Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jorge Gomez,

Petitioner,

v.

Department of Health and Human Services.

Docket No. C-13-909

Decision No. CR4175

Date: August 28, 2015

DECISION

Dr. Jorge Gomez (Petitioner), an employee of the Department of Health and Human Services (HHS), National Institutes of Health (NIH), requested a hearing to contest HHS's determination that Petitioner owes a debt to the United States Government. NIH retroactively reclassified Petitioner from a Medical Officer position to a non-physician health science researcher position because Petitioner does not have a permanent certification by the Education Commission for Foreign Medical Graduates (ECFMG) proving that his Mexican medical degree is equivalent to an American medical degree. Although NIH's reclassification did not affect Petitioner's grade and salary, NIH concluded that Petitioner was ineligible to receive a Physician Comparability Allowance (PCA). Because NIH retroactively reclassified Petitioner to a non-physician position, HHS's payroll service charged Petitioner with an overpayment of $18,393.60 based on the PCA paid to him from April 7, 2012, to November 3, 2012.

Because the Office of Personnel Management (OPM) has jurisdiction to hear and decide appeals related to the reclassification of Petitioner's position, I do not have jurisdiction to decide that issue. There is no evidence in the record that Petitioner appealed his reclassification to a non-physician position to OPM. As a result, in determining whether a debt exists, I must accept NIH's decision to reclassify Petitioner to a non-physician

position. Based on NIH's decision to reclassify Petitioner, he was not eligible for the PCA because he did not meet OPM's degree requirements to be a government physician from April 7, 2012, to November 3, 2012. Further, despite the fact that Petitioner and NIH signed an agreement related to the PCA, I cannot enforce that agreement since an agency may only pay the PCA to physicians and, based on NIH's reclassification decision, Petitioner does not meet the degree requirements to be a government physician. Therefore, I conclude that Petitioner owes an $18,393.60 debt to the United States Government.

I. Background

Petitioner has been an NIH employee since 1994. NIH originally hired Petitioner into a 601 series position (General Health Science) of the General Schedule. In 1995, Petitioner applied for an NIH Medical Officer position in the 602 series. On April 2, 1995, NIH officially reclassified Petitioner from the 601 series to the 602 series. Following this change, Petitioner became eligible for and received an allowance under the Federal Physicians Comparability Allowance Program. Petitioner began receiving a PCA in 1995 and received a PCA from that time until 2012, when he was reclassified to a non-physician position. In 2012, NIH determined that Petitioner did not qualify as a Medical Officer based on NIH's interpretation of an OPM manual. As a result, in late 2012, NIH ceased providing Petitioner with the PCA and, in early 2013, involuntary returned Petitioner to a 601 series position, retroactive to 1995. Because of this action, HHS determined that Petitioner owes a debt based on PCA amounts paid to him in 2012. HHS Exhibit (Ex.) 1; Petitioner (P.) Ex. 1.

On June 6, 2013, Petitioner filed a Petition for Hearing in which he disputed the validity of the debt. In particular, Petitioner argued that he had been properly placed in the 602 series position in 1995 and, consequently, was entitled to receive PCA payments. Petitioner also indicated that NIH's action occurred after he filed an equal employment opportunity complaint. Petition for Hearing at 2. NIH forwarded the hearing petition to the Departmental Appeals Board, Civil Remedies Division (CRD) on June 13, 2013. The CRD Director assigned this case to me and, on June 19, 2013, I issued a prehearing order that set dates for the parties to submit briefs and evidence. In the prehearing order, I also tentatively set an in-person hearing for July 23, 2013.

On June 28, 2013, Petitioner's counsel requested that I delay this proceeding because Petitioner has a case pending before the Equal Employment and Opportunity Commission (EEOC) that includes his reclassification to a 601 series position. *See* 45 C.F.R. § 33.4(a)(13). On July 1, 2013, HHS objected to Petitioner's request for a delay and filed its prehearing brief (HHS Br.) and exhibits (HHS Exs. 1-12). On July 3, 2013, I issued an order granting a temporary delay in these proceedings to take effect

when the parties completed the submission schedule I established in my prehearing order. I also cancelled the hearing set for July 23, 2013. Finally, I stated that I would consider all the parties' submissions before deciding whether to grant or deny Petitioner's request for a delay of these proceedings pending the outcome of the EEOC proceeding. On July 10 and 22, 2013, I granted two unopposed motions from Petitioner for extensions of time to file his brief and exhibits. On July 24, 2013, Petitioner filed his prehearing brief (P. Br.) and exhibits (P. Exs. 1-14). On July 31, 2013, HHS filed a reply brief (HHS Reply Br). On August 6, 2013, I granted Petitioner's request to delay this proceeding under 45 C.F.R. § 33.6(d)(1), based on judicial economy. However, I ordered Petitioner to file written status updates of his EEOC case with CRD every six months.

Since the time I authorized the delay in this proceeding, Petitioner has generally failed to provide status updates on his EEOC case without prompting from CRD personnel. Further, despite the passing of nearly two years, Petitioner still does not have a hearing date scheduled with the EEOC. As a result, on June 23, 2015, I ordered the parties to submit any objections they might have to me lifting the delay in this proceeding based on the lack of progress in the EEOC proceeding.

Petitioner submitted a response to my order in which he argued that I should continue to delay this case because briefing in the EEOC case is nearly complete and Petitioner anticipates that a hearing will be scheduled in the near future. Petitioner also submitted two additional proposed exhibits (P. Exs. 15-16).

In HHS's response to my order (HHS Response), HHS urged me to reinstate this case and render a decision. HHS argued that the scope of the present case is much narrower than the EEOC case and that Petitioner has delayed the EEOC case. In a supplemental response, HHS again argued for an end to the delay in this case and submitted a declaration from its counsel in the EEOC case. Counsel declared that Petitioner failed to timely submit to the EEOC Administrative Judge his brief in response to HHS's motion for a decision without a hearing. Declaration of Melissa Manson ¶¶ 7- 9.

On August 20, 2015, I issued an order terminating the delay in these proceeding. I informed the parties I would issue a decision based on the written record within the time remaining in this case. *See* 45 C.F.R. § 33.6(d)(1).

II. Decision on the Record

Petitioner did not object to any of HHS's proposed exhibits.

HHS objected to P. Exs. 2 and 11. HHS argues that P. Ex. 2, which is written direct testimony from a retired HHS official establishing that NIH's Office of Human

Resources determined Petitioner's medical degree from the University of Guadalajara, Mexico, was equivalent to an American medical degree for purposes of appointing Petitioner to be Medical Officer at NIH, is irrelevant because "HHS cannot be held to the prior erroneous determination which misclassified Petitioner in the 602 Series, Medical Officer position." HHS Reply Br. at 9-10. I overrule HHS's objection to P. Ex. 2. The written direct testimony provides relevant background information to HHS's original classification decision regarding Petitioner and relates to the origin of the debt. *See* 45 C.F.R. § 33.6(d)(2)(i).

HHS argues that P. Ex. 11, which is an Education Evaluation and Immigration Service, Inc. (EEIS) assessment that Petitioner's medical degree from the University of Guadalajara is equivalent to a medical degree conferred by an accredited university in the United States, is irrelevant because an EEIS evaluation is not one of the two ways that OPM uses to determine if a foreign medical degree is equivalent to an American degree. HHS Reply Br. at 10. I overrule HHS's objection to P. Ex. 11. Petitioner's medical degree is at the center of this case, and I will not exclude evidence about that degree.

Therefore, I admit HHS Exs. 1-12 and P. Exs. 1-16 into the record.

I directed each party to submit written direct testimony for all proposed witnesses. Prehearing Order ¶ 6. Further, if either party wanted to cross-examine any of the opposing party's proposed witnesses, then the party needed to affirmatively request to cross-examine the witnesses. Prehearing Order ¶ 7. Both parties submitted written direct testimony (HHS Ex. 11; P. Exs. 1-2). HHS did not request to cross-examine Petitioner's witnesses. Petitioner only sought to cross-examine Ann Nucci, a human resource supervisor, based on an unsigned affidavit purporting to be Ms. Nucci's answers to questions posed by an EEO investigator. HHS Ex. 2 at 71-79. Petitioner asserts that Ms. Nucci's affidavit and emails, which HHS submitted as exhibits, are contradictory.

The regulations governing these proceedings state that "[a]n employee who requests an oral hearing shall be provided an oral hearing if the hearing official determines that the matter cannot be resolved by review of documentary evidence alone because an issue of credibility or veracity is involved." 45 C.F.R. § 33.6(c)(2). Although the parties do not agree on all facts related to the actions NIH has taken against Petitioner, as discussed below, Petitioner's disagreement with Ms. Nucci will not preclude me from resolving this case. Therefore, I issue this decision based on the written record. 45 C.F.R. § 33.6(c)(3).

III. Issues[1]

Whether Petitioner owes a debt to the United State Government and, if so, what is the amount of the debt.

IV. Jurisdiction

I have jurisdiction to decide this case. 5 U.S.C. § 5514(a)(2); 45 C.F.R. §§ 33.2 (definition of *Hearing official*), 33.3(c)(2), 33.6, 33.7.

V. Findings of Fact, Conclusions of Law, and Analysis[2]

If HHS determines that a HHS employee is indebted to the United States, HHS may involuntarily offset the debt from that employee's salary. 5 U.S.C. § 5514(a)(1); 45 C.F.R. § 33.3(a). Before HHS offsets the debt, the employee has the right to petition for a hearing before an Administrative Law Judge (or another individual who is not under the supervision or control of the Secretary of Health and Human Services) in order to dispute the existence of the debt, the amount of the debt, and/or the payment schedule the agency establishes. 5 U.S.C. § 5514(a)(2); 45 C.F.R. §§ 33.3(c)(2), 33.7. An employee who petitions for a hearing is not precluded from also seeking waiver of the debt. 45 C.F.R. § 33.1(c)(3); *see also* 5 U.S.C. § 5584.

1. ***NIH determined that Petitioner had been erroneously placed in a Medical Officer position in 1995 and, as a result, retroactively reclassified Petitioner to a non-physician position.***

NIH first hired Petitioner into a 601 series non-physician position in 1994. In 1995, Petitioner applied for a 602 series Medical Officer position. P. Ex. 1 at 1-2. While Petitioner was a candidate for the Medical Officer position, he disclosed that his medical degree was from a Mexican university and provided documentation related to that degree. P. Ex. 1 at 3; P. Ex. 2 at 1. NIH human resources personnel reviewed these documents

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[1] Although Petitioner asserts that NIH's decision to retroactively reclassify him to a non-physician position, which resulted in the alleged debt in this case, was made in violation of equal employment opportunity laws, this decision does not address those arguments. The EEOC Administrative Judge adjudicating Petitioner's claims of discrimination/ reprisal has jurisdiction over those issues and nothing in this decision is intended to affect the EEOC proceeding.

[2] My numbered findings of fact and conclusions of law appear in bold and italics.

and confirmed that Petitioner received his degree from a school that is equivalent to accredited medical schools in the United States. P. Ex. 2 at 1. In April 1995, NIH placed Petitioner in a Medical Officer position and entered into an agreement to provide him with a PCA. P. Ex. 1 at 1; P. Ex. 2 at 2.

Petitioner continued employment with NIH as a Medical Officer with a PCA until 2012. The term of his last PCA agreement was from November 2010 to November 2012. P. Ex. 13. In May 2012, Petitioner applied for an NIH supervisory Medical Officer position through OPM's USAJOBS website. P. Ex. 1 at 3; P. Ex. 16 at 1. In the application for that job, Petitioner informed USAJOBS that he did not have an American or Canadian medical degree or an ECFMG certification for his foreign medical degree. HHS Ex. 4 at 1. In June 2012, USAJOBS informed Petitioner that he was not eligible for the supervisory Medical Officer position. P. Ex. 1 at 3. In September 2012, Petitioner's supervisor began to question whether he should approve a new PCA agreement with Petitioner. P. Ex. 7 at 7-8; P. Ex. 8 at 5; P. Ex. 16 at 1.

In September 2012, NIH started to reconsider whether Petitioner met the requirements to be a Medical Officer. P. Ex. 9 at 6-7; P. Ex. 10 at 4-6; P. Ex. 16 at 1-2. NIH focused on Petitioner's foreign medical degree and a lack of ECFMG certification as the reasons that Petitioner did not meet OPM's degree requirement to hold a Medical Officer position. HHS Ex. 2 at 2, 4, 6, 8, 10-12, 49. By the end of September 2012, NIH began to conclude that Petitioner was erroneously placed in a Medical Officer position; it resolved this problem by "reclassify[ing] his position outside the 602 series and eliminat[ing] his eligibility for PCA." HHS Ex. 2 at 48.

By October 26, 2012, it appears that NIH decided that Petitioner would have to be reclassified from a 602 series Medical Officer to a 601 series non-physician position based on his foreign medical degree that was not ECFMG certified. HHS Ex. 2 at 14. OPM's standards and qualifications make a medical degree a requirement for the Medical Officer position. As stated in an OPM handbook, "the degree of Doctor of Medicine or Doctor of Osteopathy is a fundamental requirement" for the Medical Officer series. HHS Ex. 5 at 18. Further, as stated in OPM's Qualification Standards Operating Manual, one of the requirements for the Medical Officer series is that the applicant must possess a:

> Doctor of Medicine or Doctor of Osteopathy from a school in the United States or Canada approved by a recognized accrediting body in the year of the applicant's graduation. [A Doctor of Medicine or equivalent degree from a foreign medical school that provided education and medical knowledge substantially equivalent to accredited schools in

> the United States may be demonstrated by permanent certification by the Educational Commission for Foreign Medical Graduates (ECFMG) . . . .

HHS Ex. 3 at 56.

By email dated November 8, 2012, NIH informed Petitioner that due to his lack of ECFMG certification, NIH had erroneously placed him in a Medical Officer position in 1995 and that Petitioner was not only ineligible for the PCA, but that NIH was reclassifying Petitioner to a 601 series non-physician position, retroactive to 1995. HHS Ex. 2 at 16-17; P. Ex. 16 at 2. Following this notification, Petitioner internally disputed the action NIH intended to take. HHS Ex. 2 at 18-19, 31-32, 46, 51-53, 56; P. Ex. 16 at 2-3. On January 27, 2013, NIH issued a formal Notification of Personnel Action reclassifying Petitioner from a 602 series position to a 601 series position, effective April 2, 1995. HHS Ex. 1 at 1; HHS Ex. 2 at 84; P. Ex. 1 at 2; HHS Br. at 5. There is no indication in the record that Petitioner appealed this reclassification of his position to OPM.

2. ***Because there is no indication that Petitioner appealed NIH's retroactive reclassification determination to OPM, I must accept NIH's determination that Petitioner was not eligible to serve in a Medical Officer position and, consequently, Petitioner was not eligible to receive a PCA.***

HHS asserts that Petitioner owes a debt to the United States Government based on erroneous PCA payments made to Petitioner. Congress established the PCA to recruit and retain highly qualified government physicians. In order for a physician to receive a PCA, the physician has to agree to serve as a physician with his employing agency for a specified period of time. 5 U.S.C. § 5948(a). Although only physicians may receive the PCA, neither the statute establishing the PCA nor the regulations implementing that statute specify the requirements to be a physician with the government. *See* 5 U.S.C. § 5948; 5 C.F.R. §§ 595.101-595.107.

In the present case, NIH placed Petitioner in a Medical Officer position and entered into PCA agreements with him every two years until 2012. However, in 2012, NIH interpreted OPM's qualification standards for Medical Officers to mandate an ECFMG certification and NIH determined that Petitioner never had an ECFMG certification to prove that his foreign medical degree was equivalent to an American medical degree. Therefore, NIH considered its previous decision to allow Petitioner to hold a Medical Officer position to be erroneous. As a result, NIH issued a determination reclassifying Petitioner into a non-physician researcher position. However, this determination was subject to OPM appeal.

OPM has broad authority over classification[3] of positions in the executive branch of the federal government. OPM may:

> **(1)** ascertain currently the facts as to the duties, responsibilities, and qualification requirements of a position;
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> **(2)** place in an appropriate class and grade a newly created position or a position coming initially under this chapter;
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> **(3)** decide whether a position is in its appropriate class and grade; and
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> **(4)** change a position from one class or grade to another class or grade when the facts warrant.

5 U.S.C. § 5112(a)(1)-(4).

Despite OPM's overall authority over classification issues, each federal agency must first classify the positions within that agency in conformance with OPM's published standards and, "[w]hen facts warrant, an agency may change a position which it has placed in a class or grade . . . from that class or grade to another class or grade." 5 U.S.C. § 5107; *see also* 5 C.F.R. § 511.701(a)("A classification action is a determination to establish or change the title, series, grade or pay system of a position based on application of published position classification standards or guides."). An employee may, at any time, appeal to OPM an agency's determination as to "[t]he appropriate occupational series . . . of the employee's official position." 5 C.F.R. §§ 511.603(a)(1), 511.604(a), 511.605(a); *see also* 5 U.S.C. § 5112(b). When OPM renders a decision on appeal, that decision is final and not subject to further review. 5 C.F.R. § 511.612.

Both HHS and Petitioner have provided extensive arguments and evidence to show that Petitioner either has been or has not been properly reclassified into a non-physician position based on NIH's interpretation of OPM's requirements for Medical Officers. HHS Br. at 6-9, 12-13; HHS Response at 2 ("This Tribunal's evaluation of the issue is limited only to whether there is a proper legal basis for reclassifying Petitioner from a 602 Series to a 601 Series and whether there is a proper legal basis for removing and discontinuing Petitioner's PCA."); HHS Exs. 2-8; P. Br. at 13-16; P. Exs. 5-11, 14, 16. However, I do not have jurisdiction to decide this issue because Congress vested OPM

[3] "*Classification* means the analysis and identification of a position and placing it in a class under the position-classification plan established by OPM [under applicable law]." 5 C.F.R. § 511.101(c) (emphasis in original).

with the authority to hear appeals of agencies' classification decisions. *See Caporale v. Nat'l Aeronautics & Space Admin.,* 4 M.S.P.R. 161, 162 (1980) (Merit Systems Protection Board upholding the dismissal of a case because "classification appeals are properly filed with the agency involved or with the Office of Personnel Management. 5 C.F.R. § 511.604."). My jurisdiction is limited to determining whether a debt exists. 5 U.S.C. § 5514(a)(4). I cannot assume the review authority conferred on another agency by statute.

There is no evidence in the record that Petitioner appealed NIH's decision to OPM and received a favorable decision. In the absence of an OPM decision on Petitioner's reclassification, the NIH decision, which is authorized under statute and regulation, is the official government decision on this issue. Therefore, when determining whether a debt exists in this case, I must accept that Petitioner was retroactively reclassified to a non-physician position because he did not possess the required certification to be a physician with the federal government.

Petitioner also argues that despite NIH's reclassification, he still performed services under PCA agreements that NIH entered into with him. P. Br. at 12. Petitioner avers: "Since [Petitioner] was employed as a government physician and was qualified for such employment, had a valid agreement to receive a PCA, and performed the anticipated duties during the period of coverage, receipt of the PCA did not constitute an overpayment to the petitioner or result in a debt to the government." P. Br. at 17. Although I am sympathetic to Petitioner's argument that he fully performed under the PCA agreement, NIH's retroactive reclassification of Petitioner to a non-physician position precludes Petitioner from having received the PCA in 2012. A PCA is only available for individuals who occupy certain "Government physician" positions in the federal government. 5 U.S.C. § 5948(a), (g)(1); 5 C.F.R. § 595.101-104. According to the NIH reclassification decision, Petitioner was ineligible to serve in any of those "Government physician" positions. Therefore, applying that decision to this case, I cannot conclude that Petitioner ought to have received the PCA when he was not eligible to serve as a Medical Officer.

3. *Petitioner is indebted to the United States Government in the amount of $18,393.60*

In a May 4, 2013 notice, HHS payroll services, the Defense Finance and Accounting Service (DFAS), informed Petitioner that the gross amount of money he owed was $18,393.60. HHS Ex. 10. HHS calculated this amount based on a PCA payment of $1,149.60 made each pay period for 16 pay periods from April 7, 2012, to November 3, 2012. HHS Ex. 9. Although NIH retroactively reclassified Petitioner from 1995 forward, HHS only sought the return of $18,393.60 because DFAS's computer system

only retains certain payment information for a year and, based on the date NIH informed DFAS of the reclassification, DFAS could only generate an overpayment based on limited data. HHS Ex. 11 at 2-3. Petitioner does not dispute the amount of debt sought in the DFAS notice. P. Br. at 18. Therefore, I conclude that the amount of debt Petitioner owes is $18,393.60.

4. Petitioner's hearing petition was not baseless or filed with the intent to delay collection of the debt.

The procedural regulations in this case state that a decision must "include a determination whether the employee's petition for hearing was baseless and resulted from an intent to delay creditor agency collection activity." 45 C.F.R. § 33.6(d)(2)(ii). Although I decide this case in favor of HHS, I do so with misgiving. It is clear that NIH hired Petitioner into a Medical Officer position in 1995 and authorized him to receive a PCA after NIH determined that the medical school Petitioner attended was equivalent to an accredited American medical school. P. Ex. 2. NIH's evaluation may have been correct. *See* P. Ex. 11; P. Ex. 16 at 6-10. Further, there is no evidence that Petitioner ever attempted to mislead NIH. To the extent that Petitioner appears to have failed to appeal NIH's reclassification decision to OPM, the record indicates that NIH may not have provided Petitioner with information about his appeal rights. HHS Ex. 2 at 51-54. Finally, while I reject Petitioner's argument that he was entitled to receive the PCA due to his performance under the PCA agreement, I do not find Petitioner's argument to be frivolous or made in bad faith. Therefore, I conclude that Petitioner's hearing petition was not baseless and that there is no evidence that Petitioner filed the petition with the intent to delay collection of his debt.[4]

VI. Terms of repayment

The procedural regulations in this case indicate that a decision should address "[t]he terms of any repayment schedule, if applicable." 45 C.F.R. § 33.6(d)(2)(iii). Although it is true that an individual may request a hearing to address the terms of repayment when there is no written agreement, 5 U.S.C. § 5514(a)(2)(D), Petitioner did not raise this as an issue in this case. Therefore, I conclude that I do not need to address this matter.

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[4] In 2012, NIH officials made it clear in intra-agency emails that NIH erred in deciding to move Petitioner to the Medical Officer position and pay him a PCA; those officials also thought waiver of the PCA overpayment would be appropriate. HHS Ex. 2 at 47-49. Given these emails, I am surprised that this case has not been resolved through a waiver of overpayment under 5 U.S.C. § 5584.

VII. Conclusion

Petitioner is indebted to the United States Government in the amount of $18,393.60. This decision is the final agency decision. 5 U.S.C. § 5514(a)(2).

/s/
Scott Anderson
Administrative Law Judge