

ADMINISTRATIVE MEMORANDUM

SUBJECT Procedures to be used during hearings conducted pursuant to the Setoff Debt Collection Act

NUMBER 195

DATE April 27, 1984

Introduction

This Administrative Memorandum implements an amendment to the Setoff Debt Collection Act, enacted by the General Assembly in 1983, which provides for new procedures in hearings pursuant to the Setoff Debt Collection Act.

Proper hearing procedures within The University under the Setoff Debt Collection Act have been subject to some uncertainty since the Act took effect on July 1, 1979. The 1983 amendment provides for a single, definitive set of procedural standards. But because of the complicated history of this matter, it is important to identify precisely which prior instructions about the Setoff Debt Collection Act remain in force. (A) General instructions for implementing the Act are contained in Administrative Memorandum No. 127 (October 30, 1979). Administrative Memorandum No. 127 remains in effect except for Paragraph 4 thereof (at page 3), which deals with hearing procedures; at Attachment A you will find a copy of Administrative Memorandum No. 127 indicating that Paragraph 4 has been superseded. (B) Administrative Memorandum No. 177 (March 4, 1983), which set forth Setoff Debt Collection hearing procedures pursuant to the Administrative Procedures Act, is hereby superseded in its entirety.

Please note, in addition to the required procedures, the following consideration. In the context of a student debt, a hearing under the Setoff Debt Collection Act likely will involve presentation of "education records" as defined under the Family Educational Rights and Privacy Act of 1974 (the "Buckley Amendment"). Such documents are protected under the Buckley Amendment from disclosure, other than to the student, unless particular conditions specified in the Buckley Amendment are present. Thus a hearing on a student's contested debt should not be a public hearing unless one of these Buckley provisions pertains:

- The student has waived his or her right of privacy (if the records to be used include financial records of the student's parents, their waiver also is needed);
- the contested debt is based upon records generated "in connection with a student's application for, or receipt of, financial aid"; or
- the records are produced at the hearing "pursuant to any lawfully issued subpoena" (the procedures approved by the Attorney General do not provide for agency subpoenas).

Procedures

The 1983 amendment to the Setoff Debt Collection Act exempts The University of North Carolina from the obligation to comply with the Administrative Procedures

Act (A.P.A.) when conducting hearings required under the Setoff Debt Collection Act. In lieu of A.P.A. procedures, N.C.G.S. §105A-8(a) now provides that The University, including its constituent institutions and affiliated agencies, "shall conduct hearings according to administrative procedures deemed lawful by the Attorney General." In accordance with that directive the Attorney General's office has determined (Attachment B) that whenever a debtor who receives notice of a debt requests a hearing under N.C.G.S. §105A-7 to contest the validity of the debt owed, as set out in Administrative Memorandum No. 127, The University and its constituent institutions and affiliated agencies shall use the following procedures:

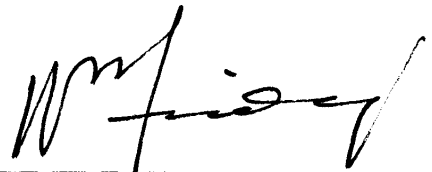
1. The debtor shall be provided written notice of the date, time, and place set by the University institution or agency for the hearing, and of the identity of the hearing officer. The notice shall be sent certified mail, return receipt requested; a model notice is attached to this memorandum (Attachment C). Any notice used in lieu of the model notice shall address at least Paragraphs 1, 2, 5, 6, 7, and 8 of these instructions.
2. The notice shall state that any further review of the debt will be limited to evidence presented at the hearing, and that if the debtor fails to appear at the hearing (either personally or through an authorized representative pursuant to Paragraph 8, below), the institution or agency in the debtor's absence shall proceed to determine the validity and amount of the debt as a final agency decision pursuant to Paragraph 11, below.
3. The Chancellor or his designee shall appoint a hearing officer to hear the evidence and make a final determination, on behalf of the institution or agency, on the validity and amount of the debt owed. The hearing officer shall have no prior involvement in the particular claim which would constitute a conflict of interest, and the hearing officer shall not be able to offer testimony or evidence on behalf of the institution or agency.
4. The institution or agency shall have the burden of establishing the validity and amount of the debt upon the evidence presented at the hearing.
5. The debtor shall be able to appear and to present evidence, including the testimony of witnesses. Although the debtor cannot compel the attendance of witnesses, the hearing officer shall have the authority to direct the attendance of any witnesses employed by the institution or agency whose possible testimony the hearing officer believes relevant.
6. The debtor shall be able to cross-examine the institution or agency's witnesses.
7. The debtor shall be able to review, prior to the hearing, the documents the institution or agency intends to introduce in support of its claim and to obtain copies of the documents at the debtor's expense.
8. The debtor may be advised or represented by another person, including legal counsel, at the debtor's own expense.
9. The hearing shall provide an opportunity for introduction of credible and relevant evidence, but judicial rules of evidence need not be followed. The hearing officer shall have the authority to exclude irrelevant, immaterial, or unduly repetitious evidence and to limit unnecessary examination of witnesses.

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10. To assure compliance with the judicial review provisions of N.C.G.S. 150A-47, the hearing officer shall record the proceedings in a manner which can be reduced to a verbatim transcript in the event of an appeal. The hearing record shall include this recording or transcript and all documents offered or received into evidence at the hearing.
11. The hearing officer shall issue a written determination on the validity and amount of the debt owed, if any, which by resolution of the Board of Governors dated April 13, 1984 (Attachment D), shall be the final institutional or agency decision pursuant to N.C.G.S. §150A-43. The determination shall state the hearing officer's decision and summarize the facts relied on in making that decision.
12. The determination shall be sent to the debtor by certified mail, return receipt requested. If the determination is against the debtor in any respect, there shall be included with it a notice of right to appeal to Superior Court within 30 days of receipt of the written determination, pursuant to N.C.G.S. 150A-43.
13. Within 20 days of the issuance of a written determination pursuant to Paragraph 11, above, the institution or agency shall notify the Department of Revenue of the determination and of the amount of any debt determined therein to be due and owed.

Questions about these procedures may be addressed to Assistant Attorney General Thomas Ziko at (919)733-7387.



William Friday

Attachments

cc: Senior Deputy Attorney General Andrew A. Vanore, Jr.
Assistant Attorney General Thomas Ziko
University Attorneys

ADMINISTRATIVE MEMORANDUM

SUBJECT Set-Off Debt Collection Act
(G. S. Chapter 105A)

NUMBER 127

DATE October 30, 1979

The 1979 General Assembly enacted legislation to facilitate collection of debts owed by an individual to an agency of the State of North Carolina by establishing a procedure for setting off any such debt against any refund that might be due the debtor under North Carolina individual income tax law. The new act is Section 94 of Chapter 801, 1979 Session Laws (the 1979 Revenue Act) and is codified as G. S. Chapter 105A ("Set-Off Debt Collection Act"). The Act was made effective July 1, 1979, but the first set-offs under the Act will be relative only to refunds due after January 1, 1980.

The North Carolina Department of Revenue has already begun drafting regulations, seeking registration of "claimant agencies" as defined by the Act, and establishing initial procedures for identifying debtors subject to set-off. In this process Mr. David Edwards of this office has responded by offering comment on the Act, as requested by the Department of Revenue, and then by identifying agencies within The University of North Carolina (and their chief fiscal officers) that we believe constitute the specific entities (claimant agencies) within The University, contemplated under the Act. As a reflection of this, we have put the Department of Revenue in direct contact with the Vice President for Finance, the Vice Chancellors for Finance (or officers of equivalent title), the Director of Fiscal Services of North Carolina Memorial Hospital, and the Executive Director of the North Carolina State Education Assistance Authority. These officers have received, by letter dated September 12, 1979, materials concerning registration of their respective agencies under the Act with the Department of Revenue. A set of these materials is attached to this Administrative Memorandum. Your attention is especially directed to the copy of G. S. Chapter 105A; the sequential outline of the Act, called "Steps in Set-Off Procedure"; and the "Proposed Rules and Procedures" (which appear to be functioning already as a regulatory document).

The purpose of this Administrative Memorandum is to provide you copies of the materials necessary to implement the Act, to comment briefly upon salient points of the Act, and to address provisions of the Act needing interpretive comment.

Textual and interpretive aspects of the Act.

Use of the Act. Some parts of the Act appear to make its use permissible [G. S. 105A-1 and G.S. 105A-3(b)]; other parts of the Act suggest its use to be mandatory [G.S. 105A-3(a) and G. S. 105A-5].

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The Attorney General has ruled, however, that the "Act is not ambiguous." Rather, "while the Act is mandatory, its use does not bar or preclude utilization of other available remedies to collect debts." This means that your institution must file by December 1 of each year a complete list of debtors whose debts are contemplated by the Act for potential set-off; but the Attorney General in the regular process of list review may decide, on the basis of your information or his own information, that the debt can be collected by means other than G. S. Chapter 105A.

2. Debts eligible for set-off. The Act may be used for set-off only if: (a) the debt is at least \$50.00 (G. S. 105A-4); (b) the debt is at least 90 days in arrears or has been reduced to judgment ("Proposed Rules and Procedures"); and (c) the tax refund due the debtor is at least \$50.00 (G. S. 105A-4). The procedure for making these determinations and the means for effecting set-off are set forth in the Act by relatively straightforward language and, skeletally, in the "Steps in Set-Off Procedure."

3. Information needed to effect the Act. To obtain the necessary match between debtor lists and lists of those eligible for a tax refund, G. S. 105A-3(c) calls upon claimant agencies "whenever possible" to obtain information, including the social security number, "from any person for whom the agencies provide any service or transact any business and who the claimant agencies can foresee may become a debtor under the terms of this Article." Similarly, G. S. 105A-14(a) directs the Department of Revenue, when remitting the net set-off check to the claimant agency, to send to the claimant agency "whenever possible" information about the debtor including the debtor's social security number. While the federal "Privacy Act of 1974" prohibits, in effect, the involuntary disclosure to a state agency of an individual's social security number (except in prescribed contexts including the "administration of any tax"), the Attorney General has taken the "position" that the federal statutory exemptions are "amply broad to include the exemption of Social Security numbers within the ambit of this Act and therefore [do] not require any voluntary disclosure by the party assigned that number." In short, the disclosure by any debtor or potential debtor to the State of that person's social security number in contemplation of possible debt set-off against a possible tax refund may be required, as its disclosure is associated with "the administration of [a] tax." While this official view may help legally protect state agencies in forcing disclosure of social security numbers, the Opinion cannot remove other prohibitions to disclosure created by the context giving rise to the debt. For example, a State agency will likely be limited by social and commercial convention from seeking the social security number of each successful bidder on State surplus property or of the purchaser of securities sold through a fiscal agent and a broker from an institutional endowment fund. Fortunately, G. S. Chapter 105A calls for disclosure only "whenever possible."

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PARAGRAPH 4 SUPERSEDED BY ADMINISTRATIVE MEMO. NO.195, April 27, 1984

~~4. Contested debts. The Act provides that debts submitted for potential set-off that are disputed by the alleged debtor shall be reviewed in a "hearing according to procedures established under Chapter 150A, the Administrative Procedure Act, to determine whether the claim is valid." [G. S. 105A-8(a)] The Attorney General has ruled, however, that the hearing contemplated under G. S. 105A-8, when a debt to The University is at issue, is not required of The University. This is because G. S. 150A-1 provides that "the University of North Carolina and its constituent or affiliated boards, agencies, and institutions" are exempt from all but Article 4 ("Judicial Review") of the APA. In consequence of this Opinion it would appear that a constituent institution can satisfy the requirements of administrative review of the debt called for by G. S. 105A-8 and by general legal requirements of procedure raised by debt set-off through simply making available to the debtor an opportunity informally to review and contest the debt. This means that the claimant institution, with reference to G. S. 105A-7(b) and Step 4 of the attached "Steps in Set Off Procedure," should announce to the debtor that the debtor may within the 30-day period specified by G. S. 105A-7(b) seek in writing the opportunity to be shown the institutional records supporting the debt claim and the opportunity to contest or correct the debt claim in the presence of appropriate institutional officials.~~

Judicial review of hearing determinations. The Act at G. S. 105A-9 provides that a hearing outcome adverse to the debtor may be taken to court by the debtor pursuant to G. S. Chapter 150A (Article 4) "except that the place of initial review shall be the superior court for the county in which the debtor resides." The Attorney General has ruled that "residence" is to be defined, pursuant to G. S. 150A-2(8), as one's "domicile or place of business." He has also ruled that "superior court" as used in the APA and Set-Off Debt Collection Act must refer only to superior courts of North Carolina. Therefore, a debtor to The University contesting a debt pursuant to G. S. 105A-9 who is neither a domiciliary of North Carolina nor established in business in this state must still look to the superior courts of North Carolina for debt review, logically either the county in which the University agency is located or Wake County (the usual situs for judicial review under the APA).

6. Alternative collection remedies. G. S. 105A-3(a) states that the "collection remedy under this [Act] is in addition to and not in substitution for any other remedy of law"; and the Proposed Rules and Regulations of the Department of Revenue stress the permissive signals of the Act, not its seemingly mandatory ones. Furthermore, the Department of Revenue has defined debts eligible for set-off to exclude those less than 90 days in arrears and not subject to an outstanding judgment. The Department has tentatively established by proposed regulation a presumption that debts less than 90 days in arrears are subject to a "pending" and "adequate" "alternative means of collection." This rule, therefore, preempts for 90 days the duty of the Attorney General under

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G. S. 105A-3(b) to assess the pendency and adequacy of alternative collection methods for a debt eligible to be submitted by a claimant agency for set-off. In sum, then, the Set-off Debt Collection Act, while written so as to require institutional response, will in fact be administered to enhance not encumber debt collection by the constituent institutions.

Compliance.

Each constituent institution and agency is urged to cooperate fully with the Department of Revenue in establishing the debt set-off machinery required of it by G. S. Chapter 105A and, of course, in supplying the annual list of debtors. For each constituent institution and agency of The University this machinery should include a designated agent or office to receive notice from a debtor of his or her intent to contest an asserted debt and to facilitate informal administrative review of the debt with institutional officials as needed pursuant to G. S. 105A-8. In preparing to use and in using that machinery, you and your staff are likely to raise both technical and general questions about the Act. These questions may be directed either to Mr. Keith Goodson, Assistant Secretary for Revenue (Raleigh telephone 733-7311), or Mr. David Edwards of this office. However, please inform Mr. Edwards, concurrently, about v inquiry you may make of Mr. Goodson.

Attachments



William Friday



Attachment B

APR 26 Recd

State of North Carolina

Department of Justice

P. O. BOX 629

RALEIGH

27602-0629

RUFUS L. EDMISTEN
ATTORNEY GENERAL

25 April 1984

William Friday, President
The University of North Carolina
General Administration
P. O. Box 2688
Chapel Hill, North Carolina 27514

Dear Mr. Friday:

Pursuant to N.C.G.S. 105A-8(a), we have reviewed your proposed Administrative Memorandum setting forth hearing procedures for the University under the Setoff Debt Collection Act. We find that the hearing procedures set forth in the Administrative Memorandum are lawful and proper, and are therefore approved.

Very truly yours,

RUFUS L. EDMISTEN
Attorney General

A handwritten signature in black ink, appearing to read "A. Vanore, Jr.", written over the typed name.

Andrew A. Vanore, Jr.
Senior Deputy Attorney General

AAVjr:js

cc: Jeffrey H. Orleans
Assistant to the President
UNC, General Administration

Thomas Ziko
Assistant Attorney General

_____, 1984

Dear (Debtor):

You are hereby notified that a hearing to determine the validity and amount of the debt described in our notice to you of (date) will be held before (hearing officer name) at (time) on (date) in (location). Any time prior to that day and time you may appear at (location) during regular business hours to inspect (and copy, at your expense) the documents the University intends to present in support of its claim. If you desire to review the University's documents but cannot come to the campus, you should contact the hearing officer to make alternative arrangements (telephone _____ - _____).

During the hearing you will be allowed to cross-examine the University's witnesses and present relevant evidence in your own behalf, including the testimony of any witnesses you may bring with you. If you believe an employee of the University has information helpful to your case, you should notify the hearing officer of the employee's name and the nature of the information; if the hearing officer determines that the information may be relevant, the employee can be directed to attend the hearing. You may, if you choose, have the advice and representation of another person at your own expense, including legal counsel.

You will have the right to appeal to Superior Court any adverse decision made at the conclusion of the hearing, but judicial review will be limited to the evidence presented during this hearing. If you fail to appear at this hearing, the University shall in your absence proceed to determine the validity and amount of the debt. Any further correspondence in this matter should be direct to (hearing officer's name, campus address and telephone number).

RESOLUTION OF THE BOARD OF GOVERNORS

N.C.G.S. §105A-8(a) provides that hearings under the Setoff Debt Collection Act, when undertaken by institutions or agencies of The University of North Carolina, "shall be conduct[ed] according to administrative procedures deemed lawful by the Attorney General." The Attorney General intends such hearings to constitute final agency decisions for purposes of judicial review. In order to establish such finality, it is hereby RESOLVED by the Board of Governors of the University of North Carolina, that as permitted by Section 501C(4) of the Code of the Board of Governors, any hearing under the Setoff Debt Collection Act which is conducted by an institution or agency of The University of North Carolina under procedures deemed lawful by the Attorney General shall constitute the final agency decision for all purposes.