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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-211626

127596

August 1, 1985

The Honorable John D. Dingell
Chairman
Subcommittee on Oversight and
Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

We refer to your interest in the handling of the debt of Mr. J. Michael Tabor--an employee of the Economic Regulatory Administration, Department of Energy--for certain travel and subsistence reimbursements established by our decision J. Michael Tabor, B-211626, July 19, 1983. Subsequent to that decision, recoupment of the debt by salary offset was precluded as a result of a hearing official's decision dated February 22, 1984, under the salary offset provisions of 5 U.S.C. § 5514(a). As you know, by letter dated December 19, 1984, B-211626, we advised the Secretary of Energy that his certifying officer was not relieved of responsibility for the recoupment of funds from Mr. Tabor through means other than salary offset. We suggested that this debt be referred to the Department of Justice for collection by litigation.

On May 29, 1985, we requested a status report from the Secretary of Energy. In response, we received a letter dated July 12, 1985, from J. Michael Farrell, General Counsel of the Department of Energy, transmitting a copy of his letter of the same date to the Department of Justice. Mr. Farrell disagrees with our position that the debt is still viable and requests that the Department of Justice review this matter. We enclose copies of Mr. Farrell's letters for your information. We shall keep you advised of further developments.

Sincerely yours,

Milton J. Socolar

for Comptroller General
of the United States

Enclosures

032786 / 127596

Department of Energy
Washington, DC 20585

July 12, 1985

Mr. Harry R. Van Cleve
General Counsel
General Accounting Office
Washington, D.C. 20548

Dear Mr. Van Cleve:

This is in response to your letter of May 29, 1985 requesting information on the status of the Department of Energy's review of your most recent decision regarding J. Michael Tabor, B-211626, December 19, 1984. For the reasons set forth in the enclosed letter to the Honorable Ralph W. Tarr, the Department respectfully disagrees with the position articulated in this decision, and therefore has requested that the Department of Justice review this matter.

Please let me know it I can be of further assistance.

Sincerely,

J. Michael Farrell
General Counsel

Enclosure

Department of Energy
Washington, DC 20585

July 12, 1985

Honorable Ralph W. Tarr
Acting Assistant Attorney General
Office of Legal Counsel
Department of Justice
Washington, D.C. 20530

re: Matter of J. Michael Tabor

Dear Mr. Tarr:

By this letter, the Department of Energy (DOE) is referring the enclosed materials associated with the matter of J. Michael Tabor (Tabor), a DOE employee, for your office's review and consideration. This matter presents an issue involving the respective authorities of executive agencies and the Comptroller General of the United States with respect to claims against Federal employees. Because this issue is one of first impression and its impact is Government-wide, involving a conflict between Federal entities over the effect of the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1749 (1982) (hereinafter "the Act"), we believe it appropriate for your office to consider this matter.

On its face, this matter involves conflicting views of the Department, stemming from the decision of a hearing official appointed by the Secretary of Energy, and of the Comptroller General, on the merits of whether Tabor owes a debt to the United States as a result of travel expense reimbursements made to Tabor by the Department. 1/ We believe, however, that this matter

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1/ As set forth in detail in the enclosed material, Tabor incurred travel expenses while assigned duty in Washington, D.C. from October 1981 to April 1983, away from Dallas, Texas (his previous designated permanent duty station). The Comptroller General ultimately concluded that Tabor was on permanent rather than temporary duty in Washington from January 1982 through April 1983, and, therefore, he was not entitled to reimbursement of such expenses. It was, however, determined by the Secretary of

(Footnote Continued)

presents a more fundamental issue requiring consideration by your office, i.e., the extent of an agency head's authority to determine, through a designated hearing official, the existence and amount of a debt owed to that agency by a Federal employee through means of the salary offset provisions of section 5 of the Act, 5 U.S.C. § 5514.

Background

The Tabor matter first came to the attention of the Comptroller General through an inquiry from two Congressmen. As a result of his evaluation of the matter, the Comptroller General responded to the Congressmen with a decision that Tabor was indebted to the United States for certain travel and subsistence overpayments. J. Michael Tabor, B-211626, July 19, 1983 (Tabor I) (Tab A). Upon receipt of Tabor I, the DOE Controller's office used the Comptroller General's reasoning to determine that the amount owed to the Department totaled $30,270.46, and initiated action to collect this amount from Tabor by notifying him of the proposed collection action (Tab B). This notice letter was provided to Tabor in accordance with the procedures set out in the Act at 5 U.S.C. § 5514(a)(2), which afford a Federal employee notice that a debt may be owed and collected from him and an opportunity for a hearing on the existence and the amount of the debt prior to any collection through salary offset. Tabor responded by requesting a hearing (Tab C).

The Secretary of Energy, pursuant to 5 U.S.C. § 5514(a)(2)(D), directed that an administrative judge of DOE's Financial Assistance Appeals Board 2/ be appointed to conduct the hearing

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(Footnote Continued)
Energy, through the decision of a hearing official pursuant to the Debt Collection Act, that Tabor was in fact on temporary duty in Washington during the period and was entitled to be reimbursed for much of the claimed expenses.

2/ The Debt Collection Act requires that a hearing may not be conducted by an individual under the supervision or control of the head of the agency, and specifically allows the appointment of an administrative law judge to preside at such a hearing. 5 U.S.C. § 5514(a)(2). At the time the Tabor matter was processed, the Department had not adopted regulations to implement the Act. Notwithstanding the lack of such regulations, it was determined that the requirements for a hearing under the
(Footnote Continued)

and to render a final decision regarding the existence and amount of the debt (Tab D). Administrative Judge Carlos R. Garza was appointed to conduct the hearing. Judge Garza granted Tabor's motion for summary judgment in a decision dated February 22, 1984, which found Tabor's alleged debt had not been established by the Department (Tab E). In the course of this decision, Judge Garza determined that the facts presented did not support the Comptroller General's analysis of the merits of the case.

By operation of law, the decision of the hearing official constitutes the final determination of the agency under 5 U.S.C. § 5514(a)(1). The existence of the contrary Tabor I decision of the Comptroller General, however, created concern within the DOE Controller's office. Before the appropriate DOE accounting official would extinguish the Tabor debt from his excepted account, he requested an advance decision from the Comptroller General on whether the debt was now extinguished as a result of the Garza ruling and whether the Department was relieved from the responsibility of recouping the debt from Tabor (Tab F). In response to that inquiry, the Comptroller General issued a second Tabor decision dated December 19, 1984, which held that the debt still existed even after the finding by the hearing official, and that the Department was still required to collect the amount that the Comptroller General determined had been overpaid. J. Michael Tabor, B-211626, December 19, 1984 (Tabor II) (Tab G). 3/

(Footnote Continued)
Act could be met by DOE's Financial Assistance Appeals Board. This is an existing administrative law tribunal which adjudicates various disputes arising out of DOE activities. The Board's identity was established by DOE Order 1100.4, March 1, 1979, and DOE Delegation Order No. 0204-36, March 1, 1979, in which the Secretary assigned functions to the Board. The Board's origin is not statutory in nature, but derives from Secretarial delegation pursuant to section 642 of the DOE Organization Act, Pub. L. No. 95-91, 42 U.S.C. § 7252, which authorizes the Secretary to "delegate any of his functions."

3/ The Comptroller General in this decision reviewed additional facts not available to him when he rendered Tabor I. On the basis of those additional facts, he determined that the debt owed by Tabor should be recalculated by the Department and the total amount owed by Tabor should be adjusted downward. The Comptroller General determined that Tabor's service in Washington from October 1981 through December 1981 was, in fact, temporary
(Footnote Continued)

The Comptroller General found that, while Judge Garza's ruling did preclude the Department from offsetting Tabor's salary pursuant to the Debt Collection Act, the Department was still required to initiate collection action 4/ by referring the case to the Department of Justice for litigation. 5/ The decision indicated that Judge Garza's determination was conclusive as to the Department's ability to utilize salary offset procedures but not as to the amount or existence of the debt, and did not overrule Tabor I on those points. The Comptroller General asserts that various statutory authorities independent of the Debt Collection Act allow him to settle all Federal claims and accounts and to supervise recovery of debts due the United States. He asserts that his decision based on those authorities is binding on this Department. Therefore, he believes his Tabor decisions are controlling over the hearing official's determination under the Debt Collection Act as to the existence and the amount of the debt.

Analysis

A. Nature of the Decision of a Hearing Official Pursuant to the Debt Collection Act as to the Existence and Amount of a Debt.

(Footnote Continued)
duty; therefore, his travel claims for that period were proper. However, the Comptroller General continues to hold that Tabor's travel claims for the period January 1982 to April 1983 are not proper. See Tabor II at 8-9.

4/ Pursuant to the Comptroller General's findings in Tabor II, the DOE Controller's office recalculated the amount of Tabor's indebtedness as $22,905.53 (Tab H). It is this amount that the Comptroller General believes the Government must collect from Tabor.

5/ We note that the Tabor case has been referred to the Department of Justice on one other occasion. On September 2, 1982, DOE's Assistant Inspector General for Investigations referred his independent investigation of Tabor to the United States Attorney for the District of Columbia (Tab I). On September 27, 1983, Carol E. Bruce, Assistant United States Attorney, District of Columbia, declined to prosecute Tabor on the facts presented (Tab J).

It is our opinion that Congress, in enacting section 5 of the Debt Collection Act, intended a final determination under section 5 to be the dispositive administrative action as to a claim of indebtedness by a Federal employee to the United States. Section 5 of the Act states in pertinent part:

> "(a)(1) When the head of an agency or his designee determines that an employee, ... is indebted to the United States for debts to which the United States is entitled to be repaid at the time of the determination by the head of an agency or his designee, or is notified of such a debt by the head of another agency or his designee, the amount of indebtedness may be collected in monthly installments, or at officially established pay intervals, by deduction from the current pay account of the individual....
>
> "(2) Except as provided in paragraph (3) of this subsection, prior to initiating any proceedings under paragraph (1) of this subsection to collect any indebtedness of an individual, the head of the agency holding the debt or his designee, shall provide the individual with--
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> * * *
>
> "(D) an opportunity for a hearing on the determination of the agency concerning the existence or the amount of the debt, and in the case of an individual whose repayment schedule is established other than by a written agreement pursuant to subparagraph (C), concerning the terms of the repayment schedule.
>
> A hearing, described in subparagraph (D), shall be provided if the individual, on or before the fifteenth day following receipt of the notice described in subparagraph (A), and in accordance with such procedures as the head of the agency may prescribe, files a petition requesting such a hearing. The timely filing of a petition for hearing shall stay the commencement of collection proceeding. A hearing under subparagraph (D) may not be conducted by an individual under the supervision or control of the head of the agency, except that nothing in this section shall be construed to prohibit the appointment of an administrative law judge. The hearing official shall issue a final decision at the earliest practicable date, but not later than sixty days after the filing of the petition requesting the hearing." 5 U.S.C. § 5514(a) (emphasis added).

This language on its face manifests Congress' intent that the head of the agency or his designee is the proper Government official to make the determination whether a Government employee is indebted to the United States. Moreover, the legislative history suggested that view:

> "Section 5 would provide for the offset of a federal employee's salary to satisfy general debts owed the government.
>
> "This provision amends the title and first sentence of 5 U.S.C. 5514(a) to allow the head of an agency or his designee, or the head of the postal service or his designee, when it is determined that an employee, member of the Armed Forces or Reserve of the Armed Forces is indebted to the United States, the amount of the indebtedness may be collected by deduction from the current pay account of the individual. In determining that the employee is indebted, the head of the agency or his designee should review the claim to make sure that it is a valid debt. For the purposes of this section, only those debts to which the United States is entitled to be repaid at the time of the determination by the head of the agency or his designee is to be collected by deduction from the current pay account of the individual. Under no conditions may an agency set off an employee's pay to collect a loan which is not yet overdue or delinquent or for which there is a formal, written repayment agreement. The "determination" is the point at which the head of the agency or his designee decides that the debt is valid. The type of indebtedness that may be deducted would include, but is not necessarily limited to, erroneous payments made to the employees, overpayments of benefits, salary or other allowances, travel allowances, federal loans or guaranteed or insured loans, or other indebtedness resulting from stolen property. The deductions may be made at officially established pay periods or in monthly installments." S. Rep. No. 378, 79th Cong. 2d Sess. 22, 23 (1982) (emphasis added).

This is in accord with the main purpose of the Act to "facilitate substantially improved collection procedures in the federal government." Id. at 1. With the agency head or his designee, the collection decision is lodged with the official who is in the best position to determine efficiently and expeditiously the existence of a debt owed to the agency and to assure that the debtor is provided with full due process rights. Id. at 24. See also, 178 Cong. Rec. S 12328 (daily ed. Sept. 27, 1982) (statement of Senator Percy). As stated by Representative

McClory in the debate in the House on the Debt Collection Act, "the Federal agency officer responsible will still have summary authority to negotiate, compromise, litigate or discharge a debt." 128 Cong. Rec. H 1738 (daily ed. May 4, 1982).

The hearing provided Tabor was in full accord with Congress' intent to resolve debts owed by Federal employees in an expeditious yet fair manner that accords full due process rights to the debtor. It was conducted pursuant to the Department's Procedures for Financial Assistance Appeals, published in 10 CFR Part 1024 (1983). These procedures provided Tabor with complete due process safeguards such as a full development of the record, ability to present and object to evidence, pre-hearing conferences, full representation in appearing before the hearing official, and the right to a written decision from an independent arbiter of the facts. 6/ Moreover, Judge Garza, where appropriate, adjusted the Board's procedures to meet the timetable set out in the Act in order that his determination would meet the statutory mandate for expeditious review and resolution.

B. Relationship of a Decision of the Comptroller General to a Final Determination Pursuant to the Hearing Provisions of the Debt Collection Act as to the Existence and Amount of a Debt.

In Tabor II, the Comptroller General observed that the Act was intended to be one among many tools that would strengthen Federal

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6/ As mentioned in footnote 2, at the time these proceedings were conducted, the Department did not have regulations implementing the Debt Collection Act, and therefore the Administrative Judge had no specific guidance concerning the scope of a hearing under the Act. Our review of the Department's current guidance implementing the Act, DOE Order 2200.2A, "Collection From Employees For Indebtness to the United States" (effective October 10, 1984, as approved by the Office of Personnel Management), indicates that all due process safeguards provided under this Order were provided Tabor under the Procedures for Financial Assistance Appeals. In fact, the Financial Assistance Appeals Procedures provided Tabor with additional procedures not provided in the DOE's Debt Collection Act Order. The Financial Assistance Appeals Procedures adhere more closely to the Federal Rules of Civil Procedure which allow such motions as summary judgment. See 10 CFR Part 1024 (1983).

debt collection, and that consequently an adverse decision under 5 U.S.C. § 5514(a)(2) "cannot overrule a decision of the Comptroller General or provide a basis for removing from the Department's accounts a debt established by the Comptroller General." The basis for the Comptroller General's conclusion is that 5 U.S.C. § 5514(a) must be read in conjunction with the Federal Claims Collection Act of 1966, 31 U.S.C. § 3711 et seq., as well as the Comptroller General's account settlement authority.

Neither the text nor the scheme of the Act is particularly congenial to the Comptroller General's position. First, 5 U.S.C. § 5514(a)(2) plainly contemplates an adjudication of the existence of a debt that will have administrative finality. Contrary to the suggestion made by the Comptroller General that the Act's reference to finality was meant only to enjoin completion of the hearing official's decision within 60 days, the text does not appear to be directed to such a narrow result. Had the Congress intended merely to require action by the hearing official within 60 days, it easily could have accomplished this without resort to the adjective "final."

And had the Congress intended to condition further the administrative finality seemingly conceived by the statute, presumably it would have done so with clarity similar to that by which it conditioned the initial agency determination on the decision by the hearing official. The scheme of the Act provides, with respect to administrative claims against Federal employees, that the decision regarding an indebtedness to the United States shall be made in the first instance by the agency's management. At the employee's option, that initial decision might be considered de novo by an independent hearing official, who shall issue the final administrative decision. Nowhere does the Act even hint at further administrative action by the Comptroller General or any other official.

In essence the Comptroller General's position would subordinate the results of adjudications in the particular context of claims against Federal employees to the Comptroller General's actions pursuant to his view of general authorities that are not directed to the specific circumstance of such claims. This construction would seem to render superfluous the hearing procedure itself, because of course those general authorities make no reference to the particular procedures prescribed by 5 U.S.C. § 5514(a). The view urged by the Comptroller General would seem to conflict with

both the obvious purpose of the hearing requirement and the congressional objective of expeditious resolution of such claims against Federal employees.

The Comptroller General cannot assure full due process rights in making a determination of indebtedness, nor does he have access to the facts for prompt, correct determination and collection of the debt from the Federal employee. Allowing such Comptroller General action would create undue delay and uncertainty as to the existence and amount owed by a Federal employee, slowing down the very collection action that the Act was intended to accelerate. Further, it would render nearly meaningless from the employee's point of view the hearing to which he or she must devote time and expense. Congress could not have intended such an inequitable result.

The only court decision we are aware of that has interpreted the relative authorities of an executive agency and the Comptroller General with regard to the determination of Federal employee indebtedness by means of salary offset lends support to DOE's interpretation of the Debt Collection Act. In Arnold v. United States, 404 F.2d 953 (Ct. Cl. 1968), the Court of Claims interpreted a predecessor of 5 U.S.C. §5514, which contained a similar provision authorizing agency heads to make a determination of indebtedness in order to withhold Federal employee pay, 7/ as imposing on the agency head an exclusive responsibility to determine the existence of an indebtedness. The court held that the agency head could not rely on a Comptroller General decision holding the employee indebted to the

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7/ This provision was codified at 5 U.S.C. § 46d (1964) and provided:

> "When it is determined by the Secretary of the department concerned ... or one of their designees, that any employee ... is indebted to the United States as the result of any erroneous payment made by the department ... concerned to or on behalf of any such person, the amount of the indebtedness may be collected in monthly installments, or at officially established regular pay period intervals, by deduction in reasonable amounts from the current pay account of such person. The deductions may be made only from basic compensation, basic pay, special pay, and incentive pay, retired pay, retainer pay, or in the case of persons not entitled to basic pay, other authorized pay...."

Government; rather the statute required an independent determination of indebtedness by the agency. Id. at 958. In rendering its opinion the court indicated that "There is an intimate connection between the ... department and the [employee's] compensation, paid by that department, which Congress ... seem[s] to acknowledge." Id. We believe the same rationale can be applied to section 5 of the Debt Collection Act of 1982. It is the agency head, through a designated hearing official, rather than the Comptroller General, that is in the best position to make a determination of indebtedness. Congress recognized this by specifically granting the designated hearing official the final authority to make that administrative determination.

C. The Comptroller General's Authority to Settle Accounts and Supervise the Recovery of Debts.

According to the Comptroller General, his authority to review and render decisions on questions of overpayment of Federal employee reimbursements is part and parcel of his general claims and account settlement authority. This authority is derived from the interplay of a number of related statutory provisions. 8/ These provisions in one form or another have been available to accounting officers of the Treasury long before the inception of the Office of the Comptroller General in 1921. The current form of these provisions derives directly from the Budget and

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8/ 31 U.S.C. § 3702(a) - "The Comptroller General shall settle all claims of or against the United States."

31 U.S.C. § 3526(a) - "The Comptroller General shall settle all accounts of the United States Government and supervise the recovery of all debts finally certified by the Comptroller General as due the Government."

31 U.S.C. § 3526(d) - "On settling an account of the Government, the balance certified by the Comptroller General is conclusive on the executive branch of the Government."

Accounting Act of 1921, 9/ which established the Office of Comptroller General. 10/

The cases cited by the Comptroller General in Tabor II as authority for the position that his decisions are binding on this Department are not controlling with respect to the issue presented here. 11/ None of those cases presented a situation where a statute specifically granted the agency head authority to make a final determination, through a designated hearing official, in a matter that would otherwise have been within the general account settlement authority of the Comptroller General. As stated previously, the closest precedent is the Arnold case, supra, which was not addressed by the Comptroller General.

In addition, we believe that other cases support our view of this matter. In Globe Indemnity Co. v. United States, 291 U.S. 476 (1934), the Supreme Court reviewed the Comptroller General's authority to settle claims and make final settlements in light of another statute that gave executive agencies the authority to make final settlement on certain types of contracts. Once final settlement is made on such contracts the statute allows subcontractors to sue within a certain time limit under their

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9/ Act of June 10, 1921, ch. 18 (title III), 42 Stat. 23 (1921).

10/ The Supreme Court has stated that "the chief change effected by the Budget and Accounting Act was that it transferred powers lodged with officers of the Treasury Department to the Comptroller General and made his office independent of the executive branch. But the function which he exercises in auditing and settling claims ... is precisely that which was previously exercised by the Accounting Office in the Treasury Department." Globe Indemnity Co. v. United States, 291 U.S. 476, 480 (1934).

11/ United States v. McCarl, 275 U.S. 1, 4-5 fn. 2 (1927); United States v. Standard Oil Co. of California, 545 F.2d 624, 637-38 (9th Cir. 1976); Burkley v. United States, 185 F.2d 267, 272 (7th Cir. 1950); Pettit v. United States, 488 F.2d 1026, 1031 (Ct. Cl. 1973). Even absent a separate statute, such as the Debt Collection Act, that deals with particular types of settlements, the depiction of the effect of the Comptroller General's decisions in these cases seems largely dicta.

subcontracts with the Government contractor. In this case, the agency made the settlement but then forwarded it to the Comptroller General for disbursement, and the difference in the time between settlement by the executive agency and approval by the Comptroller General affected the right of a subcontractor to sue the Government contractor. The Court held that the purpose of the statutory provision allowing settlement by the executive agency would be defeated and create undue delay and inconvenience if the Comptroller General could supplant, by his decision, the settlement rendered by the executive agency. The Court, therefore, found that the agency action must be treated as the final settlement. Similarly, in Grace Line, Inc. v. United States, 255 F.2d 810 (2nd Cir. 1958), the court held that the general claims settlement authority of the Comptroller General is merely a statutory scheme for coordinating the claims and debts of the Federal Government, and cannot be interpreted as allowing a unilateral decision of the Comptroller General to override the normal processes of adjudication.

Conclusion

We believe that decisions by hearing officials under 5 U.S.C. § 5514(a)(2) were intended by the Congress to have administrative finality. Under the scheme of the Debt Collection Act, once the hearing official has decided the existence or the amount of the debt, there would appear to remain no room for supplanting such a decision with one made by the Comptroller General pursuant to his general statutory settlement authorities. Consequently, an opinion by the Comptroller General that differs from the conclusions arrived at by the hearing official under the Debt Collection Act would not be "binding" on this Department, and, absent resort to judicial litigation, this Department's accounts should be adjusted to reflect the hearing official's decision.

In view of the advice previously rendered this Department's Controller by the General Accounting Office, we would appreciate your analysis and advice with regard to the legal issues addressed in this letter. Should your office agree with the conclusions we have adopted, we would also appreciate your advice that this Department's accountable fiscal officers will not be proceeded against individually as a result of any actions they might take that are consistent with the hearing official's decision but at odds with the conclusions arrived at by the Comptroller General.

I have provided a copy of this letter and its attachments to the Acting Assistant Attorney General in charge of the Civil Division.

We appreciate your advice and assistance in this matter. Should your office have any further questions they may be directed to Ralph D. Goldenberg, Assistant General Counsel for General Law (252-8665).

Sincerely,

J. Michael Farrell
General Counsel

Enclosures

cc: Honorable Richard K. Willard
Acting Assistant Attorney General
Civil Division
Department of Justice