

Grant Turner v. U.S. Government Accountability Office

Docket No. 08-01

Date of Decision: September 18, 2009

Cite as: Turner v. GAO, No. 08-01 (9/18/09)

Before: Mary E. Leary, Chair, for the Board; Steven H. Svartz, Vice-Chair, Paul M. Coran, Member

Headnotes:

Appeal to the Full Board

Jurisdiction

Personnel Action

Sanctions

Statutory Construction

Student Loan Reimbursement

Summary Judgment

DECISION ON PETITIONER'S APPEAL FROM INITIAL DECISION GRANTING SUMMARY JUDGMENT

This matter is before the Personnel Appeals Board (PAB or the Board) on Petitioner's appeal¹ from the September 25, 2008 Initial Decision (ID) on competing Motions for Summary Judgment which dismissed the Petition for lack of jurisdiction.

The Board affirms the Initial Decision and finds that Petitioner failed to demonstrate that the attempts of the Government Accountability Office (GAO or Agency) to recoup its erroneous 2004 payment to Sallie Mae towards Petitioner's student loan obligation constituted a prohibited personnel action within the jurisdiction of the PAB.

¹ The PAB Office of General Counsel (PAB/OGC) represented Petitioner through issuance of the Initial Decision herein. Petitioner is appearing *pro se* on this appeal.

A. Procedural History

Following the September 25, 2008 Initial Decision on Petitioner's Motion for Summary Judgment and Respondent's Cross-Motion for Summary Judgment, dismissing the Petition for lack of subject matter jurisdiction, Petitioner filed a Notice of Appeal.² He was granted two extensions on the deadline for filing his brief on appeal. Petitioner's Appeal of Decision on Petitioner's Motion for Summary Judgment and Respondent's Cross-Motion for Summary Judgment was filed on February 6, 2009. Respondent's Reply to Petitioner's Appellate Brief was filed on March 3, 2009, followed by Petitioner's Reply to Respondent's Appellate Brief filed on March 13, 2009. On March 24, 2009, GAO filed Respondent's Motion for Leave to File Sur Reply to Petitioner's Reply to Respondent's Appellate Brief. That request was granted, and on March 30, 2009, GAO filed Respondent's Sur Reply to Petitioner's Reply to Respondent's Appellate Brief.

Petitioner subsequently filed two Motions for Sanctions (April 20, 2009 and June 30, 2009), both of which were opposed by the Agency (May 5, 2009 and July 17, 2009).³

B. Factual Background

The facts in this case, as set forth in the Initial Decision, are summarized below:

Petitioner Grant Turner (employed by GAO from September 21, 2003 until November 26, 2005) applied for the Agency's student loan repayment program in 2004.⁴ Pet. Appeal at 5. He did not enter into the required continued service agreement.⁵ Rather, after applying for the program he declined the Agency's offer to afford him the benefit. *Id.* Despite the lack of a signed continued service agreement, the Agency made an erroneous payment on Petitioner's behalf to Sallie Mae. The \$5,000 payment was documented on Petitioner's

² For purposes of citation, the pleadings will be referenced as set forth in the parentheses below: Petitioner's Motion for Summary Judgment (Pet. MSJ); Respondent's Cross-Motion for Summary Judgment (Resp. CMSJ); Petitioner's Appellate Brief (Pet. Appeal); Respondent's Reply to Petitioner's Appellate Brief (Resp. Reply); Petitioner's Reply to Respondent's Appellate Brief (Pet. Reply); Respondent's Sur Reply to Petitioner's Reply to Respondent's Appellate Brief (Resp. Sur Reply).

³ For purposes of citation the Motions for Sanctions filed on April 20, 2009 and on June 30, 2009 will be referenced as Motion for Sanctions (4/20/09) and Motion for Sanctions (6/30/09), respectively. Respondent's Oppositions filed on May 5, 2009 and on July 17, 2009 will be referenced as Resp. Opposition (5/5/09) and Resp. Opposition (7/17/09), respectively.

⁴ GAO does not contest Petitioner's assertion that it offered the student loan repayment benefit to Petitioner.

⁵ In the Initial Decision at note 4, the AJ stated that there is a dispute as to the Agency's contention that Petitioner declined to sign the continued service agreement because he recognized that it entailed a three-year commitment of continued service to the Agency. We note that Petitioner himself stated in a letter dated October 2, 2006 to GAO's Chief Human Capital Officer: "I applied for the student loan repayment program and although I was accepted, I declined to participate because of the length of the required service agreement." Pet. MSJ, Exh. 7.

October 17, 2004 - October 30, 2004 statement of earnings and leave. ID at 3-4; Pet. Appeal at 5 n.1.

In November 2005, Petitioner accepted a job offer from the Office of Management and Budget (OMB); he so notified GAO's Human Capital Office (HCO) on November 9, 2005. Petitioner began work with OMB on November 27, 2005. Pet. Appeal at 6; ID at 4.

On December 19, 2005, Petitioner contacted GAO's HCO inquiring why the Agency had not deposited his final paycheck into his account. ID at 4; Pet. Appeal at 6; Pet. MSJ, Exh. 4 at 3. By e-mail dated December 19, 2005, GAO's HCO representative officially informed Petitioner that he was obligated to make restitution for the five thousand dollar (\$5,000) student loan payment pursuant to a continued service agreement that GAO asserted Petitioner had signed. He was also notified that the Agency would claim his final paycheck to recoup its money and refer the balance for billing to the Department of Agriculture, National Finance Center (NFC).

Petitioner informed the HCO representative that he had not entered into a service agreement with GAO. ID at 5; Pet. Appeal at 6. He further said that if such payment had been erroneously made, the Agency should consider waiving the repayment obligation in view of the financial hardship it would impose upon him. Subsequently, the HCO representative notified Petitioner that GAO would release his final paycheck. Pet. Appeal at 7; ID at 5. On January 11, 2006, Petitioner sent an e-mail to the HCO representative inquiring whether any decision had been made "on forgiving the student loan payment which GAO incorrectly processed." Pet. MSJ, Exh. 4.

By notice dated July 1, 2006, the NFC notified Petitioner that GAO had reported his tuition repayment obligation of \$6,350⁶ (payment plus interest) and demanded payment by July 25, 2006. Resp. Opposition (5/5/09) at 6-7; Pet. MSJ, Exh. 5. On August 1, 2006, NFC billed Petitioner again, informed him of his rights, and stated that: "If the question of indebtedness cannot be resolved by review of documentary evidence in this office or your former agency and issues of credibility and veracity exist, you will be provided an opportunity for an oral hearing prior to offset of your debt." Pet. MSJ, Exh. 6 (emphasis added). Petitioner wrote to GAO's Chief Human Capital Officer (CHCO) on October 2, 2006, disputing his obligation to make restitution for the erroneous payment and, alternatively, requesting a waiver of any repayment duty. *Id.*, Exh. 7. The CHCO notified Petitioner by letter of November 2, 2006 that he was referring the waiver request to the Comptroller General and that he had asked NFC to defer action on the debt until December 24, 2006. *Id.*, Exh. 8.

⁶ In Respondent's Sur Reply, GAO states that the amount of the debt is \$4,617.50 which represents the \$3,267.50 paid to Sallie Mae plus federal and state income taxes. Sur Reply at 1, n.1. GAO also states that there was an error in reporting the debt amount to the Department of Treasury which accounted for the notices stating that the debt was over \$6,000. *Id.*; see also Resp. Opposition (5/5/09), at 6. In its Opposition, GAO also stated that since 2006 all notices from GAO or NFC stated the debt as \$4,617.50; however, there is one notice from NFC dated January 2007 which states the debt as \$4,837.99. This discrepancy was not explained by GAO. See Pet. MSJ, Exh. 9. Since GAO's latest pleadings refer to the debt amount as \$4,617.50, we will also refer to that amount.

On January 24, 2007, the NFC sent Petitioner a Debt Notice, stating that he was delinquent in the amount of \$4,837.99. *Id.*, Exh. 9. He was also informed of the right to a hearing, and that the timely filing of a petition for hearing would stop debt collection proceedings; he was advised to complete a “Response to Debt Notice” form if challenging the existence of the debt, and to supply evidence to substantiate such a claim. Petitioner responded to NFC on March 14, 2007 and asked for a hearing, inspection and copying of records, review of the alleged debt assessment and a status of his account. *Id.*, Exh. 10. In this communication, Petitioner did not deny that he had received the benefit of an erroneous payment; rather, he took the position that the amount was “not past due or legally enforceable as this is an erroneous payment made by the Government Accountability Office on my behalf. I did not participate in GAO’s tuition assistance program (the transaction which generated the debt) however I was inadvertently included as a participant in the program.” *Id.* Petitioner contended that because the debt resulted from a GAO error, GAO should waive the debt. *Id.*

Petitioner submitted a written statement to GAO on April 4, 2007, in which he: 1) argued that the Agency was prohibited from recouping the loan payment; and 2) renewed his waiver request. *Id.*, Exh. 12. He also reiterated his view that because “this improper payment is solely GAO’s fault,” referring the matter to the Treasury as an uncollected debt “is unwarranted and irresponsible.” *Id.* The following day, the CHCO notified Petitioner of the Comptroller General’s decision to deny the waiver request. Acknowledging that the loan repayment had been made because of “an administrative error” by a GAO staff employee, the CHCO noted that nevertheless “your Student Loan Repayment was made on your behalf, which made you indebted to the United States and liable for repayment of these funds.” *Id.*, Exh. 13. He further advised that the hold on Petitioner’s bill of indebtedness would expire at the end of May, and asked Petitioner to arrange a payment plan with NFC. Petitioner immediately replied to the CHCO by e-mail, contesting the lawfulness of the debt collection and asking for a review of GAO’s decision. *Id.*, Exh. 14. In a subsequent e-mail he renewed the waiver request and asked for documents relating to GAO’s repayment of his student loan. *Id.*, Exh. 15.

In May 2007 Petitioner contacted the NFC to pursue his hearing request and to review records relating to the debt issue; he was told that GAO was assembling the paperwork for his requested hearing. *ID* at 7; *Pet. MSJ*, Exh. 16. On June 13, 2007, Petitioner received a package from GAO in response to the document request and no information as to a hearing. *Resp. MSJ*, Exh. 4.

Petitioner received a notice of unpaid delinquent debt from the Department of the Treasury on August 23, 2007. *ID* at 7; *Pet. MSJ*, Exh. 18. Petitioner notified the Treasury Department of his dispute and forwarded his correspondence with NFC indicating that GAO was preparing an administrative hearing on the matter. *Pet. MSJ*, Exh. 19. On September 10, 2007, NFC informed Treasury that GAO had confirmed the appropriateness of the debt collection action. Treasury therefore notified Petitioner that GAO had declared his debt delinquency to be valid, citing correspondence that allegedly Petitioner had not previously seen.⁷ *ID* at 8; *Pet. MSJ*, Exh.

⁷ The September 11, 2007 notification from Treasury attached a July 6, 2007 letter from GAO’s General Counsel to Petitioner which set forth the Agency’s review and reaffirmation of the denial of Petitioner’s request that he be relieved of liability for the repayment. The letter also instructed Petitioner to “make arrangements with the Department of the Treasury to repay this debt.” *See Pet. MSJ*, Exh. 20 at 4-6.

20. On September 17, a private collection agency contacted Petitioner on referral from Treasury. Pet. MSJ, Exh. 21. On September 26, 2007, Petitioner disputed the debt with both Treasury and the private collection agency, and notified Treasury that he was challenging GAO's denial of his right to a hearing and to inspect records. *Id.*, Exhs. 22, 23. He followed up with an October 4, 2007 e-mail to the Comptroller General, who referred the matter to both GAO's General Counsel and Chief Administrative Officer. *Id.*, Exh. 25. The collection agency notified Petitioner on October 9, 2007 that GAO had confirmed the debt as valid. *Id.*, Exh. 24. Shortly thereafter, an attorney in GAO's Office of General Counsel notified Petitioner that he was not entitled to a hearing on his debt collection claim.⁸ ID at 9; Pet. Appeal at 7-8.

Petitioner then filed a Charge with the PAB Office of General Counsel (PAB/OGC) on November 6, 2007, alleging that GAO had violated his rights in its efforts to recoup the erroneous payment.

GAO's General Counsel wrote to Petitioner on February 13, 2008, in response to e-mails of September 21, 2007 and October 16, 2007 that complained of GAO's handling of the debt issue, his waiver request and allegations that he had not been afforded all the rights to which he was entitled. Resp. CMSJ, Exh. 5. While reiterating the existence of Petitioner's obligation, the General Counsel proposed two options: establishment of a payment plan or, with Petitioner's full cooperation, GAO would recoup the money from Sallie Mae. Petitioner did not avail himself of either option. *Id.*

C. Analysis

1. Review of Dismissal for Lack of Jurisdiction

The Board may grant a request for review when it finds that:

- (1) The findings in the Decision are unsupported by substantial evidence in the record viewed as a whole; or
- (2) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
- (3) The Decision is based on an erroneous interpretation of statute or regulation; or
- (4) The Decision is arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; or

⁸ As noted above, NFC had notified Petitioner on August 1, 2006, that “[i]f the question of indebtedness cannot be resolved by review of documentary evidence in this office or your former agency and issues of credibility and veracity exist, you will be provided an opportunity for an oral hearing prior to offset of your debt.” Pet. MSJ, Exh. 6 (emphasis added). The communications in July, September, and October 2007 indicate that confirmation of the debt as valid was accomplished with a review of the documentary record. Petitioner was informed that there would be no hearing by telephone in October 2007. *See* Pet. Statement of Material Facts #40; Pet. Appeal at 7-8.

- (5) The Decision is not made consistent with required procedures and results in harmful error.

See 4 C.F.R. §28.87.

The ID concluded that the Board lacked jurisdiction over this matter because it constituted a debt recoupment action and not a covered personnel action.⁹ Petitioner did not allege any action by GAO that involved a prohibited personnel practice. As set forth below, we agree with the conclusion of the Administrative Judge.

On appeal, Petitioner contends that the AJ erred by: 1) separating the provisions of the Public Service Education Assistance Act (PSEAA), 5 U.S.C. §5379, that govern selection for the student loan benefit from provisions of the Act that govern eligibility for the benefit, thereby ignoring Merit Systems Protection Board (MSPB) and federal case law holding that decisions regarding eligibility for federal pay and benefits may constitute the basis for a prohibited personnel practice claim; 2) determining that GAO's actions under the PSEAA and debt collection statutes do not affect merit system principles in the absence of political motivation; and 3) determining that GAO did not violate the PSEAA or federal debt collection statutes and its own regulations.

Petitioner expressly continues to “challeng[e] the existence of the debt to GAO.”¹⁰ Pet. Appeal at 4. Moreover, he characterizes the posture of the case in a manner inconsistent with the known record. For example, in his Reply, he states that this case involves “a question of whether GAO afforded Petitioner the proper procedural protections before terminating his eligibility for a student loan repayment.” Pet. Reply at 7. Petitioner himself, by declining to sign the continued service agreement, determined his own ineligibility for the student loan repayment here at issue.

As the AJ determined, because this case involves not a covered personnel action, but rather, GAO's efforts to recoup an erroneous payment, it falls under the rules governing debt to the Federal government. ID at 26-28. The steps taken to ascertain the existence of the debt were outlined in the ID. The Agency reviewed the underlying facts, including Petitioner's application for the benefit, his refusal to sign the continued service agreement, and the notation of the benefit on his earnings statement; it also reviewed the PSEAA requirements and considered Petitioner's

⁹ The Administrative Judge initially addressed the timeliness of the November 6, 2007 Petition, concluding that the filing was not untimely because of the nature of Petitioner's persistent pursuit of his unaddressed claims—“Petitioner did not sit on his rights.” ID at 25. Even if it had been untimely, the AJ concluded that waiver of the time limit would have been appropriate under either 4 C.F.R. §28.4(c) (AJ may adjust time deadline for good cause unless prohibited by law), or under the provision which allows for waiver of a Board regulation “in an individual case for good cause shown if application of the regulation is not required by statute.” 4 C.F.R. §28.16(b). We agree with the AJ's determination as to timeliness.

¹⁰ Petitioner's Appeal appears to question that a payment was ever made by GAO, stating that “GAO has refused to provide Petitioner with evidence, such as a cancelled check or proof of electronic funds transfer, that it actually made a payment to Sallie Mae.” Pet. Appeal at 21. However, elsewhere Petitioner states that he is “prepared to present correspondence from Sallie Mae that shows an entirely different amount that was paid by GAO,” thus admitting that a payment was made. Pet. Reply at 13.

request for a waiver of the repayment obligation. Petitioner's disagreement with the Agency's determination that no oral hearing was necessary to ascertain the debt does not absolve him of the responsibility to accept the determination that the debt exists and that waiver of repayment—a discretionary matter—has been repeatedly denied.

The Petition involved a dispute over GAO's attempt to recoup \$4617.50¹¹ including a payment of \$3267.50 erroneously paid on Petitioner's behalf to student loan creditor Sallie Mae in 2004, along with federal and state taxes, plus interest and penalties. *See* Resp. Sur Reply, Exh. 1. On April 11, 2008, the PAB General Counsel filed a Petition alleging that GAO's attempt to recoup the erroneous payment from Petitioner under the PSEAA, 5 U.S.C. §5379, constitutes a prohibited personnel practice in violation of 5 U.S.C. §2302(b)(12) (incorporated by reference in the Board's jurisdiction under 31 U.S.C. §753(a)). Petitioner alleges that various statutes and regulations were violated in the Agency's recoupment action. The Agency asserts that no personnel action has occurred and that an alleged violation of any of the authorities upon which Petitioner relies would not constitute a prohibited personnel action; accordingly, in GAO's view this matter falls outside the Board's jurisdiction.

The PSEAA provides for the establishment of student loan repayment programs in order to recruit and retain highly qualified personnel. An agency may agree to pay, by direct payments to the creditor on behalf of the employee, any student loan previously taken out by such an employee under certain conditions. 5 U.S.C. §5379(b)(1). The statute does not authorize an agency to make a payment on the employee's behalf prior to the employee signing a service agreement. An employee must agree in writing, before receiving any such benefit, that he will remain in the service of the agency for at least three years unless involuntarily separated. If voluntary separation, or involuntary separation for misconduct, occurs before the end of the period specified in the agreement, the individual is obligated to repay to the Government the amount of benefits received from the agency. 5 U.S.C. §5379(c)(1).

In the ID, the AJ relied upon the fundamental rules of statutory construction that require, “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984); *see also* ID at 28. Petitioner was not involuntarily separated, nor did he execute an agreement to remain in the service of GAO for at least three years, before the payment was made. Since Petitioner did not enter into a continued service agreement, he was not eligible for the Agency's student loan repayment program and the Agency was not

¹¹ While the original payment was five thousand dollars (\$5000), GAO has a practice of not seeking to recoup Medicare and social security deductions taken out of erroneous payments. *See* Resp. Sur Reply, Exh. 1 at ¶3.

authorized to pay any amount towards repayment of his student loans.¹² As the AJ correctly found, this is clearly a case of an erroneous payment since the employee was required to sign the service agreement “before receiving any such benefit” and he did not.¹³ See 5 U.S.C. §5379(c)(1).

The AJ concluded that Petitioner consciously decided not to avail himself of the student loan repayment benefit and he, therefore, did not sign a continued service agreement. ID at 34. The AJ further concluded that the Agency made an erroneous payment to Petitioner’s student loan creditor Sallie Mae, and that the Agency’s decision to recoup an improper payment, standing alone, does not have a tie to the merit system principles as does selection of an employee to participate in a benefit, including the Agency’s student loan repayment program.¹⁴ ID at 26, 34-35. The AJ ruled that Petitioner never accrued any right under the student loan repayment statute, thus he had no standing to claim that he met the continued service requirement or that he had a right to timely notice of his repayment obligation when he transferred to OMB.¹⁵ ID at 35.

¹² In his appeal, Petitioner continues to argue that this is a case regarding his eligibility for the “benefit.” Pet. Appeal at 10-11. He fails to recognize that this matter does not involve his eligibility, but rather, the Agency’s right to recoup money erroneously given to him since he never signed a service agreement authorizing the payment. If this were a case where Petitioner had been denied the reimbursement payment under PSEAA, it may have involved a personnel action within the Board’s jurisdiction. Petitioner readily admits that he “declined GAO’s offer to repay his student loan and did not enter into a service agreement with GAO authorizing such payment.” Pet. Appeal at 5.

¹³ Petitioner insists that GAO’s own caselaw states that “for federal benefits requiring a service agreement, the lack of a signed agreement does not disqualify an employee from retaining the benefit.” Pet. Reply at 6. However, he cites only to Comptroller General opinions which resolve issues that are not within the Board’s jurisdiction. Further, in the cases on which Petitioner relies, the service agreement requirement was waived because those employees had actually fulfilled the minimum service required. In particular, the CG stated that “the absence of a signed service agreement is not fatal to payment of relocation expense where an otherwise eligible employee did in fact perform the required minimum service.” *Matter of: James J. Gormley*, 71 Comp. Gen. 425, B-247466 (1992) (citing *Matter of Thomas D. Mulder*, 65 Comp. Gen. 900, B-218645 (1986)). In the instant case, Petitioner did not complete the required minimum service at GAO.

¹⁴ Petitioner cites two cases to argue that other erroneous awards of pay or benefits were found to involve “personnel actions” within MSPB jurisdiction. Pet. Reply at 6. However, these cases found personnel actions based upon garnishment of wages (*Roach v. Department of Army*, 82 MSPR 464 (1999)) and appointment (*Orr v. Department of Treasury*, 83 MSPR 117 (1999))—not on an erroneous payment. In this case, the action being disputed is not whether Petitioner should have received the payment initially but whether GAO may at this point *recoup* the erroneous payment; the latter does not constitute a personnel action. There is no allegation, *e.g.*, of discriminatory treatment in the decision to recoup the erroneous payment.

¹⁵ Petitioner apparently stakes a claim in the \$5,000 payment because the Agency assertedly did not give him the actual notice that he claims he is entitled to under §5379(c)(2). Pet. MSJ at 16-18. However, the failure to do so would not entitle Petitioner to the payment since paragraph (c)(2) refers back to (c)(1)(B) which clearly states that an employee must sign a service agreement prior to receiving any benefits. In this case, there is no dispute that Petitioner did not sign a service agreement. Further, the payment had been noted on Petitioner’s earnings and leave statement; he knew of the need to sign a continued service

The head of an agency has discretion to waive all or part of the recovery under 5 U.S.C. §5379(c). In April 2007, the Comptroller General exercised his discretion by declining to do so.

The Supreme Court has noted that the elaborate scheme for protection of Federal employee rights created by the Civil Service Reform Act applies “to a multitude of personnel decisions” but not to all personnel actions taken against employees. *Bush v. Lucas*, 462 U.S. 367, 385 & n.28 (1983). In other words, not all unfavorable actions taken by management constitute personnel actions involving a violation of law, regulation or policy that implements or directly concerns a merit system principle. In this case, the AJ concluded that GAO’s efforts to recoup the mistaken payment were encompassed by the category noted in *Bush v. Lucas* as falling outside the elaborate system established by the Civil Service Reform Act and, therefore, the recoupment efforts fall outside the jurisdiction of the Personnel Appeals Board. ID at 28.

Having declined to sign the agreement, which was a condition precedent to receiving any contribution from GAO towards his outstanding student loans, Petitioner has no standing to invoke the protections provided to participants under the PSEAA (*e.g.*, his argument that he was not provided specific, advanced notice of the duty to make restitution). By the clear language of the statute, absent an agreement, the Agency was not authorized to make the erroneous payment. It is crucial to note that while GAO has attempted to recoup the erroneous payment, no covered personnel actions were taken against Petitioner herein.

The Board concludes that Petitioner has failed to show that the Initial Decision was inconsistent with law; an erroneous interpretation of statute or regulation; arbitrary, capricious or an abuse of discretion; or not consistent with required procedures resulting in harmful error. The AJ correctly concluded that the Agency’s efforts to collect an erroneous payment that was not authorized under the PSEAA did not form the basis for a prohibited personnel practice. For the foregoing reasons, the Initial Decision dismissing this matter for lack of jurisdiction is affirmed.

2. Motions for Sanctions

Pursuant to 4 C.F.R. §28.24, in Board proceedings sanctions may be imposed upon the parties “as necessary to serve the ends of justice, including but not limited to” the failure to comply with an order or subpoena, failure to prosecute or defend, and failure to make a timely filing.¹⁶

agreement in order to partake of the benefit. Accordingly, after declining any benefits, Petitioner cannot now claim that he is entitled to it because of the Agency’s mistake and because it happens to be financially beneficial for him to do so.

¹⁶ Because of the conclusion reached herein as to jurisdiction—and the Board’s affirmance of dismissal of the underlying matter in its entirety—the Board could decline to rule on Petitioner’s Motions for Sanctions. Certainly the remedy of striking a pleading is without effect if the Board does not have jurisdiction, and the sanction requests were both filed after the matter was otherwise submitted on appeal. Nothing in these Motions for Sanctions changes the ultimate conclusion reached by the AJ and affirmed herein. The matter is a debt collection case based on an erroneous, unauthorized payment. Nevertheless, because of the importance of preserving the integrity of the process while a matter is pending before the Board, we are considering and ruling on Petitioner’s Motions for Sanctions.

On April 20, 2009, Petitioner filed a Motion for Sanctions, requesting that GAO be sanctioned for: 1) allegedly failing to produce a facsimile sent to the NFC notifying that agency that the original calculation of Petitioner's debt was erroneous, and stating the correct amount owed by Petitioner; and 2) allegedly making a false statement in its Sur Reply about the amount sought in various notices sent to Petitioner regarding his debt.

As to the first contention, Respondent's Opposition to Petitioner's Motion for Sanctions states that Agency counsel had not been aware of the fax at that time and that Petitioner had not specifically asked for copies of communications between GAO and NFC. *Id.* at 6. The Agency further notes that there was no discovery in this case prior to the Decision on Summary Judgment. The record shows that it was during 2009 efforts to document the exact amount of the debt that counsel for GAO learned of the fax and received a copy on March 26, 2009. It first appears as an exhibit to the Sur Reply, filed on March 30, 2009. The record is clear that upon learning of the document, Agency counsel acted in good faith and promptly provided it to Petitioner by attaching it to the Sur Reply. Further, the record is clear that the Agency had previously provided Petitioner with numerous documents explaining why it had assessed the debt and seeking repayment for the erroneous payment. For this reason, the "fax contains no information that would have deepened Petitioner's understanding of the matter." *Id.* at 6. Petitioner has not countered the Agency's assertion that it acted in good faith with respect to the fax, and has failed to establish sufficient grounds to warrant sanctions against the Agency on this basis.

As to the second contention that GAO allegedly made a false statement concerning the amount of the debt, the Agency states that the notice to which Petitioner refers was issued by the Department of Treasury, not by GAO. GAO reiterates that its statement about debt notices from GAO or NFC was accurate. *Id.* at 7. Petitioner has not established that GAO made a materially false statement in summarizing the amount of the debt which it sought to retrieve. Accordingly, Petitioner has not established that sanctions are necessary to serve the interests of justice on this April 20, 2009 Motion. *See* 4 C.F.R. §28.24.

Petitioner filed a second Motion for Sanctions on June 30, 2009, asking that the Board impose sanctions against GAO for allegedly making false statements in Respondent's Cross-Motion for Summary Judgment and in its Reply to Petitioner's Appellate Brief. Specifically, Petitioner contends that GAO made "a materially false statement" in Exhibit 5 of its Cross-Motion for Summary Judgment in stating that "GAO has not reported your debt to private credit agencies." Motion for Sanctions (6/30/09) at 1.

Second, Petitioner claims that in Respondent's Reply to Petitioner's Appellate Brief, the Agency made another materially false statement in footnote 7, with the statement "Whether and how Treasury acts on debts referred to it is beyond GAO's authority and control." *Id.* Petitioner points to correspondence between GAO and the Department of Agriculture and correspondence with the Department of Treasury to argue that GAO does have authority and control over "the manner in which [his] debt is handled." *Id.* at 3. He further states that his credit report has been negatively affected by the adverse debt noted by the U.S. Department of Agriculture, acting as

GAO's agent, and by a private collection agency also acting as GAO's agent.¹⁷ *Id.* at 2. Petitioner rejects the conclusion that the debt's existence and obligation were resolved by a review of documents (*i.e.*, a paper hearing), and thus continues to argue that because the "amount and existence of the debt remain unresolved, the actions of GAO and its agents are clearly inappropriate." *Id.* As a result, Petitioner requests that the Board strike both Respondent's Cross Motion for Summary Judgment and its Reply to Petitioner's Appellate Brief.

GAO filed its Opposition to Petitioner's Motion for Sanctions on July 17, 2009. The Agency first states that there is "no evidence that GAO failed to comply with any order or subpoena, failed to prosecute or defend, or failed to make a timely filing." Resp. Opposition (7/17/09) at 2.

The Board does find controlling two points advanced by GAO: 1) the fact that GAO was unaware that the National Finance Center (NFC) had referred Petitioner's account to credit reporting agencies until Petitioner made that known recently; and 2) the fact that GAO itself did not report Petitioner's debt to private credit agencies.¹⁸ Based upon this information, Petitioner's first argument for sanctions in the June 30, 2009 Motion is therefore rejected.

Petitioner's second argument is that GAO made a materially false statement in its Reply to Petitioner's Appellate Brief when it said that it has no authority or control over how Treasury acts on debts referred to it, and that GAO misrepresented the degree of control it has over NFC. GAO asserts that it has communicated information to NFC as to the validity and status of Petitioner's debt, rather than telling NFC how to carry out its functions. As to the Treasury, GAO states that by law it is required to refer any debt delinquent by more than 180 days, citing 31 U.S.C. §3711(g). Resp. Opposition (7/17/09) at 4. This is to enable Treasury to "take appropriate action on the debt." *Id.*; *see also* 31 C.F.R. §901.1(e). GAO argues that it has no control over how Treasury acts on debts referred, and that Petitioner has failed to show the contrary. Resp. Opposition (7/17/09) at 5. Therefore, the Agency states that no sanctions are in order because no materially false statements have been made in this regard.

Given the clear language of the regulation, GAO did not fail to comply with an order or a subpoena, did not fail to prosecute or defend a petition, and did not fail to make a timely filing. Nor did Petitioner prove that the interests of justice otherwise call for sanctions against the

¹⁷ Motion for Sanctions (6/30/09) at 2. It should be noted that resolution of the situation appears to have been within Petitioner's control. Petitioner claims that "[c]ontrary to GAO's claims, Petitioner has inquired about a refund from Sallie Mae to no avail." Pet. Reply at 3 n.1. Petitioner provides no further detail or support on this point. Further, he makes no mention of attempts to cooperate with GAO to contact Sallie Mae to recoup the money. GAO had offered to forgive Petitioner's debt in its entirety in exchange for a full refund from Sallie Mae of all amounts paid on his behalf. According to GAO, this would have simply required Petitioner's written consent to Sallie Mae to a refund and would have required no additional expense to Petitioner. As of March 30, 2009, GAO was still willing to work with Petitioner to obtain the refund from Sallie Mae. Resp. Sur Reply at 3; *see also*, Resp. CMSJ, Exh. 5. at 8.

¹⁸ Specifically, as to Petitioner's claim that GAO made a materially false statement in February 2008 when it told him that it had not reported his debt to credit agencies, GAO argues that it would be inappropriate for the Board to strike a brief for actions taken before the Board was cognizant of this matter. The Board does not agree with this contention; if the brief submitted to the PAB contained a materially false statement, that fact could be sufficient to warrant consideration of sanctions.

Agency based on this record. Upon consideration of the submissions of the parties, the Board finds the Agency's argument on this point to be persuasive.

Accordingly, Petitioner's June 30, 2009 Motion for Sanctions is denied in its entirety.

CONCLUSION

Based on the reasons set forth above, the Decision of the Administrative Judge is affirmed. The case is hereby dismissed. In addition, Petitioner's two Motions for Sanctions are denied.

SO ORDERED.