Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Anthony J. Mazzarella,

Petitioner,

v.

Department of Health and Human Services

Docket No. C-17-407

ALJ Ruling No. 2017-21

Date: June 20, 2017

RULING

While still employed by the U.S. Department of Health and Human Services (HHS), Anthony Mazzarella (Petitioner or Mr. Mazzarella) allegedly incurred a debt of $25,300. Before HHS discovered the alleged debt, Mr. Mazzarella retired. In June of 2008, Mr. Mazzarella was sent a notice that stated, among other things, that he owed the debt and that he may request a hearing concerning the amount of the debt, the validity of the debt, or the repayment schedule. Over eight years later, on March 29, 2017, Mr. Mazzarella requested a hearing to challenge the existence of the debt. Due to the unique circumstances of this case, I conclude that I lack jurisdiction to hold a hearing or issue a decision in this case. In the alternative, even if I had jurisdiction over this case, I would conclude that Petitioner has waived his right to a hearing because he filed his hearing request over eight years after receiving notice of the alleged debt and has not shown good cause for the late filing. I therefore dismiss the case with prejudice.

I. Background and Procedural History

On February 27, 2017, Petitioner sent a letter (P. Letter) along with 16 attachments that he organized with tabs, labeled Tab 17-Tab 32, to the Departmental Appeals Board (DAB). The letter and attachments were originally directed to the Appellate Division,

which received them on March 1, 2017, but were forwarded to the Civil Remedies Division (CRD) the next day, March 2, 2017. In the letter, Petitioner made a series of assertions related to events that occurred beginning in January 2007. I accept as true for purposes of this ruling the facts that follow, which are based on the assertions found in Petitioner's letter and on the attachments to that letter.

According to Petitioner, and relevant to this case, as of January 2007, Petitioner was a federal employee who was placed on administrative leave without pay while the Centers for Medicare & Medicaid Services (CMS) investigated him for alleged misconduct. P. Letter at 2. He remained on leave without pay until January 2008, when the Merit Systems Protection Board (MSPB) denied CMS's appeal of the MSPB's earlier ruling that Petitioner did not commit misconduct. P. Letter at 2. The MSPB ordered CMS to pay Petitioner back pay plus interest for the time he was on leave without pay, which CMS paid in two installments during consecutive pay periods, on February 2 and February 16, 2008. P. Letter at 2. Thereafter, Petitioner retired from federal service on May 8, 2008. P. Letter at 2.

In June 2008, Petitioner received a letter from the Defense Finance and Accounting Service (DFAS) dated June 12, 2008, that alleged that "[a]n overpayment ha[d] been generated on [his] pay account . . . . The gross amount of [the] overpayment . . . is $25,300.00." P. Letter at 2; P. Tab 17 at 2.[1] The letter informed Petitioner that he "may request a hearing concerning the amount, validity of the debt, or the repayment schedule." The letter further stated that if he wished to request a hearing, he should "submit [a] written request within 30 days from the date of this letter to [his] civilian payroll office." P. Tab 17 at 2.

After receiving the letter from DFAS, Petitioner did not request a hearing. Rather, he "wrote back asking for the details/specifics of the alleged overpayment." P. Letter at 2. DFAS responded to his letter and sent him documentation related to the alleged overpayment on July 14, 2008. P. Letter at 2; P. Tab 18. Petitioner believed that the documentation provided by DFAS in response to his letter contradicted its allegation that he was overpaid; he thus wrote back to DFAS to inquire further. P. Letter at 1-3. DFAS did not reply to his further inquiry and at the time did not attempt to withhold money from his federal pension. P. Letter at 3. Petitioner "took DFAS'[s] lack of response and action as acknowledgment of their error and moved on with [his] life." P. Letter at 3.

[1] I cite Petitioner's tabs according to their pagination in the electronic record after they were scanned and uploaded in portable document format (PDF). Thus, for example, "P. Tab 17 at 2" corresponds to page 2 of the PDF file that contains a digital copy of the document that was included in the hard copy of Petitioner's Tab 17 that Petitioner mailed to us.

In February 2016, Petitioner received a letter from a debt collection company informing him that his alleged debt to HHS was in default as of December 3, 2015, and requesting payment on the debt. P. Letter at 3; P. Tab 19. Petitioner contacted the collection company, and later HHS, to inquire about the letter and the debt. P. Letter at 3; P. Tabs 20, 21. HHS eventually responded by sending him copies of master pay records for the pay periods for which Petitioner received back pay and the pay periods ending February 2 and February 16, 2008. P. Letter at 3; P. Tab 22. Thereafter, in July 2016, Petitioner's pension payment "contained a 25% offset" meant to recoup his alleged debt to HHS. P. Letter at 4. After months of back and forth with HHS, Senator Barbara Mikulski's office, and CMS, Petitioner sent the aforementioned February 27, 2017 letter to the DAB.

After the CRD received Petitioner's February 27, 2017 letter, this case was assigned to me. I issued an Order dated March 8, 2017, in which I acknowledged Mr. Mazzarella's letter and noted, among other things, that his letter did not include a request for hearing regarding the debt he allegedly owed HHS. Order at 1. I noted also that it was unclear whether Petitioner had a right to a hearing and whether I had the authority to conduct such a hearing. Order at 2-3. I therefore ordered each of the parties to "submit a memorandum of law addressing whether Petitioner has a right to a hearing and, if he does, whether I have the authority to conduct the hearing." Order at 3.

In response to my order, Petitioner filed a formal request for hearing (P. RFH) on March 29, 2017, which included a brief argument regarding his right to a hearing and my authority to conduct the hearing. P. RFH at 1. By contrast, HHS failed to respond to my Order and further failed to appoint a representative to enter an appearance on its behalf in this case. HHS's failure to participate in this case occurred despite the efforts of CRD staff and management to notify the department of these proceedings. Had I not concluded, as explained below, that Petitioner has no right to a hearing in this case, I would likely have sanctioned HHS for its failure to comply with my Order. As the matter stands, however, there is no legal basis for me to entertain Petitioner's hearing request.

II. Issues

The first issue that must be resolved is whether Petitioner has a right to a hearing in this case. A related issue is: if Petitioner has a right to a hearing, whether I have been delegated authority to conduct such a hearing. Finally, if both the foregoing issues are resolved in Petitioner's favor, a third issue is whether Petitioner may exercise his right to a hearing over eight years after being notified of the alleged debt.

III. Discussion

A. Applicable Legal Authorities

Before I may hold a hearing or address the merits of Petitioner's case, I must first conclude that I have jurisdiction (i.e., the "power to decide a case or issue a decree," Blacks Law Dictionary (10th ed. 2014) available at Westlaw BLACKS) over the case. This power is sometimes referred to as "subject-matter jurisdiction." The question of jurisdiction is one that cuts to the heart of judicial power over a case or controversy and thus "can never be waived or forfeited," and it is of such importance that "courts . . . have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). For me to have jurisdiction over the case, I must conclude that Petitioner has a right to a hearing over which I have the authority to preside. Such a right must be found in either a statute or regulation that both gives Petitioner the right to a hearing and gives me the authority to conduct that hearing; I cannot create a hearing right or grant myself the authority to hold a hearing in the absence of such affirmative authority. *See Conchita Jackson, M.D.*, DAB No. 2495 at 9 (2013) ("[T]he language in the letter alone could not (and did not) create a right to appeal the CAP determination where neither Congress nor CMS has provided such a right."); *see also Integrated Diagnostic of South Florida, Inc.*, DAB CR2508 at 2-3 (2012). If I determine that no such provision exists and therefore that I lack jurisdiction over this case, I must dismiss it notwithstanding HHS's failure to participate. *Cf. Arbaugh*, 546 U.S. at 514 ("when a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety").

The authorities that may confer subject-matter jurisdiction on me include the statute codified at 5 U.S.C. § 5514, and HHS regulations codified at 45 C.F.R. parts 30, 32, and 33. I summarize the applicable provisions below. I first describe the statute and its implementing regulations at 45 C.F.R. part 33. I next describe 45 C.F.R. part 30, which was superseded by part 33 in some respects, but survives in other respects. Finally, I describe 45 C.F.R. part 32, which Petitioner argues is applicable to his case.

5 U.S.C. § 5514

Section 5514 of Title 5 U.S.C. authorizes administrative agency heads, such as the Secretary of HHS (Secretary), to collect debts owed to the agency by federal employees by deductions from the employees' current pay. 5 U.S.C. § 5514(a)(1).[2] The statute further provides: "If the individual retires or resigns, or if his employment . . . otherwise ends, before collection of the amount of the indebtedness is completed, deduction shall be

[2] I cite to the 2008 edition of the U.S.C.; that version includes amendments through Pub. L. 110-181, 122 Stat. 162 (January 28, 2008).

made from subsequent payments of any nature due the individual from the agency concerned." *Id.*

The statute provides the following regarding an alleged debtor's right to a hearing:

> (2) Except as provided in paragraph (3) of this subsection, prior to initiating any proceedings under paragraph (1) of this subsection to collect any indebtedness of an individual, the head of the agency holding the debt or his designee, shall provide the individual with—
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> > (A) a minimum of thirty days written notice, informing such individual of the nature and amount of the indebtedness determined by such agency to be due, the intention of the agency to initiate proceedings to collect the debt through deductions from pay, and an explanation of the rights of the individual under this subsection;
> > (B) an opportunity to inspect and copy Government records relating to the debt;
> > (C) an opportunity to enter into a written agreement with the agency, under terms agreeable to the head of the agency or his designee, to establish a schedule for the repayment of the debt; and
> > (D) an opportunity for a hearing on the determination of the agency concerning the existence or the amount of the debt, and in the case of an individual whose repayment schedule is established other than by a written agreement pursuant to subparagraph (C), concerning the terms of the repayment schedule.
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> A hearing, described in subparagraph (D), shall be provided if the individual, on or before the fifteenth day following receipt of the notice described in subparagraph (A), and in accordance with such procedures as the head of the agency may prescribe, files a petition requesting such a hearing. The timely filing of a petition for hearing shall stay the commencement of collection proceedings. A hearing under subparagraph (D) may not be conducted by an individual under the supervision or control of the head of the agency, except that nothing in this sentence shall be construed to prohibit the appointment of an administrative law judge. The hearing official shall issue a final decision at the earliest practicable date, but not later than sixty days after the filing of the petition requesting the hearing.

5 U.S.C. § 5514(a)(2).

Effective March 8, 2007, the Secretary promulgated 45 C.F.R. part 33 to implement 5 U.S.C. § 5514.[3] *See* 72 Fed. Reg. 10,419, 10,419-20 (Mar. 8, 2007).

45 C.F.R. part 33

The Secretary's regulations implementing 5 U.S.C. § 5514 are found at 45 C.F.R. part 33. The purpose of part 33 is to "prescribe[] the Department's standards and procedures for the collection of debts owed by Federal employees to the United States through involuntary salary offset." 45 C.F.R. § 33.1(a). The Secretary may collect on such debts through involuntary offsets of HHS employees' salaries so long as he follows the procedures set forth in 45 C.F.R. § 33.3(b)-(d). 45 C.F.R. § 33.3(a). Notably, "employee" is defined as "any individual *currently* employed by [a federal] agency." 45 C.F.R. § 33.2 (emphasis added). The regulation does not include language parallel to that in 5 U.S.C. § 5514 regarding collection from former employees or retirees.

Before initiating a salary offset, the Secretary must, subject to exceptions not applicable here, provide the employee with "[w]ritten notice of intent to offset as described in [45 C.F.R.] § 33.4" and "[a]n opportunity to petition for a hearing, and, if a hearing is provided, to receive a written decision from the hearing official within 60 days . . . ." 45 C.F.R. § 33.3(c). A hearing under part 33 is presumed to consist of a "review of the documentary evidence"; an oral hearing will only be provided upon a determination that the issues in dispute cannot be resolved by review of the written record. 45 C.F.R. § 33.2. A hearing official is "a Departmental Appeals Board administrative law judge or appropriate alternate as outlined in [45 C.F.R.] § 33.7(a)(2)." *Id.*

Section 33.6 sets forth the hearing procedures that apply. The regulation provides that an alleged debtor must file a hearing request within 15 days after receiving the notice described above. 45 C.F.R. § 33.6(a)(1). The failure to file a timely hearing, if not excused, operates as a waiver of the right to a hearing. 45 C.F.R. § 33.6(b)(2). Late filing may be excused if "the delay was the result of circumstances beyond the employee's control, or . . . the employee failed to receive actual notice of the filing deadline." 45 C.F.R. § 33.6(b)(2).

45 C.F.R. part 30

Prior to the publication of 45 C.F.R. part 33, "[i]nvoluntary salary offset was . . . included in the Department's more general claims collection regulations at 45 CFR part 30." 72 Fed. Reg. at 10,420. Within 45 C.F.R. part 30, administrative offsets by HHS were governed by the regulation at 45 C.F.R. § 30.15. Section 30.15 specified that it applied to "[o]ffset of debts owed by former employees from final salary and lump sum payments;

[3] As discussed below, prior to 2007, 5 U.S.C. § 5514 was implemented through 45 C.F.R. part 30.

and from the Civil Service Retirement and Disability Fund" among other debtors and other federal payments. 45 C.F.R. § 30.15(c)(2) (2006).[4] Pursuant to 45 C.F.R. § 30.15, before implementing administrative offset, HHS was required to notify a debtor of (among other things) the right to request a hearing. 45 C.F.R. § 30.15(j)(4)(iii). A hearing request was required to be postmarked within 15 days of the date notice was mailed to the debtor. 45 C.F.R. § 30.15(*l*). Late filing of the hearing request could only be excused upon a showing that the delay was caused by circumstances beyond the debtor's control or if the debtor did not receive notice, and was not otherwise aware of the time limit. *Id.* The regulation made clear the expectation that, in most cases, a "hearing" would consist of a "review of the record," (i.e., a review of the documentary evidence) unless the hearing officer determined that an oral hearing was necessary to determine, for example, an issue of credibility. 45 C.F.R. § 30.15(n)(1); *see also* 45 C.F.R. § 30.15(b)(2). The regulation defined "Hearing Officer" to include an independent contractor of HHS, an employee of another federal agency, or an administrative law judge. 45 C.F.R. § 30.15(b)(3).

When 45 C.F.R. part 33 was promulgated, many of the provisions that previously appeared in 45 C.F.R. § 30.15 were moved to part 33. Further, after March 8, 2007, 45 C.F.R. part 30 was reorganized and its sections renumbered. 72 Fed. Reg. 10,404, 10,409-19 (Mar. 8, 2007). Thereafter (and currently), the remaining administrative offset provisions in 45 C.F.R. part 30 have appeared at 45 C.F.R. § 30.12.[5] Rather than speaking of a "hearing," section 30.12 provides for a "review within the Department of the determination of indebtedness." 45 C.F.R. § 30.12(c)(2)(ii)(B). Moreover, 45 C.F.R. § 30.12 no longer speaks of a "hearing officer." Further, in describing the review HHS is to provide, the regulation specifies that the Secretary[6] will undertake the review in accordance with the following procedures:

> (1) For purposes of this section, whenever the Secretary is required to afford a debtor a review within the Department, the debtor shall be provided with a reasonable opportunity for an oral hearing when the debtor requests reconsideration of the debt and the Secretary determines that the question of the indebtedness cannot be resolved by review of the documentary evidence, for example, when the validity of the debt turns on an issue of credibility or veracity.

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[4] All citations in this paragraph are to the 2006 edition of the C.F.R.

[5] Citations in this paragraph and following are to the 2007 edition of the C.F.R.

[6] "Secretary" is defined as the Secretary of HHS or the Secretary's designee. 45 C.F.R. § 30.2. However, part 30 does not identify a designee.

> (2) Unless otherwise required by law, an oral hearing under this section is not required to be a formal evidentiary hearing, although the Department will carefully document all significant matters discussed at the hearing.
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> * * *
>
> (4) In those cases when an oral hearing is not required by this section, the Secretary shall accord the debtor a "paper hearing," that is, a determination of the request for reconsideration based upon a review of the written record.

45 C.F.R. § 30.12(e).

45 C.F.R. part 32

Petitioner argues that the regulations at 45 C.F.R. part 32 apply to his case. P. RFH at 1. I therefore provide this brief summary of the relevant provisions. Part 32 was promulgated to implement the administrative wage garnishment provisions of the Debt Collection Improvement Act of 1996. *See* 68 Fed. Reg. 15,092 (March 28, 2003). According to the drafters, the purpose of the rule is to allow HHS "to garnish the disposable pay of *non-Federal employees* to collect delinquent non-tax debts owed to the United States without first obtaining a court order." *Id.* at 15,092 (emphasis added). Accordingly, 45 C.F.R. part 32 authorizes the Secretary to issue orders to employers to withhold up to 15% of a debtor's disposable pay. 45 C.F.R. §§ 32.6, 32.8. However, the regulation excludes federal agencies from the definition of employer:

> *Employer* means a person or entity that employs the services of others and that pays their wages or salaries. The term employer includes, but is not limited to, State and local Governments, but does not include an agency of the Federal Government as defined by 31 CFR 285.11(c).[7]

45 C.F.R. § 32.2. Furthermore, 45 C.F.R. § 32.1 plainly limits the scope of part 32 to non-federal wages:

> This part does not apply to the collection of delinquent non-tax debts owed to the United States from the wages of Federal employees from their Federal employment. Federal pay is subject to the Federal salary offset procedures set forth in 5 U.S.C. 5514 and other applicable laws.

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[7] The cross-referenced provision defines a federal agency as "a department, agency, court, court administrative office, or instrumentality in the executive, judicial, or legislative branch of the Federal Government, including government corporations." 31 C.F.R. § 285.11(c).

45 C.F.R. § 32.1(c)(5). Debtors subject to 45 C.F.R. part 32 are afforded hearing rights pursuant to 45 C.F.R. § 32.5. Any such hearing is conducted by a "hearing official." 45 C.F.R. § 32.5(c), (d). A "hearing official" is defined as "any qualified individual, as determined by the Secretary, including a Departmental Appeals Board administrative law judge." 45 C.F.R. § 32.2. Similar to the provisions of 45 C.F.R. part 33, the hearing under part 32 is presumed to consist of a "review of the documentary evidence" unless the "hearing official determines that the issues in dispute cannot be resolved solely by review of the written record." *Id.; see also* 45 C.F.R. § 32.5(c), (d). Failure to file the hearing request timely does not operate as a waiver of the right to a hearing under part 32, but if the request is untimely the Secretary may proceed to offset the employee's salary while the hearing is pending. 45 C.F.R. § 32.5(b)(3).

As explained more fully below, 45 C.F.R. part 32 plainly does not apply to Petitioner and, therefore, does not provide a basis to grant him a hearing. While it is arguable that 5 U.S.C. § 5514, as implemented through 45 C.F.R. part 33, may apply to Petitioner's situation, or that 45 C.F.R. part 30 may apply as a stop-gap, those conclusions are far from clear. However, even if I assume that Petitioner once may have had a right to a hearing pursuant to 45 C.F.R. part 30 or 33, that hearing right cannot survive Petitioner's eight-year delay in seeking to exercise that right.

B. Conclusions of Law and Analysis

1. Petitioner does not have a right to a hearing pursuant to 45 C.F.R. part 32.[8]

Petitioner contends that he has a right to a hearing and that I have jurisdiction to conduct such a hearing pursuant to the regulations found at 45 C.F.R. part 32, particularly 45 C.F.R. §§ 32.2 and 32.5. P. RFH at 1. I disagree. It is true that, as a Departmental Appeals Board administrative law judge, I am authorized by 45 C.F.R. part 32 to hold hearings, when requested by certain debtors. 45 C.F.R. §§ 32.2; 32.5(c), (d). However, it is clear that Petitioner is not within the category of debtors granted hearing rights under the regulations at 45 C.F.R. part 32. This is so because, as noted above, the purpose of part 32 is to permit the Secretary of HHS to collect debts from workers who are not federal employees by offsetting the salaries paid them by employers that are not federal agencies.

In cases where an individual owes a delinquent debt to HHS, 45 C.F.R. § 32.3 empowers the Secretary (or another federal agency collecting a debt on HHS's behalf) to "initiate proceedings administratively to garnish the wages of the delinquent debtor." The term "garnishment" is defined as "the process of withholding amounts from an employee's disposable pay and paying those amounts to a creditor in satisfaction of a withholding

[8] My conclusions of law appear as numbered headings in bold italic type.

order." 45 C.F.R. § 32.2. In turn, "disposable pay" is defined, in relevant part, as "compensation" paid by an "employer." *Id.* As described above, the term "employer" specifically excludes agencies of the federal government. *Id.* The regulation establishing a debtor's right to a hearing at 45 C.F.R. § 32.5 cannot be read in isolation to permit any debtor to seek a hearing to contest the validity of a debt allegedly owed to HHS. *Cf. King v. Burwell*, 135 S.Ct. 2480, 2492 (2015) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (quoting *Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S.Ct. 2427, 2441 (2014))). Rather, as 45 C.F.R. §§ 32.2-32.4 make clear, the right to a hearing established by 45 C.F.R. § 32.5 applies to debtors who face administrative garnishment by HHS of their compensation from their non-federal-agency employer. Petitioner is not seeking a hearing to contest administrative garnishment of wages to be paid him by a non-federal employer. Therefore, Petitioner does not have a right to a hearing under 45 C.F.R. part 32.

2. The hearing rights in 5 U.S.C. § 5514 are not self-executing.

Concluding that the regulations at 45 C.F.R. part 32 do not grant Petitioner a right to a hearing does not end the inquiry into my jurisdiction over Petitioner's case. Pursuant to 5 U.S.C. § 5514, federal agency heads are authorized to collect debts owed to the United States by current federal employees by offset against the employees' federal pay. 5 U.S.C. § 5514(a)(1). However, before initiating any collection action under subsection (a)(1), the agency head must provide the alleged debtor with, among other things, written notice and the opportunity for a hearing. 5 U.S.C. § 5514(a)(2)(A), (D). Significantly, the statute also addresses retirees: "If the individual retires or resigns, or if his employment . . . otherwise ends, before collection of the amount of the indebtedness is completed, deduction shall be made from subsequent payments of any nature due the individual from the agency concerned." 5 U.S.C. § 5514(a)(1). However, the provisions of section 5514(a)(2) do not, standing alone, confer a hearing right on Petitioner or authorize me to provide such a hearing. This is because the statute requires agency heads to "prescribe regulations . . . to carry out [5 U.S.C. § 5514.]" 5 U.S.C. § 5514(a)(2), (b)(1). The Secretary of HHS has issued implementing regulations at 45 C.F.R. part 33. 72 Fed. Reg. 10,419.

3. The HHS regulations implementing 5 U.S.C. § 5514 do not apply to retired federal employees and thus do not give Petitioner a right to a hearing.

The Secretary's regulations carrying out 5 U.S.C. § 5514 are found at 45 C.F.R. part 33. As summarized above, the regulations at 45 C.F.R. part 33 authorize the Secretary to collect debts owed by federal employees via salary offset. Before initiating salary offset, the Secretary must provide the employee with written notice and the opportunity for a hearing before a designated hearing official, who may be a Departmental Appeals Board

administrative law judge. 45 C.F.R. §§ 33.2, 33.3, 33.4. Importantly, however, the regulation defines the term "employee" to include only individuals "currently employed by an agency . . . ." 45 C.F.R. § 33.2. Petitioner was no longer a current employee at the time he received notice of his alleged indebtedness to HHS. The regulatory drafters did not explain why 45 C.F.R. part 33 neglects to implement the portion of 5 U.S.C § 5514 that extends to federal retirees and to other former federal employees. In any event, even though I am empowered to hold a hearing under 45 C.F.R. part 33, those regulations do not apply to Petitioner and thus do not afford him a right to a hearing.

4. Petitioner's right to a hearing, if one exists, must be based on 45 C.F.R. part 30.

Because the Secretary did not rescind 45 C.F.R. part 30 when part 33 was promulgated, part 30 still must have a role in the administrative debt collection process. At a minimum, it seems that part 30 must apply to administrative offsets that do not meet the more specific criteria to fall within 45 C.F.R. part 32 or part 33. As explained above, Petitioner does not have a hearing right pursuant to 45 C.F.R. part 32 because the Secretary is not attempting to collect Petitioner's alleged debt by garnishing his non-federal wages. Nor does Petitioner have a right to a hearing pursuant to 45 C.F.R. part 33 because he was not a "current" federal employee at the time he was notified of the debt. If, consistent with 5 U.S.C. § 5514, the Secretary intended for federal retirees and other former federal employees to have some right to review of an alleged debt prior to administrative offset, that right must be through 45 C.F.R. part 30. Thus, Petitioner's rights, if any, must be those defined in part 30.

5. I find no authority delegating to me the power to hold a hearing in this case pursuant to 45 C.F.R. part 30.

After the Secretary promulgated 45 C.F.R. part 33 and reorganized 45 C.F.R. part 30 in 2007, it is not clear that the hearing rights retained in part 30 are intended to be as extensive as those in part 33, nor is it clear that the Secretary has delegated authority to administrative law judges to hold such hearings. As described above, the part 30 regulations use the term "review" rather than "hearing" when describing the process that is due debtors.[9] Also, the regulation does not identify the reviewing official except as the Secretary. Further, the terms "hearing officer" and "hearing official" do not appear in 45 C.F.R. part 30. Thus, the part 30 regulations do not delegate the authority to conduct a

[9] The conclusion that the regulation intends a different meaning of a "review" and a "hearing" is reinforced by the language at 45 C.F.R. § 30.11, which states that a demand for payment must explain a debtor's right to "[s]eek review of the Department's determination of the debt, *and for purposes of administrative wage garnishment or salary offset, to request a hearing . . . .*" 45 C.F.R. § 30.11(b)(1)(iv)(A) (emphasis added) (cross-referencing 45 C.F.R. parts 32 and 33).

review to administrative law judges, and I am aware of no sub-regulatory delegation from the Secretary to the administrative law judges of the Departmental Appeals Board regarding 45 C.F.R. part 30.

I do note that 45 C.F.R. § 30.12 grants a right to an oral hearing in the limited circumstance where the reviewer determines that the issues in a given case cannot be decided based on a review of the documentary evidence alone. 45 C.F.R. § 30.12(e)(1). In the event such an oral hearing is required, the part 30 regulations cross-reference the part 33 hearing procedures. 45 C.F.R. § 30.2 (definition of hearing: "[s]ee 45 CFR 33.6(c)(2) for oral hearing procedures that may be provided by the Secretary"). Thus, it appears that, if a departmental reviewer designated by the Secretary referred such a case for an oral hearing, a Departmental Appeals Board administrative law judge could hold such a hearing pursuant to the procedures in 45 C.F.R. § 33.6. However, the regulations do not specify a mechanism for such a referral.

For all these reasons, I am unable to find a clear delegation of authority to me to conduct a hearing under the unique circumstances of Petitioner's case. Nevertheless, as I explain in the following section, even if I were empowered to hold a hearing in this case, I would decline to do so because Petitioner's delay in filing his hearing request operates as a waiver of any right to a hearing he may have had.

6. Even if 45 C.F.R. § 30.12 gave Petitioner a right to a hearing and authorized me to hold such a hearing, Petitioner has waived the right to a hearing by failing to file his hearing request timely.

Assuming, for the sake of argument, that Petitioner had a right to a hearing pursuant to 45 C.F.R. § 30.12(e) and that I have authority to hold such a hearing, I would still conclude that Petitioner's hearing request must be dismissed. Section 30.12(e) provides debtors with a "reasonable opportunity" for a hearing. To determine what is "reasonable," I look to the regulation at 45 C.F.R. § 33.6 for guidance.[10] Pursuant to section 33.6, the failure to file a timely hearing request operates as a waiver of the right to hearing unless the failure is excused. 45 C.F.R. § 33.6(b)(2). In this case, there is no basis to excuse Petitioner's late filing. Accordingly, it is not reasonable to grant him a hearing under the circumstances.

Under the regulations, if a debtor files a hearing request untimely, "the Secretary may grant the request if the [debtor] can establish that the delay was the result of

[10] I find it appropriate to look to 45 C.F.R. § 33.6 for guidance as to what is "reasonable" for two reasons. First, 45 C.F.R. § 30.2 cross-references the hearing procedures at 45 C.F.R. § 33.6(c)(2). Second, the hearing procedures formerly found at 45 C.F.R. § 30.15(*l*) similarly provided that, if unexcused, an untimely hearing request would operate as a waiver of the right to a hearing.

circumstances beyond the [debtor]'s control, or that the [debtor] failed to receive actual notice of the filing deadline." 45C.F.R. § 33.6(b)(1). Assuming that I may exercise the Secretary's authority to determine whether to grant an untimely hearing request,[11] I would not do so here because Petitioner has established neither that the delay in filing was due to circumstances beyond his control nor that he failed to receive actual notice of the filing deadline.

The notice letter informing Petitioner of his alleged indebtedness was dated June 12, 2008. Tab 17 at 2. The record does not reveal the exact date on which Petitioner received the letter, but he has at no time denied that he received it near in time to the date it was sent. Yet, he did not formally request a hearing until March 29, 2017—more than eight years later. The notice letter Petitioner received in June 2008 informed him that he "may request a hearing concerning the amount, validity of the debt, or the repayment schedule." Tab 17 at 2. The letter informed him that he should submit the hearing request "within 30 days from the date of this letter."[12] *Id.*

Instead of requesting a hearing, Petitioner sent a letter to DFAS requesting information about the alleged debt. P. Letter at 1-2. After DFAS sent him information in response to his letter, he wrote back asking about that information but received no response. He claims that he interpreted the information DFAS provided, along with its failure to respond to his questions about that information and its further failure to initiate an offset of his federal pension, as an acknowledgment by DFAS of an error on its part. He decided based on this assumption to "move[] on with [his] life." P. Letter at 3. Petitioner was certainly entitled to take that risk, but that explanation for his actions after receiving the notice letter does not establish that his failure to file a hearing request timely was due to circumstances beyond his control. He would have been well within his rights to pursue a hearing while also contacting DFAS directly about the alleged debt, but he chose not to do so. Thus, assuming that at one point he had a right to a hearing under 45 C.F.R. § 33.6, as incorporated by reference in 45 C.F.R. part 30, I would find that he waived that right by first failing to file his hearing request timely and then failing to establish good cause excusing his failure to file timely under 45 C.F.R. § 33.6(b)(1).

In sum, neither 5 U.S.C. § 5514 nor the regulations at 45 C.F.R. part 32 or 33 afford Petitioner the right to a hearing. It is arguable that Petitioner may have had a right to a

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[11] Similar to the language of 45 C.F.R. § 30.12, as described above, 45 C.F.R. § 33.6(b)(1) uses the term "Secretary" and not "hearing official" to describe who grants the hearing request. Thus, for the same reasons, it is not entirely clear that the administrative law judge has been designated to exercise this authority.

[12] The instruction to submit a hearing request within 30 days was inconsistent with the regulation at 45 C.F.R. § 33.6(a)(1), which requires a debtor to request a hearing within 15 days after receiving notice of the alleged indebtedness.

hearing pursuant to the regulations at 45 C.F.R. part 30; however, there is no indication that the Secretary has delegated authority or referred the case to me to hold such a hearing. In any event, whatever hearing right Petitioner may have had has been waived due to his unexcused delay in filing his hearing request. In light of the foregoing, I conclude that Petitioner is not entitled to a hearing in this case.

IV. Conclusion

I dismiss this case with prejudice for lack of jurisdiction. In the alternative, if I have jurisdiction over Petitioner's hearing request pursuant to 45 C.F.R. part 30, I conclude that the case must be dismissed because Petitioner has waived his right to a hearing. Petitioner's delay of more than eight years before filing a hearing request is unreasonable; further, Petitioner has not shown that his failure to file timely was for reasons beyond his control.

As explained above, the regulations governing administrative offset of debts owed to HHS do not clearly afford Petitioner a right to a hearing under the circumstances of this case. For many of the same reasons, it is not clear whether the regulations contemplate further administrative review of my ruling. For example, 45 C.F.R. § 32.5(i) provides that the hearing official's decision "will be the final agency action for the purposes of judicial review under the Administrative Procedures Act." However, neither 45 C.F.R. part 33 nor 45 C.F.R. part 30 includes parallel language. It is therefore unclear whether my ruling represents the final agency action under those regulations. If my ruling is not the final agency action, it would ordinarily be reviewed by the appellate division of the DAB. Appendix A to 45 C.F.R. part 16 lists the disputes subject to administrative review by the DAB. Debt cases arising under 5 U.S.C. § 5514 are not among the disputes listed in the Appendix. However, paragraph G of the Appendix explains that there is a procedure by which the Chair of the DAB will determine whether, in questionable cases, the DAB will review the case. Petitioner may request review by the DAB and the DAB will determine whether it will review the case; or, if Petitioner so chooses, Petitioner may file an appeal in federal district court, and the court will decide whether it has jurisdiction. Nothing prevents Petitioner from pursuing these options simultaneously.

/s/
Leslie A. Weyn
Administrative Law Judge