this prohibition does not apply to the Department's administrative law judges.

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