

Department of Health and Human Services

**DEPARTMENTAL APPEALS BOARD**

Civil Remedies Division

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In the Case of:	)	
	)	
Portia L. Pierce,	)	Date: December 22, 2009
	)	
Petitioner,	)	
	)	Docket No. C-09-733
v.	)	Decision No. CR2049
	)	
Social Security Administration	)	
	)	
Respondent.	)	

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**DECISION**

Petitioner, Portia L. Pierce, is indebted to the Social Security Administration (SSA) in the amount of \$8546.11, plus any accrued interest and penalty if applicable.

**I. Background**

The Department of the Interior, SSA's payroll provider, notified Petitioner by letter dated August 11, 2009, that she was indebted to the government in the amount of \$8546.11. The letter stated that if the debt was not paid within 30 days interest and a penalty would be applied. The letter stated that unless Petitioner made arrangements to pay the debt voluntarily, it would be collected by deductions from her salary. The letter included documents describing the debt collection process. The letter and accompanying documents also advised Petitioner regarding her right to request a waiver, a hearing, or to negotiate an extended repayment schedule. SSA Exhibit (Ex.) 1.

Petitioner requested a hearing to dispute the administrative determination of the existence and amount of the debt on August 28, 2009.<sup>1</sup> It is undisputed that her hearing request was timely filed with SSA. SSA Brief in Support of Debt Collection (SSA Br.) at 2. Petitioner sent her hearing request to the Director, Division of Central Accounting and Reporting, SSA, in Baltimore, Maryland. On September 1, 2009, Edwina Bailey, on behalf of Michele Bailey, Debt Management Team Leader for SSA, forwarded the request for hearing to the Civil Remedies Division (CRD) of the Departmental Appeals Board (DAB), Department of Health and Human Services (HHS). The CRD received the request for hearing on September 16, 2009.

The case was assigned to me for hearing and decision on September 21, 2009. On September 22, 2009, I issued an Order requiring SSA to file by October 2, 2009, documents and written argument establishing the debt and the amount of the debt. I gave Petitioner until October 16, 2009, to respond. On October 1, 2009, SSA filed its brief and SSA Exs. 1 through 3. On October 9, 2009, SSA moved to supplement its brief and offered SSA Ex. 4, a September 28, 2009 decision of the U.S. Department of Labor (DOL), Employment Standards Administration, Office of Workers' Comp Programs (OWCP) in Petitioner's case, which SSA alleged it received on October 2, 2009, after it had filed its brief. Petitioner did not timely file her response to the SSA brief and made no objection to the SSA motion to supplement. I issued an Order to Show Cause on October 23, 2009, requiring Petitioner to indicate whether she intended to pursue her hearing request. On October 28, 2009, Petitioner filed a request for an extension of time to obtain counsel and to submit her response. I granted the motion on October 29, 2009, and gave Petitioner until November 30, 2009, to retain counsel and file a response. To date, no attorney has entered an appearance on Petitioner's behalf. On November 30, 2009, Petitioner timely filed her response brief (P. Br.) titled "Petitioner Motion to Grant Stay of Collection Proceeding and Repay Monies Already Collected by Agency." Petitioner did not file any exhibits with her response and did not object to SSA's proposed exhibits 1 through 4. On December 3, 2009, SSA filed a reply brief (SSA

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<sup>1</sup> The hearing process for employees who are members of bargaining units represented by the American Federation of Government Employees (AFGE) is somewhat different from that for non-AFGE bargaining unit employees. SSA Ex. 1, at 9. Petitioner's hearing request indicates that she is not a member of a bargaining unit represented by AFGE, because it was sent to the Director, Division of Central Accounting and Reporting and not to the Office of Labor Relations Manager (SSA Ex. 1, at 9; Petitioner's August 28, 2009 hearing request) and I make the inference that Petitioner was not a member of a bargaining unit represented by AFGE.

Reply), accompanied by the declaration of Michele Bailey, in which Ms. Bailey states that SSA's failure to stop deductions from Petitioner's pay was administrative error and that it would refund Petitioner any money the agency had collected. In the absence of objection, I admit SSA Exs. 1 through 4.

## **II. Discussion**

### **A. Issues**

Whether Petitioner is indebted to the government; and

Whether the amount of Petitioner's indebtedness to the government, if she is found to owe a debt, is \$8546.11, 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. 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 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 Health and Human Services (HHS Secretary) and the Commissioner of SSA, 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 AFGE.

The head of each executive agency is required by 5 U.S.C. § 5514(b)(1) to issue regulations implementing its provisions.<sup>2</sup> 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),<sup>3</sup> which covered all claims collection by the Secretary through administrative offset. 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

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<sup>2</sup> 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).

<sup>3</sup> The text of 45 C.F.R. § 30.15 (1996) is available at [www.gpoaccess.gov/cfr/index.html](http://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)).

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 (as was done in this case); 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).

### **C. Findings of Fact, Conclusions of Law, and Analysis**

My conclusions of law are set forth in bold followed by a statement of the pertinent facts and my analysis.

**1. I have jurisdiction to decide the issues presented and the case is appropriate for decision on the documents and pleadings without an oral hearing.**

It is undisputed that Petitioner timely requested a hearing to challenge SSA’s determination that she is indebted to the government. It is also undisputed that Petitioner was an employee of SSA and not represented by AFGE when she filed her 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).

The Commissioner has provided by 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. Further, I find no issue of credibility or veracity necessitating an oral hearing. 45 C.F.R. § 30.15(n)(1).

**2. Petitioner is indebted to the U.S. government in the amount of \$8546.11.**

There is no dispute that Petitioner is employed in SSA's Office of Labor-Management and Employee Relations as a GS-13 Human Resources Specialist. SSA Ex. 3. Petitioner filed a claim with the DOL alleging that she sustained a work-related injury on March 24, 2009. SSA Ex. 2. Petitioner used 249.15 hours (roughly 31, eight-hour work days) of continuation of pay (COP) during her absence from work instead of using annual or sick leave. SSA Ex. 1, at 11; SSA Br. at 1-2. On May 15, 2009, the OWCP denied Petitioner's claim for compensation because the medical evidence did not demonstrate that the claimed medical condition was related to the work-related event as required for coverage under the Federal Employees' Compensation Act (FECA). SSA Ex. 2, at 1. The OWCP also provided that SSA was to charge any previously paid COP against Petitioner's sick or annual leave balance or to declare an overpayment. SSA Ex. 2, at 2. SSA amended Petitioner's time and attendance records, changing the period of COP to leave without pay (LWOP) which caused the debt. At Petitioner's pay grade, Petitioner became indebted to the government for an overpayment of pay and allowance during the period of LWOP in the amount \$8546.11, after SSA deducted amounts recoverable from third-parties. SSA Br. at 2; SSA Ex. 1, at 11; SSA Ex. 3. OWCP denied Petitioner's request to reconsider its May 15, 2009 decision on September 28, 2009. SSA Ex. 4. SSA asserts that although Petitioner's hearing request states that she is disputing whether she owes the debt, she is not disputing that she requested COP, that SSA paid her for it, or that her claims for a work-related injury were denied by OWCP initially and upon reconsideration.

Petitioner does not dispute the material facts cited by SSA. Petitioner asserts that on March 24, 2009, she sustained an on-the-job injury which was "respiratory in nature." P. Br. at 1. Petitioner relates that she was attended to by SSA co-workers and medical staff and transferred by ambulance to the hospital. She was treated and then followed-up on that treatment with her primary care physician. Petitioner relates that she completed the pertinent paperwork to file a claim for her work-related injury with SSA and OWCP. P. Br. at 1. Petitioner further relates that her supervisor had her timekeeper change her status from COP to LWOP after OWCP denied her claim. P. Br. at 1-2. Petitioner argues that she has not exhausted her appeals related to her FECA claim because she still has a right to review by the Employees' Compensation Appeals Board (ECAB) of the OWCP reconsideration decision of September 28, 2009. She advises me that she has not heard from ECAB as to when her hearing will be. P. Br. at 2. Petitioner argues that

collection of the overpayment should be stayed pending receipt of a decision from ECAB. Petitioner also complains that SSA has already “taken money from [her pay] for over 3 months” and never notified her as to the amount that they were going to deduct. P. Br. at 2.

SSA argues that FECA provides that once OWCP determines that an employee is not entitled to COP, the employee may choose to have the time charged to annual or sick leave, or charged as a salary overpayment within the meaning of 5 U.S.C. § 5584. SSA Br. at 3-4; 5 U.S.C. § 8118(d); 20 C.F.R. § 10.224. SSA asserts that because Petitioner did not choose to have the COP converted to annual or sick leave, SSA properly charged the COP to LWOP, creating the salary overpayment. SSA Br. at 3. SSA further argues that it is not required to wait to collect the debt until Petitioner exhausts her FECA appeals. SSA correctly states that if OWCP’s decision is overturned on appeal by the ECAB, SSA is required to refund any money incorrectly withheld from Petitioner’s pay. SSA Br. at 3-4.

Pursuant to 20 C.F.R. § 10.200(a), a continuation or regular pay, known as COP, is authorized for up to 45 days for an employee who suffers a traumatic on-the-job injury. An employer is required to continue the pay of an employee who is eligible for COP even though contesting the eligibility of the employee. 20 C.F.R. § 10.200(b). The final determination regarding entitlement to COP always rests with the OWCP. 20 C.F.R. § 10.221. Pursuant to 20 C.F.R. § 10.224, “[w]here OWCP finds that the employee is not entitled to COP after it has been paid, the employee may choose to have the time charged to annual or sick leave, or considered an overpayment of pay under 5 U.S.C. 5584. The employer must correct any deficiencies as directed by OWCP.” The regulation does not provide that an agency must or may wait until all appeals have been exhausted to take action to collect for COP found improper by OWCP. Indeed, the employer “must correct” any deficiencies identified by OWCP and OWCP is the final arbiter on entitlement to COP. The May 15, 2009 OWCP decision specifically states that the “employing agency will charge any previously paid Continuation of Pay to your sick and/or annual leave balance or declare it an overpayment.” SSA Ex. 2, at 2. The OWCP decision does not state that SSA must wait until all of Petitioner’s FECA appeals are exhausted. Petitioner’s remedy, should she ultimately prevail on her FECA appeal, is for SSA to refund to Petitioner any money it has incorrectly collected from her pay as required by 45 C.F.R. § 30.15(j).

In reply to Petitioner’s assertion that SSA has been deducting money from Petitioner’s pay for three months in violation of 5 U.S.C. § 5514(a)(2) and my Order of September 22, 2009, SSA acknowledged that erroneous deductions had been made and that SSA has taken action to stop the withholding and refund to Petitioner any money SSA erroneously withheld from her pay. SSA Reply at 1-2. I find no other remedy is necessary under the circumstances.

