

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

86 M.S.P.R. 211

GILBERTO RAMIREZ

Appellant,

DOCKET NUMBER

DA-3443-99-0492-I-1

v.

DEPARTMENT OF THE ARMY

Agency.

DATE: June 22, 2000

Jeanne Chastain, Esquire, Corpus Christi, Texas, for the appellant.

Kevin A. Storey, Esquire, Corpus Christi, Texas, for the agency.

BEFORE

Beth S. Slavet, Acting Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 This matter comes before the Board on the appellant's petition for review of the December 6, 1999 initial decision dismissing his appeal for lack of appellate jurisdiction. For the reasons discussed below, we GRANT his petition, VACATE the initial decision, and REMAND the appeal for further adjudication.

BACKGROUND

¶2 Prior to the appellant's retirement from the Department of the Army, the agency began procedures to determine his liability for government property (tools) alleged to be under his custody and control as a function of his job. By the time the process culminated in a finding that he was accountable for the

property and owed the agency \$4,814.00, he had retired. *See* Initial Appeal File (IAF), Tab 5 (Agency File), subtabs 4c, 4g, 4h. The agency apparently collected the amount, through offset by the Office of Personnel Management (OPM), from his retirement account. *See* IAF Tab 1, Exhibits K/1, M/1, M/2.

¶3 After it did so, the appellant filed an appeal with the Board, contesting his liability and blaming the agency's action on discrimination against him based on his race and national origin. *Id.*, Appeal Form at sections 27, 31C. Following the issuance of an Acknowledgment Order notifying him that his appeal raised questions of both jurisdiction and timeliness, as well as receipt of the agency's file, the administrative judge dismissed the appeal for lack of jurisdiction. She found that while the Board has limited jurisdiction, in the context of a retirement appeal properly before it, to review the procedures followed by OPM in honoring a request by a creditor agency to offset a debt from the retirement fund, the appellant did not seek such a review. Rather, she found, he sought only a review of the merits of the Department of the Army's action in finding him financially responsible, a merits issue over which the Board does not have jurisdiction. Based on this holding, she also determined that his discrimination claims could not be heard and that she did not need to reach the timeliness issue raised by the appeal.

¶4 In his petition for review, the appellant reasserts his right to a hearing before the agency began recoupment efforts; claims that it failed to present credible evidence of his culpability for the missing tools and that there is no basis in law or regulation to hold him personally liable; and states that the action is retaliatory because "I made a claim against the Army regarding my retirement." The agency has responded in opposition to the petition.

ANALYSIS

¶5 The administrative judge correctly noted the Board's limited scope of review authority in connection with OPM's collection of a debt. The merits of the

underlying debt issue between the appellant and the creditor agency are specifically excluded from its purview. *See, e.g., Lary v. Office of Personnel Management*, 65 M.S.P.R. 291, 299 (1994), *rev'd on other grounds sub nom. King v. Merit Systems Protection Board*, 105 F.3d 635 (Fed. Cir. 1997); *Malone v. Office of Personnel Management*, 52 M.S.P.R. 655, 657 (1992); *Lashley v. Office of Personnel Management*, 45 M.S.P.R. 360, 365 (1990). Thus, to the extent that he is attempting to appeal the propriety of the agency's finding that he was liable for the missing property, she properly found that his appeal did not raise a jurisdictional matter.

¶6 Nonetheless, we find that his pleadings also raise a procedural claim, specifically, that his former employing agency should have granted him a hearing, as he requested. In this regard, the record indicates that he was offered the election of a hearing, and that he requested one, but was told that he failed to make his request to the correct division of the agency. *See, e.g., IAF*, Tab 5, subtabs 4a, 4b, 4c. Such a claim, we conclude, fairly read, is one that comes within OPM's scope of review and, derivatively, the Board's. *See King v. Merit Systems Protection Board*, 105 F.3d at 639, 640, setting forth the procedures of 31 U.S.C. § 3716(a) antecedent to an agency's request for collection through administrative offset; *see also* 4 C.F.R. § 102.4.

¶7 Pursuant to 31 U.S.C. § 3716, before beginning administrative offset, an agency head must provide certain rights to the alleged debtor, among them an explanation of his rights under that section and an opportunity for review within the agency of its decision as to the claim. *See* 31 U.S.C. § 3716(a)(1), (3). Moreover, the agency must also have adopted, without change, the administrative offset regulations previously promulgated by any of three other agencies or have prescribed regulations consistent with them. *See* 31 U.S.C. § 3716(b)(1), (2).

¶8 The Federal Claims Collection Standards, 4 C.F.R. §§ 102.1-102.20, set forth more explicit requirements for administrative offsets generally, and for those that, as here, are accomplished through offset from amounts payable from the Civil

Service Retirement and Disability Fund. At section 102.4, they provide that in making a claim to OPM, the creditor agency must first, *inter alia*, certify in writing that it "has complied with the requirements of § 102.3 of [Title 4], including any required hearing or review." In turn, the latter requires that an agency's debt collection regulations provide "appropriate procedural rights" to the alleged debtor (section 102.3(b)(2)) and specify the "[t]ype of hearing or review" required. 4 C.F.R. § 102.3(c). Administrative offset may only be accomplished prior to the fulfillment of the person's procedural entitlements in very limited circumstances, where the government's ability to collect the debt would be substantially prejudiced by first providing the required protections. 4 C.F.R. § 102.3(b)(5). Among the situations in which "a reasonable opportunity for an oral hearing" is required are those in which "the debtor requests reconsideration of the debt and the agency determines that that the question of the indebtedness cannot be resolved by review of the documentary evidence, for example, when the validity of the debt turns on an issue of credibility or veracity." 4 C.F.R. § 102.3(c)(1)(ii).

¶9 Finally, in its own regulations applicable to non-fraud claims (defined at 5 C.F.R. § 831.1803), OPM has provided that the creditor agency must comply with the requirements of 4 C.F.R. § 102.4 and that "[i]f the debtor responds to the notice [of the nature and amount of the debt] by requesting a review (or hearing if one is available), the review (or hearing) must be completed before the creditor agency submits the debt claim." 5 C.F.R. § 831.1804(b)(3)(B)(iii).

¶10 As stated above, the agency notified the appellant of his right to a hearing and he responded by both disputing his liability for the debt, IAF, Tab 5, subtabs 4d, 4f, and twice requesting a hearing, *id.*, subtab 4b, Tab 3, Exhibit 0/1. The agency's response to the first request was that he had directed it to an incorrect branch of the agency. *Id.*, Tab 5, subtab 4(a). There is no evidence of a reply to the second, but it appears to have been submitted after the date on which OPM

indicated it would begin to offset his retirement account. *Id.*, Tab 3, Exhibits M/1, O/1.

¶11 Based on this record, we conclude that the merits of the appellant's claim that he is not liable for the debt are beyond both the Board's and OPM's scope of review. Nonetheless, we find that OPM's authority, and the Board's as a result, extends to the related matter the appellant seeks to vindicate -- his entitlement to a hearing and whether, under the circumstances, one was properly not afforded prior to the offset.* We therefore remand the appeal for further consideration. While we recognize that the administrative judge correctly informed him that any question concerning OPM's debt recovery actions for another agency may be addressed to OPM, we remand this issue because it is one that goes to the Board's jurisdiction, a matter which is always properly before us. *See, e.g., Becker v. Department of Veterans Affairs*, 76 M.S.P.R. 292, 296 (1997) (as a limited-jurisdiction tribunal whose authority to act is derived from statute and regulation, the issue of jurisdiction is always before the Board, and it is obligated to satisfy itself as to jurisdiction over the action before it).

ORDER

¶12 The appeal is hereby remanded. On remand, the administrative judge shall address its timeliness and the issue of good cause for any delay. If the appeal is not dismissed on that basis, she must then address the procedural claim he raised and whether, even pursuant to the Board's limited review authority, the offset may stand in the current posture of the case. The participation of OPM as intervenor may be necessary to fully resolve the issue. *See* 5 C.F.R. § 1201.24(a) (intervenors are organizations or persons who participate in a proceeding because the proceeding, or its outcome, may affect their rights or duties). Insofar as the

appellant's defenses are addressed to the Department of the Army's process, they relate to the merits of his appeal and are beyond the Board's purview.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.