Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
Kelly S. Jennings,	)	Date: August 17, 2009
Petitioner,	)	
	)	Docket No. C-08-247
v.	)	Decision No. CR1991
Social Security Administration	)	
Respondent.	)	

DECISION

Petitioner, Kelly S. Jennings, is indebted to the United States in the amount of $427,784.00, plus such interest, penalties, and cost as are authorized by 45 C.F.R. §§ 30.13 and 30.14 (1995). The debt may be collected by administrative offset, administrative wage garnishment, or by other lawful means.

I. Background

The Social Security Administration (SSA), Debt Management Branch notified Petitioner by letter dated November 19, 2007, that he was indebted to SSA in the amount of $309,662.04, and that if payment was not made within 30 days interest and a penalty would be applied. Petitioner submitted to SSA an undated request for a hearing regarding the alleged indebtedness. On January 22, 2008, the Civil Remedies Division (CRD) of the Departmental Appeals Board (DAB), Department of Health & Human Services (HHS), received a letter signed by Edwina Bailey on behalf of Michele Bailey, Debt Management Team Leader, SSA, dated January 11, 2008, forwarding the hearing request of Petitioner. Ms. Bailey advised in her letter that Petitioner's request for hearing was submitted for review and scheduling, and that the debt in issue amounted to

$309,662.04.[1] The matter was assigned to me for hearing and decision on January 30, 2008.

On February 4, 2008, I issued an Order advising the parties that it appeared that Petitioner's request for hearing was timely filed; that it appeared Petitioner was a current federal employee and that 5 U.S.C. § 5514(a)(2)[2] stays commencement of collection of the alleged indebtedness from Petitioner's salary; that Petitioner's request to delay a decision in this matter was granted pending decision in his case before the Merit Systems Protection Board (MSPB)[3] but that development of the record in this case would proceed on the schedule specified in the Order; and I directed SSA to respond to two specified issues regarding whether the Commissioner of SSA (Commissioner) consented to my exercise of jurisdiction, and whether the debt collection regulations of the Office of Personnel Management (OPM) or the Secretary of HHS should be used in this case in the absence of debt collection regulations issued by the Commissioner. The SSA motion to extend the schedule for record development was granted on February 7, 2008. Petitioner's motion to extend the schedule was granted on March 12, 2008.

On February 29, 2008, SSA filed its brief and SSA exhibits (SSA Ex.) 1 through 14. On March 12, 2008, I ordered SSA to produce copies of Army pay records for Petitioner that SSA possessed. On March 20, 2008, SSA responded to my order to produce filing SSA Exs. 15 through 17. On March 28, 2008, Petitioner filed his "Brief in Support of Total Abatement and Inaccuracy of Alleged Debt" with Petitioner's exhibits (P. Ex.) 1 through 38. SSA filed a response to Petitioner's brief on April 7, 2008, with SSA Exs. 18 through 23. On June 17, 2008, SSA filed the decision of the MSPB in *Social Security Administration v. Kelly Stephen Jennings*, CB-7521-07-0026-T-1, marked as SSA Ex. 24. Petitioner filed a response on June 19, 2008. SSA filed a reply on June 25, 2008. SSA filed the final order of the MSPB in *SSA v. Jennings* marked as SSA Ex. 25 on January 9, 2009, and requested that the stay in this case be lifted. Petitioner filed a response to the SSA submission of the final order of the MSPB on January 12, 2009. SSA filed a reply on January 16, 2009. On January 21, 2009, I issued a Ruling and Order that disposed of numerous pending motions, lifted the stay, and ordered that the parties file final briefs not

[1] SSA subsequently amended its calculations increasing the amount of the alleged indebtedness to $316,906.64. SSA Ex. 18. As discussed hereafter, I accept neither amount as accurate.

[2] Citations are to the 2006 edition of the United States Code, unless otherwise indicated.

[3] An agency may take action against an administrative law judge (ALJ) only for good cause "established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521(a). Actions that must be brought before the MSPB are removal, suspension, reduction in grade, reduction in pay, and furlough of 30 days or less. 5 U.S.C. § 7521(b).

later than February 10, 2009, specifically addressing whether Petitioner is indebted to the government and, if so, whether the amount of the debt is $316,906.64, or some greater or lesser amount. My January 21, 2009 Ruling and Order also provided that the record would be closed as of February 10, 2009 to permit a decision. SSA filed its final brief on February 9, 2009. SSA filed with its final brief pages 6 and 7 of SSA Ex. 19, requesting that the pages be substituted for those previously filed as SSA was concerned about the legibility of the copies originally filed. Petitioner filed his final brief on February 9, 2009 with P. Exs. 39, 40, and 41 attached. Petitioner also filed "information copies" of pleadings he filed with the MSPB on February 10, 2009.[4]

On May 18, 2009, I issued a 32-page "Ruling on Existence of Debt and Order to Produce Corrected Accounting" (Ruling and Order of May 18, 2009). I permitted SSA to substitute pages 6 and 7 of SSA Ex. 19, and I admitted into evidence SSA Exs. 1 through 25 and P. Exs. 1 through 41. Section II of the Ruling and Order of May 18, 2009, set forth my rulings and rationale for finding that Petitioner is indebted to the government for an overpayment of pay and allowances. The rulings are set forth in this decision as conclusions of law, but otherwise are essentially as they appeared in the Ruling and Order of May 18, 2009, except as noted hereafter. Section III of the Ruling and Order of May 18, 2009, sets forth my order that a corrected accounting be prepared by SSA or its pay agent[5] consistent with my rulings and with instructions for the preparation and arrangement of the report of the accounting. Section III of the Ruling and Order of May 18, 2009, is not reproduced in this decision.

On May 25, 2009, Petitioner advised me that he had received notice from SSA's pay agent, DOI, that the debt collection action against him was being transferred from the pay agent back to SSA for collection. Petitioner attached a copy of the letter from DOI to his notice. Petitioner asserted that SSA intended to begin collection in violation of my order. He requested that I take remedial action I deemed appropriate, including sanctioning SSA for violating my order. SSA responded on May 26, 2009, that its pay agent was simply providing Petitioner notice that it would no longer be handling the debt and the appropriate contact information for who would be handling the debt action at SSA. My review of the DOI letter to Petitioner reveals that it is no more than a transfer of administrative responsibility for Petitioner's debt from DOI back to SSA. There is no evidence that SSA initiated collection of Petitioner's debt in violation of my order. I conclude that no remedy is necessary or appropriate.

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[4] The pleadings were a "Motion to Vacate Final Order and to Reopen, Reconsider, and Grant Respondent's Petition for Review or in the Alternative Vacate and Remand for Correction by the [MSPB] Administrative Law Judge;" a supporting brief, and Petitioner's affidavit. These documents were not marked as exhibits and are not admitted as evidence.

[5] The SSA pay agent is the Department of Interior (DOI).

P. Exs. 39 and 40 are compact discs that contain recordings of prehearing sessions convened by ALJ Cates in the action against Petitioner before the MSPB. On June 3, 2009, Petitioner submitted transcripts of the recordings and requested by email that they be marked and admitted as exhibits. The transcript of the hearing on January 4, 2008 is marked as P. Ex. 42, the transcript of the hearing on January 7, 2008 is marked as P. Ex. 43, and the transcript of the January 8, 2008 hearing is marked as P. Ex. 44. Because the compact disc recordings are in evidence, there is no reason that the transcripts of the recordings should not also be made part of the record. P. Exs. 42, 43, and 44 are admitted.

On June 15, 2009, SSA filed its response to my Ruling and Order of May 18, 2009 with SSA Exs. 26 through 43 attached. Petitioner has not objected to the admissibility of SSA Exs. 26 through 43 and the exhibits are admitted.

I provided in my Ruling and Order of May 18, 2009 at page 31, that "Petitioner may file any comments specific to the accounting not more than 15 days from the date of service of the accounting." Petitioner requested by motion received on June 29, 2009, that he be granted an extension of time to respond to the SSA corrected accounting. He requested that he be granted the same amount of time to respond as SSA was granted to prepare the corrected accounting. On June 30, 2009, I granted Petitioner's request for extension until July 17, 2009.

On July 17, 2009, Petitioner filed a motion to stay further proceedings pending a decision by the United States Court of Appeals for the Federal Circuit on his appeal of the MSPB final order authorizing his termination as an ALJ. Petitioner argues that some of the issues before the appellate court are the same as the issues before me; that a stay should be granted in the interest of judicial efficiency; and that a stay would cause no prejudice to SSA. On July 23, 2009, I ordered that the SSA respond to the motion for stay not later than July 31, 2009. SSA filed an objection to Petitioner's motion for stay on July 31, 2009. The motion for stay is denied. Petitioner has not identified the specific issues that are pending before me and the Federal Circuit, and I am not privy to Petitioner's theory on appeal. However, I am aware of no legal authority for the Federal Circuit to decide the issue that remains undecided in this case, i.e., the correct amount of Petitioner's indebtedness. I have also received no notice from the Federal Circuit that it has assumed jurisdiction to decide the matter presently before me.

Also on July 17, 2009, Petitioner filed his "Response and Motion to Vacate May 18, 2009 Ruling On Existence of Debt and Order to Produce Corrected Accounting Due to ALJ Abuse of Discretion and Gross Procedural Error." Petitioner's pleading is accepted as the responsive pleading I authorized by my Ruling and Order of May 18, 2009 at page 31. Petitioner's arguments are addressed in detail hereafter.

II. Discussion

A. Issues

Whether Petitioner is indebted to the government; and

Whether the amount of Petitioner's indebtedness to the government, if he is found to owe a debt, is $316,906.64, or some greater or lesser amount.

B. Law Applicable

Debts owed to the United States from a federal employee may be collected from the current pay account of the employee, including basic pay, special pay, incentive pay, retired pay, retainer pay or other authorized pay, subject to the provisions of 5 U.S.C. § 5514. The amount that may be deducted is limited to 15 percent of disposable pay per pay period, unless the employee consents in writing to the collection of a larger amount. 5 U.S.C. § 5514(a)(1). Before an agency head may direct collection of indebtedness from the salary of an employee, due process must be provided.[6] The employee must be given written notice a minimum of 30 days prior to any attempt to collect and the notice must inform the employee of the nature and amount of the debt determined to be due; the intention of the agency to effect collection through deduction from the employee's pay; and the notice must explain the employee's rights under 5 U.S.C. § 5514. The employee must be given the opportunity to inspect and copy government records related to the debt. The employee must be offered an opportunity to enter a written agreement agreeable to the agency head establishing a repayment schedule. The employee must also be given the opportunity for a hearing on the determination of the agency regarding the existence or the amount of the debt and any repayment schedule not established by written agreement. The statute requires that a hearing be provided only if requested within 15

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[6] The Comptroller General is head of GAO (formerly the General Accounting Office, currently the General Accountability Office). 31 U.S.C. § 702. Until 1996, the Comptroller General shared responsibility with the Attorney General for debt collection. Comptroller General opinions regarding debt collection continue to be considered authoritative. Effective December 18, 1996, the Comptroller General's authority to collect and to prescribe standards for and to waive claims against government employees and members of the uniformed services for erroneous payments of pay and allowances, travel, transportation, and relocation expenses was transferred to the Director of Office of Management and Budget (OMB) for government employees, other than legislative branch employees, and members of the uniformed services. General Accounting Act of 1996, Pub. L. 104-316, 110 Stat. 3826, 3834-35. OMB redelegated the authority to the head of the agency that made the erroneous payment. *See, e.g.*, OMB Circular No. A-129 (Rev. Nov. 2000).

days of receipt of the notice of indebtedness from the agency. The timely filing of a request for hearing automatically stays the commencement of collection proceedings. The statute requires that a decision be issued by the official designated to conduct the hearing not more than 60 days from the date of filing the request for hearing. The hearing may not be conducted by an individual subject to the supervision or control of the head of the agency but the statute provides that it should not be construed to prohibit the appointment of an ALJ to conduct the hearing. 5 U.S.C. § 5514(a)(2). Collection of any amount pursuant to 5 U.S.C. § 5514 must be in accordance with standards promulgated pursuant to 31 U.S.C. §§ 3711 and 3716 through 3718. 5 U.S.C. § 5514(a)(4). The Secretary of HHS (Secretary) and the Commissioner through their delegees, have provided by Interagency Agreement that ALJs assigned to the HHS DAB will conduct hearings related to collection of debts owed to the government by SSA employees who are not represented by the American Federation of Government Employees (AFGE).[7]

The head of each executive agency is required by 5 U.S.C. § 5514(b)(1) to issue regulations implementing its provisions.[8] The Commissioner has not issued new regulations implementing 5 U.S.C. § 5514. Rather, the Interagency Agreement between the Secretary and the Commissioner provides that the HHS debt collection regulations at 45 C.F.R. Part 30 (1995) be applied when reviewing alleged debts to the government owed by current SSA employees. The applicable provision is 45 C.F.R. § 30.15 (1995),[9] which covered all claims collection by the Secretary through administrative offset.

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[7] SSA filed a copy of the Interagency Agreement as Attachment 1 to its brief filed on February 29, 2008. SSA became independent from the HHS in 1995, but was authorized to continue to follow regulations of the Secretary applicable to SSA operations until such time as the Commissioner had an opportunity to reissue, change, rescind, or otherwise take action regarding the regulations. Pub. L. No 103-296, Social Security Independence and Program Improvements Act of 1994 (Aug. 15, 1994).

[8] The current regulations of the Secretary implementing the provisions of 5 U.S.C. § 5514 are found at 45 C.F.R. Part 33 (2008) (http://www.gpoaccess.gov/cfr/index.html). The final regulations were published on March 8, 2007 and were effective on that date. 72 Fed. Reg. 10,419 (Mar. 8, 2007).

[9] The text of 45 C.F.R. § 30.15 (1996) is available at www.gpoaccess.gov/cfr/index.html, but earlier editions are not. The regulation was promulgated in 1987 (52 Fed. Reg. 264 (Jan. 5, 1987)) and there was no change in the language of the section until the Secretary's new regulations related to debt collection were promulgated in 2007. The Secretary's regulations related to claims collection were substantially changed and reorganized in 2007 with publication of final rules on Claims Collection, codified at 45 C.F.R. Part 30 (72 Fed. Reg. 10,404 (Mar. 8, 2007)), and Salary Offset, codified at 45 C.F.R. Part 33 (72 Fed. Reg. 10,419 (Mar. 8, 2007)). The Secretary's final rule on Administrative Wage Garnishment, codified at 45 C.F.R. Part 32, was issued in 2003 (68 Fed. Reg. 15,092 (Mar. 28, 2003)).

Administrative offset was defined as "satisfying a debt by withholding money payable by the Department [HHS] to, or held by the Department for a debtor." 45 C.F.R. § 30.15(b)(1). Examples of money payable by HHS to a debtor that might be withheld to satisfy a debt included benefit payments, amounts due a defaulting or overpaid contractor, salaries of federal employees, federal income tax returns, and judgments held by the debtor against the United States. *Id.*

Pursuant to 45 C.F.R. § 30.15(i), when feasible, a debt is to be collected by offset in one lump sum. However, when the collection of a debt is by offset of a federal employee's pay pursuant to 5 U.S.C. § 5514, offset is limited to 15 percent of the employee's disposable pay for any pay period, unless the employee agrees in writing to a larger deduction. "However, if the employee retires, resigns, or is discharged, or if his or her employment or active duty otherwise ends, an amount necessary to satisfy the debt may be offset immediately from payments of any nature due the individual." 45 C.F.R. § 30.15(i). The procedural due process provided by 45 C.F.R. § 30.15 is consistent with that required by 5 U.S.C. § 5514. Before any offset of a debt against a federal employee's salary may be effected, the employee must be notified in writing of: the nature and amount of the debt; the agency's intent to collect by offset if not paid; the interest, administrative cost, and penalties that will or may be assessed if payment is not made within 30 days; the right to request within 15 days, copies of agency records pertaining to the debt, an alternative repayment schedule, or a hearing if the debtor contests the debt; the right to request a waiver; the office, including address and telephone number, where inquiries or requests may be directed; the requirement that a decision issue no later than 60 days after the request for hearing is filed unless the employee requests and is granted an extension of time; the fact that knowingly false and frivolous statements, representations, or evidence may subject the debtor to civil, criminal, or disciplinary action; and the fact that any amount collected incorrectly or for which waiver is subsequently granted, will be promptly refunded. 45 C.F.R. § 30.15(j). The regulation provides that the hearing to be accorded "will normally be a review of the record, unless the hearing officer determines that a decision cannot be made without resolving an issue of credibility or veracity, in which case the hearing officer will provide for an oral hearing." 45 C.F.R. § 30.15(n).

Pursuant to 45 C.F.R. § 30.15(g), administrative offset may not be initiated, with some exceptions not applicable to this case, more than ten years after the government's right to collect the debt first accrued. 31 U.S.C. § 3716(e) (offset does not apply to a claim outstanding for more than ten years). The regulation provides that a debt first accrues "when it is administratively determined to exist, when it is affirmed by an administrative appeals board or a court having jurisdiction, or when a debtor defaults on a repayment agreement, whichever is later." 45 C.F.R. § 30.15(g). The regulation specifies that offset is initiated by (1) mailing a notice to the debtor; (2) withholding money payable to the debtor; or (3) an HHS request for offset from money held by another agency. *Id.* Pursuant to 45 C.F.R. § 30.15(q), offset may be initiated as soon as practical after a decision affirming the debt. However, pursuant to 45 C.F.R. § 30.15(r):

> Protection of the Government's interest. Notwithstanding the provisions of paragraphs (j) through (q) of this section, the Secretary may take immediate action to delay a lump sum or final payment to the debtor whenever such action is necessary to protect the Government's ability to recover the debt by offset. The amount withheld may not exceed the amount of the debt plus any accrued or anticipated interest, administrative cost charges and penalties. The Secretary shall promptly send the debtor the notice specified in paragraph (j) of this section. The Secretary may not take final action to effect offset of the debt from the withheld amount until the procedures required by paragraphs (j) through (l) of this section have been exhausted. The appropriate amount will be paid to the debtor as soon as practical after the debt, or a portion of the debt, is found not to be owed.

In this case Petitioner has been removed from federal employment for cause. SSA Exs. 24, 25. The accrued pay of a federal employee who is removed for cause must be applied to the satisfaction of any claim or indebtedness due to the United States. 5 U.S.C. § 5511; 45 C.F.R. § 30.15(i). If any debt Petitioner is determined to owe is not fully recovered from Petitioner's accrued pay or by administrative offset against other amounts that might be due to Petitioner from the government, the Commissioner may attempt further collection through administrative wage garnishment. Garnishment of wages to accomplish collection of a debt to the United States is authorized by 31 U.S.C. § 3720D. The limitations on garnishment of wages specified in 31 U.S.C. § 3720D are essentially the same as those applicable to collection of a debt from the current salary of a federal employee. Furthermore, the due process procedures to be accorded to an alleged debtor prior to wage garnishment are the same as those specified by 5 U.S.C. § 5514 and 45 C.F.R. § 30.15 (1995) for collection of a debt from a current federal employee's salary.[10] The due process procedures accorded Petitioner in this case satisfy the requirements of both 5 U.S.C. § 5514 and 31 U.S.C. § 3720D and are sufficient to support administrative wage garnishment, if necessary.

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[10] The Commissioner of SSA has promulgated regulations regarding administrative wage garnishment at 20 C.F.R. Part 422, subpart E (§§ 422.401-445) (2008) and it is not necessary to rely upon regulations of HHS in effect at the time of the split of the agencies in 1995. The Secretary of the Treasury is responsible for implementing 31 U.S.C. § 3720D and other federal claims collection laws. Treasury regulations applicable to administrative wage garnishment by all agencies are at 31 C.F.R. § 285.11 (2008). The procedures followed in this case satisfy the requirements of these regulations.

C. Conclusions of Law

My conclusions of law are set forth in bold followed by a statement of the pertinent facts and my analysis. The conclusions of law are substantially the same as my rulings on the existence of the debt from my Ruling and Order of May 18, 2009. The only significant change is the duration of the period of LWOP, which for reasons discussed hereafter, is January 2, 2003 through January 17, 2006, not January 2, 2003 through January 16, 2006.

1. I have jurisdiction to decide the issues presented.

It is not disputed that Petitioner timely requested a hearing to challenge the SSA determination that he is indebted to the government. It is not disputed that Petitioner was an employee of the SSA and not represented by the AFGE when he filed his request for a hearing. The request for hearing was forwarded to the DAB for assignment of an ALJ to provide Petitioner the hearing required by 5 U.S.C. § 5514 and 45 C.F.R. § 30.15 (1995) before the debt was collected by administrative offset from Petitioner's pay as a federal employee. The Commissioner has provided by the Interagency Agreement that cases involving the collection of a debt of a current SSA employee by offset against the employee's current salary, except employees represented by the AFGE, be referred to the DAB for assignment of an ALJ to comply with 5 U.S.C. § 5514, as implemented by 45 C.F.R. § 30.15 (1995). I find no irregularity in the assignment of this case to me for hearing and decision and I conclude that I have jurisdiction. I further conclude that the fact that Petitioner was removed from his position as a federal employee subsequent to the assignment of this case to me does not deprive me of jurisdiction. Rather, before collection of the alleged debt by administrative offset or wage garnishment may be finally effectuated, Petitioner is entitled to receive the process due him under 5 U.S.C. § 5514 or 31 U.S.C. § 3720D and implementing regulations of the Commissioner and the Secretary of the Treasury, and it is consistent with notions of judicial economy for me to complete the adjudication and the decision.

I do not have, however, delegated authority to review Petitioner's request for waiver[11] of any debt I may determine he owes the government. SSA is correct that the Commissioner did not delegate to me his authority to waive debt.[12] Social Security

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[11] Petitioner's Brief in Support of Total Abatement and Inaccuracy of Alleged Debt (P. Brief), at 15-16, filed March 28, 2008.

[12] I could not find Petitioner acted in good faith or was without fault for the same reasons discussed related to his equitable defenses. Therefore, I could not grant a wavier of the debt even if I had jurisdiction. *See Matter of: Public Health Service Officer*, B-214919, 64 Comp. Gen. 395, 405 (1985 WL 50669 (Mar. 22, 1985); *Matter of: Air Force Dental Officers*, B-207109 (1982).

Administration's Response to Petitioner's Statement of Facts and Briefs in Support of Total Abatement and Motion to Dismiss at 5.

2. Petitioner has received procedural due process.

Petitioner has alleged throughout the pendency of this case that he is being deprived of due process because he did not receive some further opportunity to contest the debt or obtain review by SSA prior to his request for hearing being forwarded to the DAB for assignment to an ALJ. Petitioner has cited no authority to support his assertion that there is another process internal to SSA that SSA failed to follow prior to referring the matter to the DAB for assignment of an ALJ. The process due Petitioner is that which I have described in the section entitled "Law Applicable" and which has been accorded Petitioner by the proceedings in this case. Petitioner has not been deprived of the process due him.

Petitioner also argues in his "Final Brief and Submission of Additional Exhibits" filed February 9, 2009 (P. Final Brief) that he was denied the right to inspect and copy records. P. Final Brief at 3-4. Petitioner does not identify the "work papers and other documents relied on by the Agency for calculating the alleged debt . . ." that he alleges he was denied. P. Final Brief at 4. The evidence submitted by SSA is sufficient to establish a prima facie showing that Petitioner is indebted to the government. In my Ruling and Order of May 18, 2009, I concluded that a corrected accounting was required. The corrected accounting and supporting documentation are adequate to support the pay agent's conclusion regarding the amount of the debt. The SSA documentation is complete and it has been fully disclosed and produced to Petitioner through this proceeding.

3. A member of a Reserve component of one of the armed forces, when in active duty status in a uniformed service, may not receive pay as a federal employee in the civil service of the United States.

SSA alleges in its final brief[13] that in 2006 its management discovered that Petitioner had served on active duty in the Army while also receiving pay and allowances as a civilian employee of SSA. Based on its discovery, SSA changed Petitioner's personnel and time-and-attendance records to reflect that he was in a leave without pay status (LWOP) "for the period that he performed active duty military service from January 2, 2003, through December 24, 2005, unless he was using leave." SSA Final Brief at 1-2. Placing Petitioner in a LWOP status caused an overpayment of pay and allowances to Petitioner that SSA alleges Petitioner owes the government as a debt. SSA Final Brief at 2.

[13] "Social Security Administration's Final Brief in Response to Judge Sickendick's Order Dated January 21, 2009," filed February 9, 2009 (SSA Final Brief).

Petitioner disputes the SSA position that he was not entitled to pay from both his civil service ALJ job with SSA and his performance of active duty in the Army for the same period. Petitioner also disputes that it was proper to put him in a LWOP status and he disputes the accuracy of the SSA calculation of the amount of his indebtedness including the credit for leave during the period in question. As discussed hereafter, the SSA conclusion that Petitioner's active duty concluded on December 24, 2005 was in error. I concluded that the period of LWOP should have run through January 16, 2006, and Petitioner should not have been credited with leave during the period of LWOP as he was. Accordingly, I ordered a corrected accounting.

SSA alleges generally that Petitioner is indebted to the government because he received pay as a civilian employee of the federal government as an ALJ while also receiving pay as a member of the United States Army Reserve on active duty. SSA argues that Petitioner was not entitled or authorized to receive pay for both positions as a matter of law and that amounts paid to Petitioner in his capacity as a federal civilian employee, or to third-parties on his behalf, must be recovered as an overpayment of pay.[14] Petitioner does not deny that there are days for which he received both civilian pay, paid to him by his civilian employer SSA for hours of work performed during a pay period and during which he was also paid military pay by the Army while in a duty status with the Army. It is important to understand the distinction between entitlement to civilian pay for a civil service position and military pay.

The basic administrative workweek for a full-time federal employee is 40 hours performed within not more than six of seven consecutive days. 5 U.S.C. § 6101(a)(2). Flexible and compressed work-schedules are permitted. 5 U.S.C. §§ 6122, 6127. A pay period for a federal employee, including ALJs, is two administrative workweeks of 80 hours total. 5 U.S.C. § 5504. A federal employee is entitled to pay for the hours worked or in an authorized leave status (5 U.S.C. §§ 6301-6328), but not for periods of absence without leave or LWOP. A federal employee who is also a member of a Reserve component, such as Petitioner, "is entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training, . . . funeral honors duty, . . . as a Reserve of the armed forces or member of the National Guard." 5 U.S.C. § 6323(a). Military leave "accrues . . . at the rate of 15 days per fiscal year and, to the extent that it is not used in a fiscal year, accumulates for use in the succeeding fiscal year until it totals 15 days at the beginning of a fiscal year." 5 U.S.C. § 6323(a)(1). The minimum charge to military leave is one hour and multiples thereof. 5 U.S.C.

[14] Pay as used in this decision, unless otherwise specified, "means basic pay, special pay, incentive pay, retired pay, retainer pay, or, in the case of an employee not entitled to basic pay, other authorized pay." 45 C.F.R. § 30.15(b)(4); *see also* 5 U.S.C. § 5514(a)(1) and 37 U.S.C. § 101(21).

§ 6323(a)(3). An employee may also request to use annual leave or compensatory time to which he or she is otherwise entitled, in lieu of or in addition to military leave. 5 U.S.C. § 6323(d)(2).

Members of the uniformed services are paid on a monthly basis. 37 U.S.C. § 203(a). In the event that a member of a uniformed service who is entitled to pay but for a period of less than 30 days, he or she is paid 1/30 of the monthly amount for each day the individual is entitled to pay. 37 U.S.C. § 1004. The Comptroller General explained in *Matter of: Public Health Service Officer*, B-214919, 64 Comp. Gen. 395, at 400 (1985 WL 50669), that members of the uniformed services are entitled to pay based upon their status as members – **not upon the number of hours of work performed** – they are in status 24 hours a day even though they may be scheduled to work only certain hours in a 24-hour period.

(a) Petitioner was in the "civil service" and an "employee" of the federal government as an ALJ.

It is an undisputed fact that throughout the period in which the debt allegedly arose, Petitioner was an ALJ assigned to SSA. Pursuant to 5 U.S.C. § 2101, the civil service includes all appointive positions in the executive, judicial, and legislative branches of the federal government except positions in the uniformed services. An "employee" of the federal government is: (i) an officer[15] of the United States or an individual appointed in the civil service by one with authority to do so; (ii) is engaged in the performance of a federal function under authority of law or Executive act; and (iii) is subject to supervision of the appointing authority while engaged in the performance of the duties of his or her position. 5 U.S.C. § 2105(a). Thus, a member of a uniformed service is not a federal employee within the meaning of the statutes. Congress has specified that "[a] Reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity." 5 U.S.C. § 2105(d). The legislative history of this provision

[15] An "officer" in the civil service is a justice or judge of the United States or an individual who is required by law to be appointed to the civil service by the President, a court of the United States, the head of an executive agency, or the Secretary of a military department; who is engaged in the performance of a federal function under authority of federal law or an Executive act; and who is subject to supervision by his or her appointing authority or the Judicial Conference of the United States, while performing the duties of his or her office. 5 U.S.C. § 2104(a). The meaning of the term "officer" in the civil service is different than the meaning of "officer" as used in the context of the uniformed services.

indicates that Congress intended to protect Reservists against the application of dual compensation and employment laws that might be applied to deny them participation in the Reserve components. S. Rep. No. 82-1795, Chap. V., § 241 (1952), *reprinted in* 1952 U.S.C.C.A.N. 205.

ALJs are appointed to the civil service pursuant to 5 U.S.C. § 3105, which provides, in part, that "[e]ach agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with [5 U.S.C. §§ 556 and 557 (Administrative Procedure Act of 1946)]." ALJs are federal employees within the meaning of 5 U.S.C. § 2105(a). ALJ pay is determined in accordance with 5 U.S.C. § 5372(b). Congress tasked the Office of Personnel Management (OPM) with promulgating regulations governing the appointment and pay of ALJs. 5 U.S.C. § 5372(c); 5 C.F.R. Part 930, subpart B (2008).

(b) Petitioner was a commissioned officer in the Reserve component of the Army.

There is no factual dispute that throughout the period when the debt allegedly arose, Petitioner was a Reserve commissioned officer in the Army Reserve.[16]

The armed forces are the Army, Navy, Air Force, Marine Corps, and the Coast Guard. The uniformed services include the armed forces, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration. 5 U.S.C. § 2101; 10 U.S.C. § 101. Military refers to the Army, Navy (including the Marine Corps and Coast Guard), and the Air Force. Military personnel include commissioned officers, warrant officers, and enlisted members. 10 U.S.C. § 101(b).

"Reserve," when referring to enlistment, appointment, grade or office indicates that the enlistment, appointment, grade, or office is held as a member of a reserve component of one of the armed forces as opposed to a member of a regular component. 10 U.S.C. § 101(b)(12) and (c)(6); 37 U.S.C. § 101(24). Members of the Reserve components may volunteer to serve on active duty or may be involuntarily ordered to active duty for specified periods. *See, e.g.*, 10 U.S.C. §§ 10103, 12301, 12302, 12303, 12304. The "Ready Reserve" includes individual Reserves and units that are subject to being ordered to active duty pursuant to 10 U.S.C. §§ 12301, 12302, 12304. 10 U.S.C. §§ 10142, 10144. A member of the Ready Reserve must meet minimum training requirements by

[16] The reserve components of the armed forces are the Army National Guard of the United States, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air National Guard of the United States, the Air Force Reserve, and the Coast Guard Reserve. 10 U.S.C. § 10101. The Army Reserve includes all Reserves of the Army not in the Army National Guard of the United States. 10 U.S.C. § 10104.

either (1) performing a minimum of 48 scheduled drills or training periods each year and serving on "active duty for training" for not less than 14 days each year; or (2) serving on active duty for training for not more than 30 days each year. 10 U.S.C. § 10147(a).

"Active duty" means full-time duty in active military service, and includes full-time training duty, annual training duty, and attendance at a service school while in active status. Active duty does not include full-time National Guard duty. 10 U.S.C. § 101(d)(1); 37 U.S.C. § 101(18). A member of a Reserve component ordered to active duty, except active duty for training, may be given any duty authorized by law to be performed by a member of the regular component of the armed force. 10 U.S.C. § 12314. The phrases "active duty" and "active duty for training" are used discretely throughout the United States Code. While "active duty" is specifically defined as note above, there is no specific definition for "active duty for training" in the statutes. The primary reason for Congress to discretely use the two phrases was recognized by the Court of Claims in *Remaley v. U.S.*, 139 F.Supp. 956, 957-58 (Ct. Cl. 1956) in stating: "[w]e think the intent of Congress in drawing a distinction between 'active duty for training,' and other active duty, was to withhold from those Reserve officers who were being trained, at Government expense, to be soldiers, or better soldiers, some of the benefits which the statutes gave to those who were on regular active duty as soldiers." In *Remaley* the court found that neither the language of the officer's orders nor the appropriation from which he was paid was determinative of the issue; rather, the nature of the duties he performed showed that he was on active duty rather than active duty for training. For purposes of this Ruling and Order, it is important to understand that, contrary to Petitioner's implication, active duty as defined by the statute includes active duty for training.

(c) Receipt of pay from a civil service position while receiving pay for active duty with the armed forces is prohibited, except during a period of terminal leave or authorized military leave.

Petitioner argues that he was not charged in the MSPB proceeding with having received "improper dual compensation." P. Final Brief at 4-8. The gist of Petitioner's argument is that because he was not charged with improper dual compensation before the MSPB, there is no legal basis for the debt SSA alleges he owes and no debt for me to review. Petitioner further argues that there could be no charge of improper dual compensation before the MSPB because the statute that prohibits dual compensation only applies to dual compensation from two civilian positions. Petitioner's arguments in this regard are incorrect and without merit.

SSA referred charges against Petitioner to the MSPB seeking to remove him from his ALJ position for good cause. SSA Ex. 24, at 1. Pursuant to 5 U.S.C. § 7521, an action such as removal, suspension, reduction in grade, a reduction in pay, and a furlough of 30 days or less may be taken against an ALJ "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for

hearing before the Board." 5 U.S.C. § 7521. The MSPB jurisdiction is limited by the terms of the statute to the actions enumerated. The jurisdiction of the MSPB does not include review of an alleged indebtedness of an ALJ. Rather, the authority to review the basis for an alleged debt against an ALJ is the same as that for an alleged debt against any other federal employee or member of the Armed Forces or Reserve under 5 U.S.C. § 5514. As already discussed, the alleged debt of Petitioner is properly within my jurisdiction pursuant to 5 U.S.C. § 5514. Because the MSPB had no jurisdiction to determine whether Petitioner is indebted to the government, any comments of the MSPB ALJ regarding possible indebtedness of Petitioner is no more than dicta and not binding in this proceeding. Petitioner incorrectly asserts that I indicated in my January 21, 2009 Order that the facts found by the MSPB would be adopted. P. Final Brief at 4, n.7; 5. I stated in my January 21, 2009 Order at page 8, that staying this proceeding during the pendency of the MSPB case was "prudent to avoid duplicate fact finding proceedings and consistent with notions of judicial economy." I did not indicate that the MSPB fact finding would be adopted or that it had any binding effect in this proceeding. However, as discussed hereafter regarding Petitioner's equitable defenses, the findings and conclusions of the MSPB are significantly pertinent.

According to the MSPB ALJ's decision, Petitioner was originally charged with: (1) failure to fully disclose his active duty status; (2) improper dual employment; (3) lack of candor; (4) failure to follow agency time and attendance procedures; (5) failure to follow agency flexiplace procedures; and (6) conduct unbecoming an ALJ. SSA Ex. 24, at 2. The MSPB ALJ found that Petitioner did not fully disclose to SSA his active duty status.[17] SSA Ex. 24, at 14. The MSPB ALJ found that it was "demonstrated and admitted that [Petitioner] worked full time January 2003 through December 2005, as an administrative law judge for [SSA] and was on active duty with the United States Army receiving pay from both simultaneously." SSA Ex. 24, at 15. While that finding is not specific enough to support a proper debt calculation, it is consistent with my ultimate conclusion that Petitioner was paid for both his civil service position and his active duty assignment encompassing the same period. The MSPB ALJ concluded that Petitioner was engaged in improper dual employment during the period. SSA Ex. 24, at 16-18. The MSPB ALJ noted that the improper dual employment charge was not alleged as a statutory violation but rather it was alleged as a violation of agency policies and procedures. The MSPB ALJ found against Petitioner on the lack of candor charge, however, because that charge appears to involve the investigation of Petitioner after his release from active duty, it has no relevance to the existence of Petitioner's indebtedness

[17] The MSPB ALJ limited his inquiry to whether or not Petitioner failed to fully disclose his active duty status from January 1, 2003 through December 31, 2005. SSA Ex. 24, at 3. It is not clear from the decision why the MSPB ALJ chose the date range January 1, 2003 through December 31, 2005, but I speculate that it was based upon the charge by SSA. P. Ex. 20. As discussed hereafter, the evidence before me establishes that Petitioner was actually on active duty from January 2, 2003 through January 17, 2006.

and no bearing on my decision. The MSPB ALJ found that Petitioner violated agency time and attendance procedures (SSA Ex. 27, at 27-30) and the SSA flexiplace policy (SSA Ex. 27, at 30-32). However, these charges and the MSPB ALJ's findings and conclusions have no bearing upon the existence of Petitioner's indebtedness. The MSPB ALJ dismissed the charge of conduct unbecoming an ALJ. SSA Ex. 24, at 2.

My review of the MSPB ALJ's decision reveals that Petitioner is correct that he was not charged before the MSPB with receiving improper dual compensation. However, it is clear from the MSPB ALJ's decision that SSA levied sufficient charges against Petitioner to ensure his removal without a charge that Petitioner also improperly received pay and allowances from both his civil service position and from active duty in the Army. Petitioner has identified no requirement for SSA to have charged him before the MSPB with improperly receiving dual compensation in order for SSA to declare him indebted to the government on that basis.

Petitioner argues that SSA admitted before the MSPB that he did not violate any statutory provision prohibiting dual compensation and that SSA can, therefore, not establish a legal basis for Petitioner being indebted to the government in this proceeding. P. Final Brief at 4-8. Petitioner's logic is faulty and his legal analysis is flawed. The debt in this case is not based upon an alleged violation of 5 U.S.C. § 5534 or another statute that prohibits receipt of dual compensation. Rather, as explained hereafter, the debt arose because Petitioner violated a longstanding, often stated, and well recognized interpretation of federal law that receipt of pay and allowances for a civil service position or contract paid by appropriated funds by one on active duty in the uniformed services is prohibited. Petitioner's argument that he is entitled to receive both civilian pay for performance of work as an ALJ and military pay for the same period is not unique and has been addressed and rejected many times. The following Comptroller General decisions squarely address the issues.

In 1938, the Comptroller General advised Acting Comptroller General Elliot to the Secretary of War, that an enlisted soldier could not be compensated for services to the Weather Bureau as an airway observer. After examining a prior Attorney General Opinion, Comptroller General Decisions, court decisions, and statutes, the Comptroller General concluded that "any appointment in the civil branch of the government would be incompatible with service on the active list of the Army." A-51624, 18 Comp. Gen. 213, 216 (1938 WL 848)(Sept. 1, 1938). The Comptroller General reasoned that whether or not a soldier might have time to do both jobs is not the issue; rather, the obligation to render military service makes it impossible to accept, without qualification, an obligation to serve the government in a civilian capacity. *Id.* at 216-17.

In 1966, the Comptroller General wrote to the Secretary of Defense that officers and enlisted personnel serving extended active duty may not be employed during off-hours in civilian positions paid by appropriated funds, such as in the commissary and fire department on the military installation. The Comptroller General stated that it had been consistently held that a person in active military service could not be paid from appropriated funds for a civilian position absent a statute expressly permitting the payment. The Comptroller General noted that the Dual Compensation Act of 1964, Pub. L. 88-448, 78 Stat. 493 (Aug. 19, 1964) repealed certain statutory prohibitions on receipt of double salaries. The Comptroller General further noted that 5 U.S.C. § 5533, a codification of section 301 of the Dual Compensation Act, limited civilian compensation to not more than 40 hours in one calendar week in the case of civilian personnel serving in more than one civilian position. However, the Comptroller General pointed out that regardless of changes in the statutes, it had been repeatedly held by his office that holding a federal civilian position while receiving active duty pay as a member of the armed forces is prohibited as being incompatible with military service. The Comptroller General explained that the legislative history of the Dual Compensation Act made no reference to the issue of whether a person in active military service could be employed in a federal civilian position and be paid for that service with appropriated funds, despite the fact that the Act had been under consideration for several years and that the accounting officers of the government had issued numerous decisions that federal civilian employment was incompatible with military service. The Comptroller General reasoned that while Congress specifically enacted limitations on retired military members' acceptance of civil service positions, Congressional silence was tacit approval of the rule that holding a civil service position was incompatible with active military service. B-133972, 46 Comp. Gen. 400, 401-03 (1966 WL 1684)(Nov. 14, 1966).

In 1978, the Comptroller General held that Army Reserve Officers, who were involuntarily separated from active duty but were subsequently restored to active duty by correction of their military records to show a continuous period of active duty, were indebted to the government for any civil service pay received during the period prior to their restoration to duty. *In the Matter of Reserve Members Restored to Duty*, B-190375, 57 Comp. Gen. 554 (1878 WL 13437)(June 13, 1978); *see also Matter of: Lieutenant Colonel Carlo J. Montisano, AUS (Retired)*, B-196688 (Feb. 15, 1980).

In *Matter of: Air Force Dental Officers*, B-207109 (Nov. 29, 1982), the Comptroller General rejected various defenses of two Air Force Dental officers and found them indebted to the government for amounts paid them by the Veterans Administration for dental services they rendered in a civilian capacity as part of their part-time private dental practice, while still on active duty. The Comptroller General cited the "established rule that in the absence of specific statutory authority, any agreement by an active duty member of the Armed Forces for the rendition of services to the Government in a civilian capacity is to be regarded as legally incompatible with the member's military duties." The Comptroller General also addressed the provisions of 5 U.S.C. §§ 5534 and 6323, which provide that a federal civil service employee may receive pay and allowances as a

member of the Reserve in addition to civilian pay and 15 days annual military leave from the civil service job. The Comptroller General stated that the purpose of those provisions was to permit government employees to participate in the part-time Reserve program without a reduction in their civilian pay and vacation time. Sections 5534 and 6323 of 5 U.S.C. are not authority for an active duty member of the uniformed services to obtain a civil service position or other civilian work compensated from appropriated funds. The Air Force officers were found indebted to the government because the public funds were erroneously paid to them; they had no right to the appropriated funds erroneously paid to them; and, thus, they were liable to make restitution of the full amount. *See also Matter of: Commander Martin P. Merrick, USN, and Petty Officer Albert Jackson, Jr., USN*, B-204533 (Dec. 30, 1981) (employment of active duty military personnel in federal civilian position related to high school extracurricular activities is incompatible with military duties and not compensable from appropriated funds).

In *Matter of: Public Health Service Officer*, B-214919, 64 Comp. Gen. 395, the Comptroller General reached the same result in the case of an active duty Public Health Service (a uniformed service) commissioned officer who for 13 years, while on active duty, was also paid under a contract as a consultant to SSA. However, the Comptroller General further recognized that the facts of that case amounted to a violation of 5 U.S.C. § 5536 which provides:

> An employee or a member of a uniformed service whose pay or allowance is fixed by statute or regulation may not receive additional pay or allowance for the disbursement of public money or for any other service or duty, unless specifically authorized by law and the appropriation therefor specifically states that it is for the additional pay or allowance.

Congress has created two specific exceptions to the prohibition on receiving both civilian and military pay – 15 days of military leave authorized by 5 U.S.C. § 6323 and terminal leave authorized by 5 U.S.C. § 5534a. The entitlement of a member of a Reserve component to military leave is discussed above. Military leave permits the Reservist to receive his regular pay and allowances and to continue to accrue leave in his federal civil service position even though he is absent from the civil service job performing military duty, including active duty, and receiving pay for that military service. The terminal leave provision of 5 U.S.C. 5534a, subject to the conditions specified, permits a soldier on active duty to begin to work and receive pay in a federal civil service position paid by appropriated funds, despite the fact that he continues to receive active duty pay and allowances. The statute provides:

> A member of a uniformed service who has performed active service and who is on terminal leave pending separation from, or release from active duty in, that service under honorable conditions may accept a civilian office or position in the Government of the United States, its territories or possessions, or the government of the District of Columbia, and he is entitled to receive the pay of that office or position in addition to pay and allowances from the uniformed service for the unexpired portion of the terminal leave. Such a member also is entitled to accrue annual leave with pay in the manner specified in section 6303(a) of this title for a retired member of a uniformed service.

5 U.S.C. § 5534a; *see also To Major G.B. Adams*, B-165492 (Nov. 27, 1968).

The foregoing authorities clearly establish that a member of a uniformed service on active duty may not receive pay from appropriated funds for other federal government service, whether pursuant to a contract or from a federal civil service position, except in a military leave or terminal leave status or as otherwise authorized by law.

4. Petitioner, a member of a Reserve component of the Army, while in an active duty status, received pay and allowances as an employee in the civil service of the United States.

5. Petitioner is indebted to the government.

On December 7, 2007, SSA executed a personnel action, evidenced by a Notification of Personnel Action (Standard Form (SF) 50-B), that placed Petitioner in his civil service position as an ALJ in a LWOP status effective January 2, 2003. A second SF 50-B executed on December 7, 2007, returned Petitioner to duty in his civil service position effective December 24, 2005. SSA Ex. 1. These personnel actions resulted in SSA declaring an overpayment against Petitioner for all pay and allowances he received from SSA for the period of LWOP except for periods when he was granted leave by SSA management.

Petitioner, a Lieutenant Colonel in the U.S. Army Reserve at the time and a member of the Judge Advocate Generals Corps of the Army (JAG Corps), was ordered to "active duty" for 365 days by Orders M-365-0036, dated December 31, 2002, issued by the 81st Regional Support Command, with a reporting date of January 2, 2003, in support of operation "Enduring Freedom." SSA Ex. 6; P. Ex. 1, at 1. Pursuant to Orders 03-342-00261L, dated December 8, 2003, issued by the 81st Regional Readiness Command (RRC), Orders M-365-0036, dated December 31, 2002, issued by the 81st RRC were amended to change Petitioner's period of active duty from 365 days to 437 days. P. Ex. 1, at 6 (unnumbered). Pursuant to Orders 04-054-00050L, dated February 23, 2004,

issued by the 81st RRC, Orders 03-342-00261L, dated December 8, 2003 and issued by the 81st RRC, pertaining to the mobilization of Petitioner, was amended to change Petitioner's period of active duty from 437 days to 730 days. SSA Ex. 9; P. Ex. 1, at 7 (marked "Page 5"). Orders A-10-410885 dated October 27, 2004, issued by the U.S. Army Human Resources Command, directed that Petitioner report for active duty on January 1, 2005, for a period of 365 days with an end date of December 31, 2005. SSA Ex. 10. A DD (Department of Defense) Form 214, Certificate of Release or Discharge

from Active Duty,[18] with Petitioner's name and signature, reflects that he entered active duty on January 2, 2003 and was released from active duty on January 17, 2006, a net period of active service of 3 years and 16 days. The DD Form 214 also indicates that he was paid for one-half day of accrued leave. SSA Ex. 20. A Memorandum For Commander, Coalition Forces Land Component Command, United States Army Forces Central Command Third United States Army dated August 20, 2003, indicates that Petitioner was approved for early release or discharge from active duty not later than September 12, 2003. P. Ex. 1, at 5 (marked "R-13"). However, Petitioner has presented no evidence to show that he was released or discharged from active duty on or before September 12, 2003, and he admits that he was subject to the "stop loss" and was not released. Petitioner's Statement of Facts and Submission of Documents in Support of Total Abatement and Inaccuracy of Alleged Debt, Facts # 95-96. Petitioner has presented no evidence to establish that he was not continuously on active duty from January 2, 2003 through January 17, 2006, as shown by his DD Form 214.[19] The foregoing orders and Petitioner's DD Form 214 support the conclusion that he was continuously on active duty from January 2, 2003 through January 17, 2006.

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[18] The DD Form 214 is accepted as presumptive evidence of military service by the Veterans Administration and other governmental agencies for purposes of validating veteran eligibility for benefits. Department of Defense Instruction No. 1336.1 (Jan. 6, 1989) (w/changes 1-3, Feb. 28, 2003).

[19] Various orders issued by units in the active component of the Army that Petitioner offered as evidence at P. Ex. 1 are also consistent with his having continuously been on active duty throughout the period. For example, active component units issued temporary duty orders of various durations for Petitioner on May 6, 2003 (P. Ex. 1, at 2 (unnumbered)), on April 15, 2003 (P. Ex. 1, at 3 (unnumbered)), August 1, 2003 (P. Ex. 1, at 4 (marked "Page 6")), on August 2, 2004 (P. Ex. 1, at 8 (marked "Page 7")), on October 29, 2004 (P. Ex. 1, at 10 (marked "Page 9)), on May 2, 2005 (P. Ex. 1, at 10 (marked "Page 11")), on June 17, 2005 (P. Ex. 1, at 11 (marked "Page 12")), and August 26, 2005 (P. Ex. 1, at 12 (unnumbered)). All the temporary duty orders were issued by active duty units and directed Petitioner's return to his active duty assignment at the completion of his temporary duty assignments also at active duty installations and/or with active duty units.

Accordingly, I conclude that Petitioner was on active duty with a uniformed service and not entitled to pay and allowances from his civil service position for the period January 2, 2003 through January 17, 2006.[20]

The general rule is that a full-time federal employee will work a basic administrative workweek of 40 hours. 5 U.S.C. § 6101. Federal holidays and authorized leave permit the employee to be absent part of the 40 hours but remain entitled to receive pay and allowances for the period. 5 U.S.C. §§ 6103-6104, 6301-6340. Congress tasked OPM with promulgating regulations for the administration of Executive agency employee pay and allowances and time and attendance. 5 U.S.C. §§ 5504(d)(2), 6101(c). Pursuant to regulations promulgated by OPM, a full-time employee such as Petitioner was on January 2, 2003, earns leave (annual and sick) during each biweekly pay period but only while in a pay status or a combination of pay and non-pay status. 5 C.F.R. § 630.202(a). Leave earned by an employee is reduced by periods of non-pay status. 5 C.F.R. §§ 630.204, 630.208. An employee in a non-pay status for the entire leave year[21] does not earn any leave. 5 C.F.R. § 630.208(b). Pursuant to 5 U.S.C. § 6323(a)(1), a full-time employee in the civil service who is also in a Reserve component of the armed forces as Petitioner was throughout the period January 2, 2003 through January 17, 2006, is entitled to 15 days of paid military leave per fiscal year and may carry-over as many as 15 days of military leave to the next fiscal year. Entitlement to military leave is not conditioned upon the employee being in a pay status.

Pursuant to 5 C.F.R. § 353.106(a), an employee absent from his work place due to service in the uniformed services must be in a LWOP status unless "the employee elects to use other leave or freely and knowingly provides written notice of intent not to return to a position of employment with the agency, in which case the employee can be separated." *See also* 5 C.F.R. § 353.208. There is no dispute that prior to reporting for active duty on January 2, 2003, Petitioner did not notify SSA about his active duty,[22] thus, he also made

[20] It is not apparent from the evidence presented why SSA failed to place Petitioner in a LWOP status for the entire period rather than ending it on December 24, 2005. The law mandates recovery of erroneously paid pay and allowances, and I find no discretion to reduce the period for which Petitioner is obliged to repay erroneously paid amounts.

[21] A leave year begins the first day of the first complete pay period in a calendar year and ends the day before the first day of the first complete pay period in the next calendar year. 5 C.F.R. § 630.201(b).

[22] OPM regulations implementing 38 U.S.C. §§ 4301-4334, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), for the executive agencies are at 5 C.F.R. Part 353 (2003) and were promulgated pursuant to authority of 38 U.S.C. § 4331. Petitioner was not entitled to the protections of USERRA and

(...continued)

no election to use other leave[23] or to be separated. Accordingly, I conclude that it was appropriate and required for SSA to carry him in a LWOP status for the period January 2, 2003 through January 17, 2006. However, any annual or military leave to which Petitioner was entitled when he entered active duty on January 2, 2003, must be applied to reduce the amount of the debt he owes. Due to his non-pay status from January 2, 2003 through January 17, 2006, Petitioner was not entitled to earn additional annual or sick leave during the period January 2, 2003 through January 17, 2006. Because the entitlement to military leave is not contingent upon pay status,[24] Petitioner was eligible

[22](continued...)
restoration to his civil service position due to his failure to provide at least oral notice of his service absent a showing that notice was precluded by military necessity or was otherwise impossible or unreasonable. 38 U.S.C. § 4312(a); 5 C.F.R. § 353.204 (2003). I see no evidence that suggests Petitioner could not have provided the required notice. The evidence shows that Petitioner actually visited his civilian office often during his period of active duty. There is no evidence that Petitioner could not give notice due to a requirement for secrecy. In order to have USERRA protection, Petitioner was also required to notify SSA of his intent to return to his ALJ position within 90 days of hisrelease from active duty on January 17, 2006. 38 U.S.C. § 4312(e)(1)(D); 5 C.F.R. § 353.205. I have no evidence that Petitioner complied with USERRA in any respect, including giving SSA timely notice of his intent to return to his ALJ position. Nevertheless, the totality of the evidence suggests that SSA implicitly accepted Petitioner for return to his ALJ position when it learned of his active duty by continuing him in a pay status and initiating an action for his removal before the MSPB.

[23] SSA indicates that during the period January 2, 2003 through January 17, 2006, Petitioner did request annual and military leave and that "SSA properly granted him pay for annual and military leave. . . ." SSA Brief and Evidentiary Record in Response to the Departmental Appeals Board Orders dated February 4 and 7, 2008, at 4, n.2. There is also evidence that Petitioner requested and was granted sick leave during the period. The SSA assertion that it properly granted him pay for any period of leave of any type during the period January 2, 2003 through January 17, 2006 is in error for, as discussed, Petitioner had to be placed in a LWOP status for the entire period.

[24] Agencies are obligated to consider employees absent for uniformed service "for any incident or advantage of employment that they may have been entitled to had they not been absent." 5 C.F.R. § 353.106(c). The entitlement to military leave is an advantage of federal employment to which a federal employee who is a member of a Reserve component is entitled. If SSA had declined to reemploy Petitioner upon learning of his active duty, I would likely have concluded that Petitioner was not entitled to the benefit of this regulatory provision implementing the USERRA. The SSA Personal Policy Manual provides that:

(...continued)

for and earned 15 days[25] of military leave for the period October 1, 2003 through September 31, 2004; 15 days of military leave for the period October 1, 2004 through September 31, 2005; and 15 days of military leave for the period October 1, 2005 through September 31, 2006, a total of 45 days of military leave.[26] The 45 days of military leave

[24](continued...)
Generally, employees who would have been in pay status except for the military duty receive military leave. However, employees who are called to military duty within a period of nonpay status are not eligible for military leave.

SSA Policy Manual ¶ 3.2; SSA Ex. 12, at 4. Petitioner was in a pay status when called to active duty and the SSA policy does not prevent him from earning military leave throughout his period of uniformed service. Although the second sentence of the provision could arguably be applied to Petitioner due to his LWOP status, he was not in LWOP when ordered to active duty. Further, the source of the authority to withhold military leave is not cited, and I have located no such authority granted by either Congress or OPM.

[25] Petitioner asserts that SSA failed to credit him with 22 days of additional military leave per year pursuant to 5 U.S.C. § 6323(b). Petitioner does not identify evidence that supports his claim of entitlement. Petitioner's Statement of Facts and Submission of Documents in Support of Total Abatement and Inaccuracy of Alleged Debt, Facts # 49, filed March 28, 2008. Furthermore, pursuant to 5 U.S.C. § 5519 any military pay Petitioner received for an additional 22 days of military leave granted pursuant to 5 U.S.C. § 6323(b) would be "credited against the pay payable to the employee or individual with respect to his civilian position for that period." The net effect is that the employee benefits by receiving the higher pay of his civil service position for the 22-day period. Because Petitioner was not properly in a pay status in his civil service position but was only properly in a LWOP status during the period January 2, 2003 to January 17, 2006, Petitioner was not entitled to pay against which his military pay could be credited. Thus, Petitioner can obtain no benefit from the application of 5 U.S.C. § 6323(b) to his case.

[26] Petitioner argues that he is entitled to credit against any debt pursuant to *Butterbaugh v. Dep't of Justice*, 336 F.3d 1332 (Fed. Cir. 2003). SSA did grant Petitioner 16 hours of credit pursuant to *Butterbaugh* in 2005. As discussed in section III of this decision the value of the 16 hours is credited against Petitioner's debt. I have no jurisdiction to determine that Petitioner was entitled to more than 16 hours credit and Petitioner offers no evidence to support a claim for additional credit. If Petitioner pursues the matter further with SSA through procedures established by SSA for that purpose and it is determined that Petitioner is entitled to additional days of credit, SSA must use the monetary equivalent to offset Petitioner's debt unless the debt has already been fully collected.

earned during the period, plus any unused military leave as of January 2, 2003, plus any accrued annual[27] leave to Petitioner's credit on January 2, 2003, must be converted to a monetary amount[28] and applied to reduce Petitioner's total indebtedness. Further, out of an abundance of caution, I direct that Petitioner be given credit for "5 days of uncharged leave" pursuant to the Memorandum for Heads of Executive Departments and Agencies issued by President George W. Bush on November 14, 2003. P. Ex. 12. The Memorandum poses as conditions for granting five days of uncharged leave that the person be a federal employee returning from active duty. Petitioner met the conditions of the Executive Order on January 17, 2006.

SSA placed Petitioner in a LWOP status effective January 2, 2003 and that determination is consistent with the facts and law. SSA Ex. 1, at 1. SSA's personnel action reflects that Petitioner was treated by SSA as having returned to duty effective December 24, 2005. SSA Ex. 1, at 2. SSA does not point to evidence supporting its determination regarding the effective date of Petitioner's return to duty and that determination is not consistent with the evidence before me. A possible explanation for the SSA error suggested by the SSA Final Brief is that SSA improperly credited Petitioner with annual and/or military leave during the period of LWOP, thereby reducing his period of LWOP. SSA Final Brief at 2, 14-16. SSA reveals the error in its accounting by stating in its final brief that the amended bill of collection to Petitioner was due in part to the fact that during the second week of the 16th pay period of 2003 (August 17 to 23, 2003) "the payroll technician made a manual error and gave Petitioner 18 regular hours and 22 leave without pay hours but should have given him 12 regular hours and 28 leave without pay hours. (SSA Ex. 3, pages 7 and 24, and SSA Ex. 19, page 6)." SSA Final Brief at 15. SSA also reveals an additional error in its final brief by stating that "SSA paid Petitioner for military leave . . . during pay periods 0311, 0312, 0418, 0425, 0511, 0512, 0520, and 0522 (SSA Ex. 3, pages 7, 8, 9, 21, 22, 38, 42, 48, 52, and 53)." SSA Final Brief at 15. If, as SSA indicates in its briefing, SSA or its pay agent reduced the period of LWOP by crediting leave, military or annual during the period of LWOP, that method was in error. Petitioner did not request leave prior to beginning active duty and the entire period must be treated as LWOP according to the regulations and the Comptroller General's decisions. Total pay and allowances paid to Petitioner or to third parties on his behalf during the period of LWOP is the gross debt. The gross debt must be reduced by

[27] The use of sick leave is limited and the evidence does not show that use of accrued or accumulated sick leave could have been appropriate during any part of the period in issue because Petitioner was on active duty, in a leave without pay status, and he did not require sick leave from his civilian position to be paid for the time despite his absence. 5 C.F.R. § 630.401.

[28] Pursuant to SSA's Policy Manual, issued July 15, 2004 and revised May 2007, ¶ 3.1.1, one day of military leave is treated as eight hours. SSA Ex. 12, at 2.

crediting the monetary equivalent of any accrued leave, annual and military as already described. SSA also indicates in its final brief that Petitioner was credited with sick leave during the period that Petitioner should have been in LWOP status, January 2, 2003 through January 17, 2006. SSA Final Brief at 16. Petitioner was on active duty with the Army during the period January 2, 2003 through January 17, 2006, and was not entitled to any of his civil service pay during that period, including pay and allowances based on being erroneously granted sick leave by the agency.

Petitioner argues that he was on terminal leave within the meaning of 5 U.S.C. § 5534a for 47 days from October 15, 2005 to November 30, 2005, and that he was eligible to receive his civil service pay and allowances for that period. Petitioner offered as evidence a DA Form 31, Request and Authority for Leave, that bears his signature and indicates that he requested terminal leave for the period October 15 to November 30, 2005. (P. Ex. 2, at 23 (marked "Page 22")). However, it is apparent from the face of the document that it does not bear the required signature of an approving authority. Army Regulation 600-8-10, Leaves and Passes, 4-21 & 4-22 (Feb. 15, 2006). Thus, Petitioner has not presented evidence that he was authorized any terminal leave from his military unit while in an active duty status. I further note that the evidence does not support a conclusion that Petitioner was "pending separation from, or release from active duty" during the period October 15, 2005 to November 30, 2005, which is required for 5 U.S.C. § 5534a to apply.

Petitioner argues that he should not be found indebted for pay and allowances paid him for days when he was granted leave by either his military commander or the SSA. He argues that the MSPB ALJ essentially agreed with this position. P. Final Brief at 10-12. As already noted, the MSPB ALJ has no jurisdiction regarding the determination of whether Petitioner is indebted to the government and, if so, how much. To the extent the MSPB ALJ made any comments on the record or in his decision that might be construed to reflect upon Petitioner's indebtedness they are no more than dicta. Because Petitioner failed to notify SSA prior to entering active duty status on January 2, 2003, he failed to make the election to use accrued annual or military leave and SSA was required to carry him in LWOP status for the entire period of his active duty. Thus, Petitioner's attempts to use accrued annual or military leave during the period when he should have been in a LWOP status are of no legal effect. The use of annual or sick leave ensures that the civil servant continues to receive his pay from his civil service position even though he is absent and not working the usual 40-hour workweek. It is the continued receipt of pay and allowances from a civil service position while in an active duty status, except while in a terminal leave or a military leave status, that is prohibited. Accordingly, whether Petitioner had approved annual or sick leave during the period in question does not result in any credit or reduction of his indebtedness because, even if in a leave status, he improperly received pay for both positions for the same day. The same is true in the case

of military leave. Military leave authorized Petitioner to be absent from his active duty assignment without loss of military pay, it did not eliminate the problem of receiving pay and allowances for a civil service position while in an active duty status with a uniformed service.

Petitioner argues that in computing his debt, SSA failed to credit him for federal holidays during 2003 through 2005. P. Final Brief at 11, n.14. Petitioner's argument is without merit and Petitioner should not be credited for any federal holidays as defined by 5 U.S.C. § 6103 during the period in question. Petitioner received pay and allowances for his civil service position during the period January 2, 2003 through January 17, 2006, which included pay and allowances for every federal holiday. He was not properly scheduled for work during the period and was not entitled to pay and allowances because he should have been in a LWOP status because he failed to elect to use military or annual leave prior to departing for active duty for any part of the period. Petitioner cites no authority for the proposition that he should be credited for federal holidays and I am aware of no such authority. To the contrary, Petitioner is not entitled to credit during the period January 2, 2003 through January 17, 2006, because none of those holidays occurred when Petitioner was properly scheduled to work or when he was properly entitled to pay and allowances from his civil service position. 5 C.F.R. § 610.202.

The evidence shows that Petitioner received pay and allowances from SSA during the period January 2, 2003 through January 17, 2006, to which he was not entitled. However, the current SSA accounting is erroneous and may not accurately reflect the correct amount of Petitioner's debt. Accordingly, a corrected accounting is required.[29]

6. Petitioner is not entitled to receive pay and allowances for any work performed for SSA during the period January 2, 2003 through January 17, 2006 on an equitable theory such as estoppel, quantum meruit, quasi contract, or de facto employee.

Petitioner argues that during the period in question he issued 1098 decisions in disability cases as an ALJ, he traveled, and he conducted 878 disability hearings. He argues that he was one of the most productive ALJs in his office and in the nation from 2003 through 2005. Petitioner argues that he "fully earned" his pay and allowances from SSA during the period January 2003 through December 2005. P. Final Brief at 8-9. Petitioner cited in various pleadings the equitable theories of estoppel, quasi contract, and quantum

[29] I have considered all the arguments and allegations of Petitioner in his various pleadings. My prior rulings and orders resolve all issues identified by Petitioner even though certain arguments and allegations are not specifically described in this Decision.

meruit. *See, e.g.*, Petitioner's Brief in Support of Total Abatement and Inaccuracy of Alleged Debt at 14-15. SSA suggests that Petitioner should be arguing a de facto employee theory, but asserts that Petitioner cannot prevail on any equitable theory as he was not acting in good faith. SSA Final Brief at 9-13.

I do not find it necessary to discuss the various equitable theories mentioned by the parties in detail. Rather, it is sufficient to recognize that in order for Petitioner to invoke any of the equitable doctrines to justify his retention of pay and allowances for the period in question it is incumbent upon him to establish that he was acting in good faith. *See Matter of: Public Health Service Officer*, B-214919, 64 Comp. Gen. 395, 404-05 (1985 WL 50669)); *Matter of: Air Force Dental Officers*, B-207109. Petitioner's equitable arguments are that he was productive at the urging of the agency and that the agency will be unjustly enriched if he is required to return his pay and allowances for the period. Petitioner does not argue to me that he acted in good faith when continuing to perform duties and receive pay and allowances as an ALJ while also being in an active duty status with the Army. P. Final Brief, at 8-9; Petitioner's Brief in Support of Total Abatement and Inaccuracy of Alleged Debt at 14-15. Given the MSPB ALJ's decision (SSA Ex. 24); the fact that Petitioner was a member of the JAG Corps and should have been very familiar with the reemployment rights of Reservists under USERRA; and the fact that as a Reservist, an ALJ since 1994, and a federal employee he should have been aware of time and attendance law, policy, and procedures; I cannot find that he acted in good faith.

Accordingly, I conclude that no equitable theory is available to Petitioner to justify his retention of improperly received pay and allowances from his civil service position.

7. Collection of the debt Petitioner owes to the government is not time barred by any applicable statute of limitation.

Petitioner argues that action to collect the debt in this case is barred by the four-year statute of limitations established by 28 U.S.C. § 1658(a). Section 1658 of Title 28 was enacted as part of the Judicial Improvements Act of 1990 and applies only to causes of action or claims created by Congress after December 1, 1990. *See* 28 U.S.C.A. § 1658 (Practice Commentary) (West, WESTLAW 2002). Although the responsibility to collect debts to the government was shifted from the Comptroller General to the agency heads in 1996, the requirement to recover debts to the government, the procedures for claims collection, and the procedures for offsetting a federal employee's salary as a means for recovering debt were established before 1990. *See* 31 U.S.C. §§ 3711-3720E; 5 U.S.C. § 5514. Thus, the statute of limitations of 28 U.S.C. § 1658(a) has no application to this case.

Two statutes of limitation have potential application in this case, the six-year waiver provision of 31 U.S.C. § 3712(d) and the ten-year statute of limitation at 31 U.S.C. § 3716(e). The six-year waiver provision at 31 U.S.C. § 3712(d) provides that "[t]he Government waives all claims against a person arising from dual pay from the

Government if the dual pay is not reported to the Comptroller General for collection within 6 years from the last date of a period of dual pay." Arguably, 31 U.S.C. § 3712(d) has no application to this case to the extent that it refers to dual pay under 5 U.S.C. § 5533, for as Petitioner recognizes, that statute applies only to dual pay from two civilian positions.

The statute specifically applicable to the use of administrative offset to collect debts to the government is the ten-year statute of limitations at 31 U.S.C. § 3716(e), which provides that administrative offset does not apply to a claim that has "been outstanding for more than 10 years." *See, e.g., Matter of: Public Health Service Officer*, B-214919, 64 Comp. Gen. 395, 403 (1985 WL 50669).

The first day for which Petitioner received pay and allowance for his civil service position, while he was also in an active duty status, was January 2, 2003. There is no dispute that Petitioner's improper receipt of pay and allowances was not discovered by SSA until early 2006, after Petitioner's release from active duty. SSA notified Petitioner of his alleged indebtedness by letter dated November 19, 2007, and the debt collection action was received at my office on January 22, 2008. I conclude that SSA initiated the collection action well within the ten-year period authorized for collection.

III. The Corrected Accounting

The evidence shows that during the period January 2, 2003 (the date on which Petitioner was ordered to report for active duty) through January 17, 2006 (the date Petitioner was released from active duty), SSA paid pay and allowances to Petitioner or to third-parties on his behalf, even though Petitioner was on active duty with the Army. SSA Ex. 2, at 12; SSA Ex. 3; SSA Ex. 4; SSA Ex. 14; SSA Ex. 18, at 7; and SSA Ex. 19. Petitioner was not entitled to receive pay or allowances during the period pursuant to controlling statutory and regulatory provisions and the prior decisions of the Comptroller General discussed in Section II of this decision. Accordingly, all pay and allowances received by Petitioner from his civil service position during the period constituted an overpayment of pay and allowances to which Petitioner was not entitled and which must be recovered subject to the credits specified in the rulings in my Ruling and Order of May 18, 2009. In Section III of my Ruling and Order of May 18, 2009, I ordered that SSA or its pay agent provide me a corrected accounting consistent with my rulings.

SSA filed its corrected accounting on June 15, 2009, with a properly executed declaration of Linda Rihel, Chief of the Payroll Operations Division for the Department of the Interior, National Business Center in Denver, Colorado, dated June 12, 2009, with copies of the audit work-papers attached. SSA Ex. 26. SSA also filed copies of payroll calendars for 2002 through 2009 (SSA Exs. 27-34), copies of the OPM Locality Rates of Pay for Administrative Law Judges tables for 2002 through 2009 (SSA Exs. 35-42), and a copy of Notification of Personnel Action, Standard Form 50-B, issued in Petitioner's name and that reflects a correction of Petitioner's return to duty (RTD) date to January

18, 2006 (SSA Ex. 43). I address certain issues raised by the accounting and provide a brief summary of the accounting as it is not practicable to set forth the entire accounting in this decision.

In my Ruling and Order of May 18, 2009 at page 20, I concluded that Petitioner was continuously on active duty from January 2, 2003 to January 17, 2006 and that he was not entitled to pay and allowances for the period January 2, 2003 through January 16, 2006. In effect, my conclusion was that Petitioner was separated or released from active duty on January 17, 2006 and he was, thus, available for duty with SSA on that date. My conclusion was based upon Petitioner's DD Form 214, which shows that Petitioner's separation date was January 17, 2006. SSA Ex. 20. Ms. Rihel explains in her declaration that based upon Petitioner's DD Form 214, Petitioner's return to duty date was January 18, 2006 and not January 17, 2006. SSA Ex. 26, at 4, ¶ 9. Counsel for SSA explains that the return to duty date was based upon OPM guidance that employees are to be given a day of credit for military service for each day from the date of their entry on active duty **through** the date of their separation from active duty. SSA's Response To Judge Sickendick's Ruling on Existence of Debt and Order to Produce Corrected Accounting (SSA Response) at 2, citing OPM's *Civil Service Retirement System/Federal Employees' Retirement System Handbook*, Chap. 22, § 22A6.1-1. The OPM guidance is consistent with that of the Comptroller General in *Matter of: Public Health Service Officer*, B-214919, 64 Comp. Gen. 395, at 400 (1985 WL 50669), where it is stated that members of the uniformed services are entitled to pay based upon their status as members not upon the number of hours of work performed – they are in status 24 hours a day even though they may be scheduled to work only certain hours in a 24-hour period. Thus, if Petitioner was released from active duty on January 17, 2006 as his DD Form 214 indicates, then he was in an active duty status for that entire 24-hour period and was not eligible to return to duty in his civil service position until January 18, 2006. I stand corrected. The SSA position is well-reasoned and supported. Petitioner does not dispute the accounting in this regard. Accordingly, I conclude that Petitioner was not entitled to pay and allowances from his civil service position as an ALJ with SSA during the period January 2, 2003 through January 17, 2006.

Ms. Rihel explains in her declaration that in the original calculation of the debt, Petitioner was charged with 80 hours of LWOP in pay period 200302 (December 29, 2002 through January 11, 2003). However, it was determined that he actually worked on December 30 and 31, 2002, and that he was entitled to a federal holiday on January 1, 2003 (which is paid like a regular work day). Thus, the corrected accounting credited Petitioner with 24 regular hours and the remaining 56 hours for pay period 200302 was LWOP. SSA Ex. 26, at 4, ¶ 7; SSA Ex. 26, Attachment A at 7. The accounting reflects that pay period 200602 (December 25, 2005 through January 7, 2006) was treated as 80 hours LWOP, consistent with my rulings. SSA Ex. 26, at 4, ¶ 9; SSA Ex. 26, Attachment A, at 33. For the next pay period, pay period 200603 (January 8, 2006 through January 21, 2006), Petitioner was charged with 56 hours of LWOP for the workdays January 9 through 13, 16, and 17, 2006, and he was credited with 24 regular hours of work for January 18, 2006

through January 20, 2006. SSA Ex. 26, at 4, ¶ 9; SSA Ex. 26, Attachment A, at 33. The accounting audit sheets reflect that for the remaining 77 pay periods during the period Petitioner was on active duty, he was charged with LWOP. Petitioner's total pay per pay period from January 2, 2003 through January 17, 2006 ranged from $5243.20 to $5824.00, with increases due to annual pay raises, with hourly equivalent rates calculated to be from $62.94 to $72.80. SSA Ex. 26, Attachment A, at 7-33. All annual leave, military leave, and sick leave for which Petitioner was paid by SSA during the period January 2, 2003 through January 17, 2006 was converted to leave without pay. SSA Ex. 26, at 5, ¶ 10.

The accounting does not credit Petitioner for any amount of accrued annual leave as he was paid $18,732.00 for 240 hours of accrued leave upon his termination. SSA Ex. 26, at 5, ¶ 11. The accounting credits Petitioner with $14,514.97 for military leave accrued in 2003, 2004, and 2005. The accounting credits Petitioner with $2084.33 for military leave accrued for fiscal year 2006 effective October 1, 2005. However, because Petitioner used nine days of military leave in fiscal year 2006, after his return to duty, he was only entitled to credit against his debt for the six unused days. Petitioner was given credit for the five days of administrative leave granted by President Bush's memorandum of November 14, 2003. SSA Ex. 26, at 5-6, ¶¶ 13-15.

Payments on Petitioner's behalf to third-parties that SSA may still recover from those third-parties to reduce Petitioner's debt are reflected on the following table. SSA Ex. 26, at 6, ¶ 16. Recovery of payments made by SSA on Petitioner's behalf to the Old-Age, Survivors and Disability Insurance (OASDI) fund is not possible. SSA Ex. 26, at 6, ¶ 17.

During the period January 2, 2003 through January 17, 2006, SSA paid the one percent government contribution, a matching contribution, and the amount from Petitioner's pay that he had designated to Petitioner's Thrift Savings Plan (TSP) account. Petitioner was not entitled to any government contribution or match during the period of LWOP and he was not entitled to the pay from which his designated contribution to his TSP account was made. Petitioner's contribution to his TSP account is included within the gross salary overpayment. The government contribution and match amounted to $21,609.59 during the period. According to Ms. Rihel, no amount can be recovered from Petitioner's TSP to satisfy his debt as he withdrew the entire balance from the account after his termination. SSA Ex. 26, at 6, ¶ 18.

The following table summarizes the accounting.

Gross Salary Overpayment From January 2, 2003 Through January 17, 2006 Due To LWOP Status		$432,191.84
Government Contributions To Petitioner's Thrift Savings Account During The Period – 1% Basic and Matching		$21, 609.59
	Total Gross Overpayment	$453,801.43
Less Amounts Recoverable From Other Sources		
	Medicare Tax	$222.79
	Retirement Account	$3,457.71
	Federal Employee Group Life Insurance (FEGLI)	$3,250.52
Less Value of Leave		
	Military FY 2003-2005	$14,514.97
	Military FY 2006	$2,084.33
	Administrative Leave (5 days, Pres. Bush's Memo. 11/14/2003)	$1,792.34
	Net Debt	**$428,478.77**

During the pay period that ended March 5, 2005, SSA restored 16 hours of annual leave to Petitioner consistent with the decision in *Butterbaugh v. Dep't of Justice*, 336 F.3d 1332 (Fed. Cir. 2003). SSA Ex. 23; SSA Response at 5. Ms. Rihel explains in her declaration that SSA paid Petitioner for the 16 hours of restored leave during his period of active duty but, as a result of the accounting, Petitioner was charged 16 hours of LWOP for the restored leave. DOI established a value of $694.77 for that restored leave based upon my Rulings. SSA Ex. 26, at 5, ¶ 12. SSA explains that restored leave must be used within two years pursuant to 5 C.F.R. § 630.306(a) and, technically, the period for Petitioner to use the restored leave has expired. However, SSA does not object to crediting the value of the restored leave against Petitioner's debt. SSA Response at 5-6. In *Butterbaugh* the court determined that the 15 days of military leave granted by 5 U.S.C. § 6323(a)(1) are 15 work days rather than 15 calendar days and, therefore federal employees had to take military leave only for those days on which they were required to work. 336 F.3d at 1343. The decision in *Butterbaugh* did not require that SSA restore leave to Petitioner or pay him the value of military leave used for non-work days. However, SSA did independently determine to compensate Petitioner for military leave used for non-work days consistent with the decision in *Butterbaugh*. The restored leave was ostensibly to correct an error in charging Petitioner for leave related to Reserve duty that occurred prior to his entry on active duty. To ensure Petitioner is not deprived of a benefit of his federal employment due to his service in the Reserve, I find it appropriate

to apply credit for his restored leave to reduce his debt, notwithstanding that the time for using the restored leave may have long since expired. Accordingly, the net debt of $428,478.77 is reduced by $694.77, resulting in a remaining debt due the government of $427,784.00.

I am satisfied that the accounting has been correctly accomplished consistent with my prior rulings. Except as noted hereafter, Petitioner does not specifically challenge the accuracy of the accounting.

In my Ruling and Order of May 18, 2009 at page 31, I accorded Petitioner 15 days to respond to the corrected accounting. On June 29, 2009, Petitioner requested that he be granted an extension of time to respond to the SSA corrected accounting. He requested that he be granted the same amount of time to respond as SSA was granted to prepare the corrected accounting. On June 30, 2009, I granted Petitioner's request for extension until July 17, 2009.

On July 17, 2009, Petitioner filed a pleading entitled "Response and Motion to Vacate May 18, 2009 Ruling on Existence of Debt and Order to Produce Corrected Accounting Due to ALJ Abuse of Discretion and Gross Procedural Error" (P. Response and Motion). Petitioner attached exhibits to his pleading including a copy of my Ruling and Order dated January 21, 2009; a copy of the SSA's Brief and Evidentiary Record in Response to the Departmental Appeals Board Orders dated February 4, 2008 and February 7, 2008, and filed February 29, 2008; and the cover plus pages 4 through 18 from P. Ex. 43. The documents Petitioner submitted with his pleading are already of record and they are not admitted as evidence. Petitioner's arguments are addressed in the order in which they are presented in his pleading.

Petitioner argues that I abused my discretion and exceeded my authority by closing the record on February 10, 2009 and then reopening the record on May 18, 2009. P. Response and Motion at 1-2. Petitioner is correct that in my Ruling and Order dated January 21, 2009 at page 13, I advised the parties that the record would be closed on February 10, 2009 to permit a decision upon receipt of their final briefs. In my Ruling and Order of May 18, 2009, I concluded that Petitioner is indebted to the United States, but the evidence of an accounting by SSA or its pay agent was inadequate to permit a determination of the amount of the debt or to allow Petitioner to meaningfully respond or understand the calculation of the debt. Accordingly, I ordered that SSA prepare and submit a proper accounting consistent with my rulings related to the existence of the debt. Contrary to Petitioner's assertion I did not reopen the record "without any explanation whatsoever. . . ." P. Response and Motion at 2. I discussed my rulings in significant detail and also provided SSA lengthy and detailed guidance for how the accounting was to be organized and presented for understanding and clarity. Reopening the record to obtain a corrected accounting was consistent with my responsibilities and authority as an ALJ as described in 5 U.S.C. § 556 and the applicable regulations discussed above.

Petitioner argues that I abused my discretion and exceeded my authority because I failed to follow my own ruling dated January 21, 2009. P. Response and Motion at 2. Petitioner asserts that in my Ruling and Order dated January 21, 2009 at page 9, I stated: "[a]ccordingly, the amount of the alleged debt subject to my review is $316,906.94." The language upon which Petitioner seizes is clearly not a ruling that the amount of Petitioner's debt was $316,906.94. Rather, the statement is merely that the alleged debt subject to review is $316,906.94. Read in the context of the entire Ruling and Order dated January 21, 2009, it is absolutely clear that I was making no findings or conclusions related to the actual amount of the debt. Nor does the Ruling and Order dated January 21, 2009 suggest that my jurisdiction or authority to determine the debt was limited to finding the debt was no more than that alleged by SSA. As Petitioner admits (P. Response and Motion at 4-5), I also stated in the January 21, 2009 Ruling and Order at page 12, that the parties were to address in their final briefs the issues before me, i.e. whether Petitioner is indebted to the government and, if so, whether "the amount of the debt is $316,906.64 or some greater or lesser amount."

Petitioner also focuses upon my statement in the Ruling and Order dated January 21, 2009 at page 8, that I have no authority to review SSA leave and personnel actions. P. Response and Motion at 2-6. As I also stated on the same page of the Ruling and Order, in the preceding sentence, my jurisdiction is limited to determining whether a debt exists and, if so, how much. I am not obliged to review ministerial acts of SSA recording or documenting leave and personnel actions. The fact that SSA may, as a result of my decision, find it necessary to undertake certain actions to document leave or personal actions is not subject to my review and not relevant to any issues I may decide in this case. Contrary to Petitioner's assertions, I entered no order that SSA change Petitioner's time and attendance records. Changes to Petitioner's records would have been done based upon some independent regulatory authority or policy requirement to document Petitioner's time and attendance, pay, and related matters. Of course, it was also necessary for SSA and its pay agent to accurately and adequately document the corrected accounting consistent with my rulings regarding the existence of the debt. Petitioner is also in error alleging that I ordered SSA to increase the debt determination. P. Response and Motion at 3. SSA originally notified Petitioner that the debt was $309,662.04 and subsequently notified Petitioner that the debt was $316,906.94. As my Ruling and Order dated May 18, 2009 reflects, I determined that both debt amounts alleged by SSA were likely in error based upon the statutes, regulations, and prior decisions of the Comptroller General and ordered a corrected accounting with no direction to SSA regarding the actual amount of the debt or modification of any of Petitioner's personnel records. I do not consider SSA's failure to argue in its final brief that Petitioner owed more than $316,906.64 to constitute waiver or amount to a limit on my authority to adjudicate the correct debt amount. P. Response and Motion at 5. My order to SSA to prepare a corrected accounting was well within my authority under the statutes and regulations discussed above and necessary both to complete the record and to finally adjudicate this matter.

Petitioner complains that I should have recognized the significance of his DD Form 214 when the case was first assigned to me. He complains that the Ruling and Order of May 18, 2009 was an "11th hour surprise on *both* petitioner and SSA." P. Response and Motion at 5-6. Petitioner seems to overlook that proceedings in this case were stayed at his behest and over the objection of SSA from January 2008 to January 2009, while he pursued his case before the MSPB. Further, the DD Form 214 was offered by SSA as evidence before the parties were requested to file final briefs and the content of that document and its weight in establishing Petitioner's period of active duty should have been apparent to Petitioner even if it was not to SSA. Petitioner did not address the DD Form 214 in his final brief and does not deny in the present pleading that it presumptively establishes his period of active military service as January 2, 2003 through January 17, 2006.

Petitioner also complains that he was denied due process because he did not have notice of the amount of the debt. His complaint is frivolous. SSA served on Petitioner the corrected accounting on June 15, 2009. Petitioner subsequently requested and was granted an extension of time to address the corrected accounting. However, his Response and Motion dated July 17, 2009 shows that he raises no serious issue regarding the corrected accounting or the amount of the debt.

Petitioner argues that I have consistently failed to comply with 5 U.S.C. § 5514(2)(D). Petitioner advances the theory that because I did not resolve this matter before he was terminated by SSA, I lost jurisdiction to decide this matter. P. Response and Motion at 6-7. This issue was raised and addressed in section II.C.1 of my Ruling and Order of May 18, 2009 at page 8 and is also set forth in this decision in section II.C.1. I concluded that my jurisdiction continued under statutes and regulations that control debt collection and Petitioner cites no authority in support of his position to the contrary.

Petitioner argues that he was denied the hearing to which he is entitled under 5 U.S.C. § 5514. P. Response and Motion at 7. The process due to Petitioner, including a record review versus an oral hearing is discussed in detail in section II.B of this decision. The statute does not specify the form of the hearing required. 5 U.S.C. § 5514(a)(2)(D). The applicable regulation provides that the hearing to be accorded "will normally be a review of the record, unless the hearing officer determines that a decision cannot be made without resolving an issue of credibility or veracity, in which case the hearing officer will provide for an oral hearing." 45 C.F.R. § 30.15(n). The only testimony I have considered is that of Ms. Rihel in the form of her declaration. SSA Ex. 26. Petitioner raised no issue regarding the credibility of Ms. Rihel or her declaration, therefore, no oral hearing is necessary in this case.

Petitioner argues that there is a credibility issue regarding testimony that SSA's attorney in this case, Ms. Daniel, gave during Petitioner's MSPB proceedings that should trigger an oral hearing. P. Response and Motion at 8. Petitioner raised a similar argument in his final brief. P. Final Brief at 1-3.[30] The only evidence of alleged testimony by Ms. Daniel that Petitioner cites is a transcript of a prehearing conference among the MSPB ALJ and the parties on January 7, 2008, during which the MSPB ALJ was attempting to facilitate a settlement. P. Ex. 43, at 4-18[31] (Ms. Daniel's comments are at P. Ex. 43, at pages 10-18 of the transcript). Apparent to me, as it should be to Petitioner, is that Ms. Daniel was not sworn as a witness and therefore her statements to the MSPB ALJ were not testimony. Furthermore, the settlement conference was clearly not for the purpose of the MSPB ALJ receiving evidence on the substantive issues before him. The MSPB ALJ was without jurisdiction to decide issues related to any overpayment or debt. Furthermore, Ms. Daniel is not appearing as a witnesses in the proceeding before me and I clearly recognize that all her written statements in this case are not testimony but, rather, merely argument of counsel zealously representing her client. The fact that Petitioner transcribed the recordings of the prehearing conferences with the MSPB ALJ and offered them as evidence in this case, does not make Ms. Daniel a witness before me.[32] As an ALJ with years of experience, Petitioner should be well aware that his argument is frivolous. Petitioner also argues that Ms. Daniel should have disqualified herself in this proceeding. P. Response and Motion at 8. In his final brief Petitioner argued that her conduct would amount to a violation of the American Bar Association Model Code of Professional

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[30] I addressed the issue in my Ruling and Order of May 18, 2009, at 27, n.30.

[31] Petitioner originally submitted recordings, on two compact discs, of three prehearing conferences that occurred on January 4, 7, and 8, 2008, among the MSPB ALJ, his clerk, and the parties. The compact discs were admitted as P. Exs. 39 and 40. Petitioner subsequently submitted transcripts of the recordings that have been marked and admitted as P. Exs. 42, 43, 44.

[32] It does clearly demonstrate why counsel should be reluctant to hold themselves out as subject matter experts in a proceeding, even a different but related proceeding. After listening to the recordings prior to issuing my Ruling and Order dated May 18, 2009 and being obliged to read the transcripts when they were submitted by Petitioner, I am convinced that the MSPB ALJ did not consider Ms. Daniel a witness but rather received her comments as an attorney representing SSA who was more knowledgeable and could more clearly state the agency position regarding debt collection, an issue that clearly was not before the MSPB ALJ but potentially impacted his ability to facilitate a settlement. Even if Ms. Daniel testified in the MSPB proceeding, the fact she provided testimony in another proceeding involving Petitioner would not, alone, be a basis for her disqualification in this proceeding.

Responsibility, DR 5-102.[33] P. Final Brief at 2, n.5. Whether or not any ethical breach occurred before another judge in another forum is not a matter within my cognizance and has no impact upon my decision. Petitioner is in error to the extent he implies that Ms. Daniel's participation in this case as counsel for SSA amounts to a violation of DR 5-102. DR 5-102 provides that if a lawyer learns or it becomes obvious that he or she or his/her firm ought to be called as a witness on behalf of his or her client, the lawyer and firm should withdraw from conducting the trial. DR 5-102 also provides that if a lawyer learns he or she or his/her firm may be called as a witness, other than on behalf of the client, the lawyer may continue representation until it becomes apparent that the lawyer's testimony may be prejudicial to the client. I see nothing in the record before me that suggests that Ms. Daniel should be a witness on behalf of SSA. Furthermore, Ms. Daniel will not be given an opportunity to testify in the proceeding before me and, thus, her testimony poses no possible prejudice to SSA. I find there is no conduct by counsel for SSA that is inconsistent with the guidance of DR 5-102.

Petitioner argues that I no longer have jurisdiction under either the Interagency Agreement or 5 U.S.C. § 5514, because Petitioner is a former employee. He argues that it is improper for me to rely upon an interagency agreement in the absence of rulemaking by the Commissioner. P. Response and Motion at 8-9. Petitioner is in error on both points. The Commissioner clearly was authorized by Congress to follow regulations of the Secretary until such time as the Commissioner had an opportunity to reissue, change, rescind, or otherwise take action regarding the regulations. No time-limit was established. Pub. L. No. 103-296, Social Security Independence and Program Improvements Act of 1994 (Aug. 15, 1994). Petitioner points to no authority to the contrary. Petitioner also points to no authority that prevents one agency head from agreeing with a second agency head to refer debt collection cases to the ALJs of the second agency and applying the debt collection regulations of the second agency rather than those of the first agency. SSA filed a copy of the applicable Interagency Agreement as Attachment 1 to its brief filed on February 29, 2008. Section 1.B.2 of the agreement specifically provides that it applies to "separated employees of SSA regardless of former bargaining unit status or former union affiliation." SSA Attachment 1, at 2. Petitioner argues that I stated in my Ruling and Order of May 18, 2009 at page 5, that the Interagency Agreement applies only to current employees. P. Response and Motion at 9. Petitioner misinterprets the language he quotes from my Ruling and Order in support of his position. I did not state that the Interagency Agreement applied only to current SSA employees – that would be inconsistent with the plain language of the Agreement. Rather, I stated that the Agreement provides that the Secretary's debt collection regulations at 45 C.F.R. Part 30 (1995) would be applied to debt cases of current SSA

[33] I construe the reference to be to the *Model Code of Professional Responsibility* adopted by the House of Delegates of the American Bar Association on August 12, 1969, as amended in 1970, 1974, 1975, 1976, 1977, 1978, 1979, and 1980, and not the *Model Rules of Professional Conduct* adopted in 1983.

employees. My intent was to distinguish between the application of 45 C.F.R. Part 30 (1995) from application of the Secretary's current regulations that specifically apply to employee debt collection cases. I did not intend to limit application of the Interagency Agreement in a manner contrary to the express intent of the parties. Further, for reasons already discussed, I conclude that I have jurisdiction even though Petitioner is no longer an employee of SSA.

Petitioner argues that SSA failed to properly account for all leave entitlements and to give credit against the debt for amounts that can be recovered from third-parties. P. Response and Motion at 10. Petitioner asserts that he should not be penalized for the delinquent actions of SSA in failing to promptly request refunds from third-parties. This debt collection action was stayed at his request, preventing SSA from taking any action to recover the debt from Petitioner or third-parties. Petitioner asserts that, despite the stay, SSA could have sought to recover from third-parties amounts paid on his behalf. Petitioner cites no authority for his assertion and I am aware of none. The agency is clearly obligated to attempt to recover amounts improperly paid to third-parties. *Matter of: Alfred H. Varga*, B-260909 (Dec. 17, 1996). However, I am aware of no authority for the proposition that the agency must do so, or may do so, before the amount of the debt is determined, if there is a request for review by the alleged debtor as in this case.

Finally, Petitioner argues that I should recuse myself based upon "abuse of discretion and bias causing material prejudice to Petitioner." P. Response and Motion at 11-12. He alleges "gross mismanagement, legal error, and abuse of discretion to such extent as to indicate blatant bias against petitioner." P. Response and Motion at 11. Petitioner cites the reopening of the record by my Ruling and Order of May 18, 2009; he alleges that I ordered SSA to change his records and extend the period of his LWOP and other actions that resulted in an increase of his debt to the government; he alleges that I failed to act in a timely manner as contemplated by 5 U.S.C. § 5514; he alleges I failed to credit against his debt the "seizure of thousands of dollars by SSA from his retirement accounts in violation of the stay on collection;" he alleges he has been denied his oral hearing even though the "credibility of SSA witnesses in the MSPB hearing are called into question in the DAB proceeding;" and that I refused to disqualify or sanction SSA's counsel. P. Response and Motion at 11-12. All, but two of these issues have been addressed in detail in this decision and they have been found to be without merit. Regarding Petitioner's argument that I did not act in a timely manner under 5 U.S.C. § 5514(a)(2), I note that the stay in this case was granted at Petitioner's behest pursuant to 45 C.F.R. § 30.15(j)(7). When the stay was lifted, 5 U.S.C. § 5514 and its 60-day limit for issuing a decision was no longer applicable as Petitioner was no longer a federal employee. 45 C.F.R. § 30.15(j)(7) (decision to be issued "at the earliest practical date"). I further note that even if a decision cannot be issued with in 60 days as contemplated by 5 U.S.C. § 5514(a)(2) and 45 C.F.R. § 30.15(j)(7), the statute and regulations authorize no remedy for the alleged debtor. Though I regret any delay in issuing a decision, delay is warranted and unavoidable in a case, such as this, where there are multiple issues to address; there is voluminous evidence; and, for the protection of the debtor, it is necessary to order a

corrected accounting by the agency before ruling upon the amount of the debt for which the debtor is liable. Regarding Petitioner's allegation that I failed to credit against his debt money seized by SSA from his retirement account, Petitioner has failed to present any evidence to support his allegation that SSA seized money that was not returned to his TSP account or that has not been properly credited. The evidence shows that Petitioner drained his own TSP account (SSA Ex. 26, at 6, ¶ 18) because SSA apparently failed to put a hold on the account and the corrected accounting specifically shows the amount of $3457.71 recovered from Petitioner's retirement account (SSA Ex. 26, Attachment A, at 5). I have no evidence that SSA seized money from any other retirement account.

Other than the fact that my rulings have been adverse to Petitioner, Petitioner points to no evidence in support of his argument that I cannot decide his case in an independent and unbiased or impartial manner. The losing party before every judge could make the same allegation. The fact that I have decided issues adversely to Petitioner does not establish lack of independence, lack of impartiality, or bias against Petitioner. I find no grounds to recuse myself but, rather, conclude that I am legally obligated to complete the adjudication of this case.

Petitioner's motion that I vacate my Ruling and Order of May 18, 2009, and his motion that I recuse myself are denied.

Accordingly, I conclude that Petitioner is indebted to the government in the amount of $427,784.00, plus interest, costs, and penalties as authorized by 45 C.F.R. §§ 30.13 and 30.14. I do not find that the request for review was spurious within the meaning of 45 C.F.R. §§ 30.13 and 30.14. The debt is subject to collection in any manner permitted by law including administrative offset and administrative wage garnishment.

IV. Conclusion

For the foregoing reasons, I conclude that Petitioner is indebted to the government in the amount of $427,784.00, plus interest, costs, and penalties. The debt is subject to collection in any manner permitted by law, including administrative offset and administrative wage garnishment.

/s/ Keith W. Sickendick
Administrative Law Judge