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The purpose of this memorandum is to remind hearing officers of the requirements concerning mailing issues that resulted from the settlement in the case of Meachem v. Wing. Recent circumstances indicate there may be a lack of clarity on the part of some hearing officers concerning how to proceed with proof of mailing issues, including the analysis of affidavits and supporting evidence presented by the Agency. Attached is the relevant portion of the CLE training curriculum pertaining to the issue of proof of mailing and its disposition.

Please keep in mind that these procedures must be followed whenever there is a factual question as to whether the agency mailed a relevant piece of correspondence or whether the Appellant received a relevant piece of correspondence. The attachment explains:

- how the Agency may establish proof of mailing at the hearing
- how the Appellant may rebut the presumption of receipt of mail
- how conflicting evidence may be evaluated
- how to develop the record on proof of mailing issues
- how to make credibility determinations on proof of mailing issues

Specific questions about these procedures should be addressed to your supervisor.

Thank you for anticipated cooperation.

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## **PROOF OF MAILING: DISCUSSION OF THE ISSUE AND ITS DISPOSITION**

### **B. When do issues related to proof of mailing arise?**

The question of whether or not an agency mailed a significant piece of correspondence and the question of whether or not an appellant received a significant piece of correspondence cause proof of mailing issues to arise.

If the appellant says, “I didn’t get the letter (or notice, or other form of essential mail which gives rise to a discontinuation or reduction in benefits or SOL issue),” then the issue as to receipt of mail has been presented.

### **C. How is proof of mailing established?**

If the appellant alleges non-receipt of a mailed document, the hearing officer should explain to both parties that the agency will first be asked to provide evidence that establishes the document was properly mailed and, if mailing is established, the appellant will have a full and fair opportunity to explain why the document at issue was not received.

#### **1. Agency’s presentation**

When the appellant raises the non-receipt of a document concerning which the failure to respond is the basis for the agency’s notice, the agency must present proof of mailing of the document and receipt by the appellant. In order to establish receipt by the appellant of the subject document, the agency will typically rely on two evidentiary presumptions:

- a. that regular office mailing procedures took place in this case in order to get the document into the possession of the US Postal Service – to establish that the document was mailed.

- b. the regularity of the US Mail – to establish that the document was received.

To successfully establish the first presumption, the agency must show there is:

- an established office mailing procedure, and
- that the procedure was followed in this particular case

The agency will attempt to do this with a mailing affidavit or through direct testimony by someone familiar with the process or with this specific mailing. The mailing affidavit must describe a regular office mailing procedure that is relevant to the document in question. The affidavit must also establish a basis, or nexus, for asserting that the document in this case followed that procedure. This can be shown by the affidavit clearly stating, for instance, that if the document follows the described mailing procedure, the file copy of the document will contain a particular marking in the upper right hand corner of the document. The agency must then show that their file copy contains that marking. Remember, we are working with presumptions. If the presumption is not established, the evidence must fail.

- a. Affidavits – Should be applicable to the mailing, current and complete.

- 1) The hearing officer should evaluate whether the affidavit is appropriate for the type of document mailed. For example, does it refer to a specific kind of appointment notice. Also, the evidence presented should correspond with the process described in the affidavit (e.g., a manually-addressed letter but the affidavit describes a computer-generated letter).

- 2) Is the affidavit current and reliable?

Stale-dated affidavits - agency representatives should always testify whether or not the process described in the affidavit was the process in place at the time of the mailing. This should apply whether the affidavit post-dates or pre-dates the mailing. If the affidavit pre-dates the mailing by more than a year – it should be rejected.

- 3) Is the affidavit complete? Is the complete mailing process described?

Examine the affidavit to confirm that it establishes to your satisfaction the regular office mailing procedure for the type of mailing at issue. If there is a deficiency in the agency's affidavit, ask the agency's representative to comment on your concern. For example, the affidavit refers to the mailing of a document not in issue or the affidavit refers to a nexus that has not been established by the agency's representative.

- b. Direct testimony – An agency representative may testify as to the agency’s mailing process.
- c. Client Notice System mailings. If CNS notices are the subject of a claim of non-receipt, the agency MUST present affidavits from OTDA’s Division of Information Technology. That operation is responsible for mailing CNS notices and therefore prepares the affidavit concerning mailing of those notices but HRA is responsible for the submission at the hearing.

## 2. Appellant’s rebuttal

If there is some question as to whether or not the agency has established mailing of the essential correspondence, the ALJ should probe and question sufficiently to establish a record that would support a finding that either the presumption was established or that it was not established.

If the agency fails to establish mailing and receipt, their case fails. However, because our hearing officers are not authorized to make final determinations at the hearing, we must still at this point turn to the appellant as if the agency established mailing and receipt to obtain the appellant’s cross exam and direct case.

If the agency establishes the presumption of mailing and receipt to the ALJ’s satisfaction, the burden of going forward shifts to the appellant. It is recommended that an ALJ wait for the agency to complete its presentation.

- If the agency establishes its prima facie case, the appellant may attempt to overcome the agency’s use of the presumption of regular office practice by showing, for instance, that the document was not properly addressed.
- Also, the appellant may attempt to overcome the presumption of the regular delivery of the US mail by showing, for instance, that his/her mailbox was broken or that he/she filed a complaint of non-delivery with the USPS, etc...

Appellants should be afforded a full opportunity to address the alleged failure to receive the correspondence. If little information is provided, the following are a few, non-exclusive avenues of inquiry:

- Correct address and address of record (not always the same).
- Was a change of address timely and properly reported.
- Was a change of address made to the residence address or mailing address and was it properly recorded.
- Reliability of mail delivery.
- Expectation of the mailing.
- Does the agency have any indication in the case record of returned mail?

Adjournments to obtain documents or witnesses – Adjournments are appropriate when there is *good cause* for not bringing them to the hearing (§358-5.3(a)) or “*when in the judgment of OAH or the hearing officer the parties’ due process rights would best be served by adjourning the fair hearing, or if there are special circumstances which make proceeding with the case fundamentally unfair*” (§358-5.3(b)). Typically, the need for documents or witnesses related to issues of non-receipt of mail arise for the first time at the hearing and therefore adjournments may well be appropriate.

#### **D. Evaluating the evidence**

Initially, the ALJ must decide if the presumption of receipt has been established. If not, the agency has not established a necessary element of its case. If the presumption of receipt is established, then the ALJ must next evaluate whether the appellant’s explanation successfully rebuts the presumption. Is the explanation plausible and believable? Did the appellant testify in a credible manner? What are those facts established at the hearing that support a finding that the correspondence was not received? The rationale relied upon to find either in favor of receipt of mail or non-receipt of mail should be clearly articulated in the “DISCUSSION” section of the DAFH. The future need to engage in this exercise should be kept in mind by the ALJ as the hearing is being held. Thus, be certain that before closing the hearing, your record is as well developed as the circumstances permit.

Credibility calls are not just applicable to hearing appellants. Witnesses or written statements must also be examined for credibility. For example, agency representatives may make unclear assertions related to their interactions with the appellant. Conflicting information may surface within agency documentation. In any instance in which the credibility of an account arises as a concern, the ALJ has the responsibility to develop the record sufficiently in order to make a well-reasoned judgment as to what are the supported facts of the case.

After allowing the witness to provide her/his account, consider its believability and compare it to other independent evidence presented. Be a proactive fact finder. If something does not make sense to you, say so and seek clarification. If conflicting statements have been made or inconsistent accounts exist, actively seek an explanation from hearing participants. If a party says it needs additional time to provide the information you seek, afford that additional time to the party.