

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Social Security Administration

v.

Antoinette McFarland,

Respondent.

Docket No. C-10-300

Decision No. CR2128

Date: May 04, 2010

DECISION

The request for hearing of Petitioner, Antoinette McFarland, is dismissed. Petitioner has waived the right to a hearing regarding the alleged debt to the government in the amount of \$884.18. The debt is subject to immediate collection by administrative offset or in any manner permitted by law.

I. Background

Petitioner requested a hearing by letter dated September 18, 2009. The Civil Remedies Division of the Departmental Appeals Board (DAB) received Petitioner's request for hearing on January 4, 2010. Petitioner's request for hearing was attached to a letter dated December 9, 2009. Edwina Bailey signed the letter for Michele Bailey, the Debt Management Team Leader for the Social Security Administration (SSA). Ms. Bailey advised in her letter that Petitioner's request for hearing was forwarded for review and scheduling of a hearing and that Petitioner was a current employee of SSA.

The case was assigned to me on January 12, 2010. On January 20, 2010, I issued an Order for Submission of Documents and Written Argument that established a schedule for briefing and the submission of evidence. On February 12, 2010, SSA filed a motion requesting that it be granted a three-day extension of time to file its brief and supporting evidence, because federal offices in Washington, D.C. and Baltimore were closed for three days due to severe weather. The SSA brief and supporting evidence were filed with its motion for an extension. I granted the SSA motion by my Order Amending the Order for Submission of Documents, dated February 12, 2010, and SSA's brief and SSA exhibits (SSA Ex.) 1 through 5 were accepted for filing.

Pursuant to the amended schedule, Petitioner was to file her written argument and exhibits not later than March 5, 2010. No submission was received from Petitioner as of April 2, 2010. Petitioner was ordered to show cause not later than April 12, 2010, why her request for hearing should not be dismissed for untimely filing as SSA urged. The Order to Show Cause also advised Petitioner to file any written argument or documentary evidence not later than April 12, 2010. Petitioner filed a letter dated April 5, 2010 that is marked P. Ex. 1. SSA Exs. 1 through 5 and P. Ex. 1 are admitted and considered as evidence.

II. Discussion

A. Issue

Whether Petitioner's request for hearing must be dismissed, because it was not timely filed.

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. The notice must inform the employee of the nature and amount of the debt determined to be due, and the agency's intention to effect collection through deduction from the employee's pay. 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 Administrative Law Judge (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 (Secretary) of Health and Human Services (HHS) and the Commissioner of SSA (Commissioner), through their delegees, have provided by Interagency Agreement that ALJs assigned to the DAB, which is part of HHS, 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.

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

¹ 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).

² 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

(continued...)

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 the requirements of 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).

² (...continued)

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. Petitioner is a not a bargaining unit employee and her request for hearing is properly before me.**
- 2. Petitioner's request for hearing was not timely filed.**
- 3. Dismissal of Petitioner's request for hearing is required.**

Petitioner's request for hearing is dated September 18, 2009. She alleges in her request for hearing that her servicing personnel office erroneously advised her to file a request for waiver of indebtedness rather than a request for hearing. She states that the request for waiver was denied. She alleges in her request for hearing that the overpayment was due to an administrative error, and its collection would be against equity and good conscience and a financial hardship.

The packet of materials received from Ms. Bailey at SSA includes a letter dated September 8, 2009, to the Department of Interior's Payroll Operations Division regarding Petitioner and states that Petitioner's request for waiver of an overpayment in the amount of \$884.18 that occurred during pay period 14 of 2009 was denied. The packet included a letter dated September 2, 2009, addressed to Petitioner from Geri Bortz, Director, Human Resources of SSA that advised Petitioner that her waiver request was denied. Also included was a letter to Petitioner dated August 24, 2009, signed by Geri Bortz that confirmed receipt of Petitioner's request for waiver of overpayment dated August 24, 2009.

Petitioner states in her letter to me dated April 5, 2010 (P. Ex. 1) that she received the notice of overpayment dated August 10, 2009, but she does not state the date on which it was received. She states, however, that on August 23, 2009, she was advised by a representative of her servicing personnel office that it was quicker to file a request for waiver of the overpayment than to request a hearing. Petitioner states that: this was her first overpayment; she was misinformed by her personnel office; and the overpayment was the result of an administrative error. P. Ex. 1.

SSA alleges that Petitioner is a non-bargaining unit employee and that her request for hearing is properly before me pursuant to the Interagency Agreement. SSA Brief at 1, 4; SSA Ex. 4. Absent any evidence to the contrary, I conclude that Petitioner is a non-bargaining unit employee and that her request for hearing is properly before me pursuant to the Interagency Agreement.

SSA argues that Petitioner's request for hearing was not timely filed and must be dismissed. SSA Brief at 3. SSA Exhibit 1 is a copy of the notice of indebtedness to Petitioner dated August 10, 2009. The notice advised Petitioner that an amendment of her time and attendance records resulted in her receiving an overpayment of employee pay. Exhibit 7 to the notice letter advised Petitioner that the amount of the debt owed was \$884.18, based upon adjustment of leave used during pay period 14 of 2009. SSA Ex. 1, at 11. Exhibit 4, 5, and 6 to the notice advised Petitioner of her due process rights, including the right to a hearing. SSA Ex. 1, at 7-10. Exhibit 6 to the notice advised Petitioner that her request for hearing "must be postmarked no later than 15 days from the date of this letter." SSA Ex. 1, at 9. Exhibit 6 also advised Petitioner that "[a] debtor who fails to meet a filing deadline or to request an extension waives the right to a hearing and will be subject to offset [i.e., collection of the debt by administrative offset]." SSA Ex. 1, at 9-10.

Collection of Petitioner's debt to the government is subject to 5 U.S.C. § 5514 and 42 C.F.R. § 30.15 (1995). Pursuant to 5 U.S.C. § 5514(a)(2), a hearing will be provided to an alleged employee-debtor if a petition requesting a hearing is filed "on or before the fifteenth day following receipt of the notice" of the alleged debt. The regulation is more specific regarding the time for filing a request for a hearing and the effect of the failure to timely file.

The request must be postmarked no later than 15 days (unless otherwise provided by statute or regulation) from the date the notice was mailed to the debtor. . . . The Secretary may grant an extension or excuse a delay if the debtor shows good cause for late filing of a request for a hearing. A reasonable extension will be granted only if the debtor shows that the delay was caused by circumstances beyond the debtor's control or because the debtor did not receive notice, and was not otherwise aware of the time limit. A debtor who fails to meet the filing deadline or to request an extension waives the right to a hearing and will be immediately subject to offset.

42 C.F.R. § 30.15(1).

The provision of the statute that the running of the 15 days for filing a request for hearing begins on the date of receipt of indebtedness controls in this case. 5 U.S.C. § 5514(a)(2). However, the evidence does not reflect the date on which Petitioner actually received the August 10, 2009 notice of indebtedness. SSA Ex. 1. SSA did not submit a certified mail receipt, and Petitioner did not mention a date of receipt in her request for hearing, or in her April 5, 2010 letter to me (P. Ex. 1). I may infer, however, that she received the notice on or before August 23, 2009, because Petitioner states in P. Ex. 1 that she spoke to a representative of her servicing personnel office about the notice on that day.

Furthermore, the August 27, 2009 letter to Petitioner, from Geri Bortz attached to Petitioner's request for hearing, acknowledges receipt of Petitioner's August 24, 2009 request for waiver of the overpayment.

I accept for purposes of this decision that Petitioner received the August 10, 2009 notice of indebtedness not later than August 24, 2009, the date of her request for waiver. Petitioner's request for hearing is dated September 18, 2009, which is 25 days after her receipt of the notice of indebtedness on August 24, 2009. The only excuse Petitioner offers for not filing her request within 15 days of receipt, as required by 5 U.S.C. § 5514(a)(2) and 42 C.F.R. § 30.15(l), is that she was "given misinformation on what to file—waiver vs. hearing." Request for Hearing.

In her letter dated April 5, 2010, Petitioner asserts that a representative of her personnel office recommended that she request a waiver by email, because it was faster to request a waiver first. P. Ex. 1. I conclude that Petitioner has not established good cause for granting her an extension of time for filing her request for hearing. She does not deny that she received notice of the alleged debt and notice of her right to request a hearing within 15 days. She does not deny that the copy of the notice of indebtedness dated August 10, 2009, with its seven exhibits (SSA Ex. 1), is an accurate copy of the notice she received not later than August 24, 2009. I find that the notice of debt is clear and unequivocal in advising Petitioner of her right to request a hearing to dispute the existence or amount of the debt.

The notice was also clear that the request for hearing had to be filed no later than 15 days from the date of the notice. SSA Ex. 1, at 9. The notice is also clear and unequivocal in advising Petitioner of her right to request a waiver of the overpayment and resulting debt, if Petitioner "did not dispute the validity of the debt . . ." SSA Ex. 1, at 8. Petitioner states in her letter dated April 5, 2010, that she told the representative of her personnel office on August 23, 2009, that as a non-bargaining employee she should file a request for hearing if she disagreed with the debt. P. Ex. 1. Petitioner's election to request a waiver first, rather than request a hearing, was clearly within her control and not a circumstance beyond her control, even if I accept that she received bad advice from her personnel office.

I conclude that Petitioner waived the right to hearing on the alleged debt based upon the language of 42 C.F.R. § 30.15(l), i.e. "[a] debtor who fails to meet the filing deadline or to request an extension waives the right to a hearing and will be immediately subject to offset." I further conclude that there is no reason to further delay the government's collection of the debt by administrative offset.

III. Conclusion

For the foregoing reasons, I conclude that Petitioner has waived the right to hearing regarding the alleged debt to the government in the amount of \$884.18. The debt is subject to immediate collection by administrative offset or in any manner permitted by law.

/s/
Keith W. Sickendick
Administrative Law Judge