

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
)	
Qin Ryan, M.D., Ph.D.,)	
)	Date: July 8, 2009
Petitioner,)	
)	
- v. -)	Docket No. C-08-277
)	Decision No. CR1970
Defense Finance and Accounting)	
Service.)	

Petitioner, Qin Ryan, M.D., Ph.D., was overpaid salary in the amount of \$8461.01 for pay periods ending April 29, 2006 through February 3, 2007.

I. Background

Petitioner is employed as a Medical Officer by the Department of Health and Human Services (DHHS or Department), Food and Drug Administration (FDA), Center for Drug Evaluation and Research (CDER). On January 20, 2007, Petitioner received a letter from the Defense Finance and Accounting Service (DFAS), the entity responsible for the payment of salary to DHHS employees, notifying her that an overpayment had been generated on her pay account for pay periods ending April 29, 2006 through September 30, 2006, totaling \$5280 (both the gross and net amounts). By letter dated February 14, 2007, Petitioner timely requested a hearing regarding the amount and validity of the debt. By letter dated March 3, 2007, DFAS notified Petitioner that an overpayment had been generated on her pay account for pay periods ending October 14, 2006 through February 3, 2007, the gross amount being \$4480 (the net amount \$3751). By letter dated March 13, 2007, Petitioner timely requested a hearing regarding the amount and validity of that debt.¹

¹ Petitioner requested waivers of the overpayments on June 8, 2007, and the waiver requests are pending. I do not have the authority to rule on Petitioner's waiver requests as the Secretary has not granted me the authority to do so on my own or asked me to do so in this case. *See* Attachment B to DFAS's Brief filed December 30, 2008.

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On July 31, 2007, the office of Senator Benjamin L. Cardin sent a letter² to DFAS noting that Petitioner had filed requests for hearing in February and March of 2007 and that no hearing had been scheduled. The Senator's letter further requested that DFAS do "anything you can do to resolve Dr. Ryan's payroll issues . . . [and] provide information as to when she may be scheduled for a hearing." In response, on January 9, 2008, DFAS forwarded Senator Cardin's letter and accompanying documents to the Rockville Human Resources Center of DHHS for "appropriate action." My office received Senator Cardin's letter and accompanying documents on February 7, 2008. The case was assigned to me for hearing and decision on February 13, 2008. Following prehearing conferences on March 3 and 19, 2008, I issued an Order dated March 20, 2008, in which I framed the issue in the case as "whether an overpayment exists and, if so, what the amount of the overpayment is." I then set a schedule for the parties to brief the issues.³

On April 9, 2008, DFAS (through its representative Michael Watson, Director of the Rockville Human Resources Center) submitted a brief (DFAS Brief) accompanied by DFAS exhibits (DFAS Exs.) R1-R11. Petitioner submitted her response (P. Brief)

¹(...continued)

Thus, I do not address the issue of waiver in this decision. I note that in DFAS's final response to Petitioner's reply dated March 10, 2009, DFAS stated that Petitioner's waiver requests have been received by FDA and will be considered once Petitioner has received a "final decision from the Agency's hearing official," i.e., my decision in this case.

² Accompanying the letter were documents sent by Petitioner to Senator Cardin's office, including: a June 26, 2007 letter from Petitioner to Senator Cardin; a January 20, 2007 letter from DFAS to Petitioner notifying Petitioner of an overpayment; a February 14, 2007 letter from Petitioner to DFAS requesting a hearing, with supporting documentation; a March 3, 2007 letter from DFAS notifying Petitioner of an overpayment; a March 13, 2007 letter from Petitioner to DFAS and to the Rockville Human Resources Center requesting a hearing, with supporting documentation; two letters dated June 8, 2007 requesting waivers of repayment of debt from Petitioner to DFAS and the Rockville Human Resources Center, accompanied by three letters of support by FDA, CDER officials recommending the waiver.

³ Both parties have asked for several extensions in their briefing in this case. I granted their requests in order to allow Petitioner, a Departmental employee who is appearing pro se, is accused of no misconduct, and has worked assiduously to redress problems with her pay over several years, and the DFAS representative, who is not an attorney, the time they requested in order to allow them to fully evaluate the case and explain their respective positions to me.

on May 30, 2008, accompanied by Petitioner's exhibits (P. Exs.) P1-P20. DFAS replied to Petitioner's response on August 7, 2008 (DFAS Reply). Petitioner submitted a sur-reply (P. Reply) on September 14, 2008, accompanied by P. Exs. P21-P25.

On September 25, 2008, I informed the parties that I would hold an in-person prehearing conference prior to issuing a decision in the case. I held the conference on November 25, 2008. In my summary of the conference I addressed topics discussed, noting once again the limits of my authority and that my delegated authority is only to decide whether an overpayment exists and the amount of the debt owed. I specifically informed the parties that I did not have the delegated authority to decide whether a debt can be waived or to issue a default judgment against the government.⁴ I noted that Petitioner had agreed in her submissions, and during the conference, that an overpayment did exist, but that she disputed the amount of the overpayment. Specifically, although DFAS now asserts that the overpayment amounts to \$8891.01 (less than the amount cited in the two notice letters), Petitioner asserts that the amount of the overpayment is only \$8458.01, a difference of \$433.79. To resolve this difference, I gave the parties time to brief the issue of whether a \$433.79 overpayment exists.⁵

On December 30, 2008, DFAS submitted its brief (DFAS Brief 2), accompanied by DFAS Exs. A-K. Petitioner responded on January 29 and 31, 2009 (P. Brief 2 January 29 and P. Br. 2 January 31), and with an e-mail addendum on February 4, 2009 (P. Brief 2 February 4), accompanied by P. Exs. P26 (filed with P. Br. 2 January 29) and P27 (filed with P. Br. 2 January 31). After reviewing P. Brief 2, I determined that Petitioner had raised issues not previously addressed by the parties. Thus, by Order dated February 3, 2009, I requested that DFAS respond specifically to the issues raised by Petitioner in that briefing 2.⁶ DFAS submitted its "Final Response to Petitioner" (DFAS Reply 2) on

⁴ Nor do I have the authority to consider other issues raised by Petitioner, including how DFAS generally administers pay systems (which would include DFAS's policy regarding rounding of numbers, as referenced at P. Brief at 3, 19-25; P. Reply at 5, 19; P. Ex. P15).

⁵ Also during this conference, DFAS agreed to provide Petitioner with the Department's policy for filing waiver requests, specifically addressing who Petitioner should file her waiver request with, and the status of the waiver requests previously filed by Petitioner. DFAS did so in its March 10, 2009 submission.

⁶ One of the issues raised by Petitioner, which I asked DFAS to address, related to the authenticity of documents placed in the record. The authenticity of the documents in question does not impact my decision in this case. However, the issues raised by
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March 10, 2009. Petitioner submitted her reply (P. Reply 2) dated March 21, 2009, accompanied by P. Ex. P28. On March 24, 2009, DFAS submitted an addendum to its Final Response (DFAS Addendum), accompanied by an attached document it stated was a mass pay retention worksheet for FDA, CDER. I have marked this document as DFAS Ex. L.⁷ Petitioner submitted a response to the DFAS Addendum (P. Addendum Response) on April 10, 2009, accompanied by P. Ex. P29 and P. Ex. P30. I admit P. Exs. P1-P30 and DFAS Exs. R1-R11 and DFAS Exs. A-L into the record. I closed the record in the case on April 15, 2009, the date I received Petitioner's Addendum Response.

II. Applicable Law

The debt collection regulations of the Secretary of Health and Human Services (Secretary) governing administrative hearings pursuant to 5 U.S.C. § 5514, at the time the notice letters were sent, were found at 45 C.F.R. Part 30. These regulations were revised effective March 8, 2007. 72 Fed. Reg. 10419 (March 8, 2007). However, as the alleged overpayment and the notice letters regarding these overpayments were generated prior to March 8, 2007, I apply the prior regulations here. I note that applying the revised regulations would not change the outcome in this case.

The regulations provide no right to a hearing except in the case of administrative offset. Section 30.15 of 45 C.F.R. provides for notice and a review or hearing by a hearing officer, who may be an administrative law judge, before administrative offset may be

⁶(...continued)

Petitioner are troubling and are not addressed by DFAS's assertion that a delay in transmission of documents to Petitioner's electronic personnel file was the cause of her concerns relative to the authenticity of documents in the record. *See* P. Brief 2 January 29, at 8; P. Reply 2, at 5-10; P. Addendum Response, at 5.

⁷ By e-mail dated May 5, 2009, DFAS asserted it was submitting a document to rebut Petitioner's argument that the document DFAS submitted with its March 24, 2009 Addendum was not authentic. By e-mail on May 15, 2009, Petitioner stated that she would be replying to the DFAS e-mail. By e-mail on July 7, 2009, Petitioner asserted that she had submitted a response. As I do not rely on DFAS Ex. L in my decision, and never gave the parties permission to supplement the record, I do not rely on, or admit into the record of this case, these documents. I will, however, retain the documents submitted in the record file.

effected. The Secretary has provided that the agency's failure to comply with the procedures specified by the debt collection regulations is not a defense to any debtor. 45 C.F.R. § 30.10.⁸

III. Analysis

A. Petitioner received an overpayment of salary.

Both parties agree that Petitioner received an overpayment of salary, and only disagree as to the amount of that overpayment. Summary of November 25, 2008 Prehearing Conference.

B. The amount of the overpayment is \$8461.01.

As a physician employed by FDA, CDER, Petitioner's pay has consisted of base pay for her grade level, a locality adjustment, and some form of physician retention payment. These forms of special pay have successively been termed a retention allowance, retention incentive pay, and, finally, market pay. Different formulas have gone into determining the amount of pay. Prior to April 16, 2006, Petitioner received a retention allowance. Petitioner's retention allowance was converted to retention incentive pay effective April 16, 2006 (the start of the first pay period covered by the notice letters). Retention incentive pay was terminated on September 30, 2006, when Petitioner's pay was converted to market pay. During this period, errors were made in Petitioner's pay and Petitioner was overpaid. Petitioner admits the overpayment for the lion's share of the amount claimed by DFAS (P. Ex. 23), and, in this decision, I am only concerned with addressing the amount in contention between the parties, which is \$433.79. I discuss each element of the amount in dispute below.

Petitioner asserts that the \$433.79 in contention is broken down as follows:

1. \$399.70 Retention Allowance from 1/6/06-4/15/06 owed to Petitioner, the difference consisting of the amount claimed by Petitioner for these pay periods minus the amount DFAS said should have been paid (\$455.50 retention allowance claimed by Petitioner for these pay periods and the \$397.60 DFAS asserts is owed).

⁸ Although neither DFAS nor the Department addressed Petitioner's hearing requests timely or forwarded them to me timely, their inaction does not affect my review of whether Petitioner owes a debt. Thus, the regulations do not allow me to consider Petitioner's request that a default judgment be entered against DFAS. The DFAS or Department failures, although patent, are not defenses to repayment of Petitioner's debt.

2. \$1.54 Base Pay from 1/6/06-4/15/06 owed to the Government.
3. \$4.86 Base Pay 4/16/06-12/23/06 owed to Petitioner.
4. \$26.01 Physician Comparability Allowance (PCA) 1/6/06-4/15/06 owed to Petitioner.
5. \$4.76 rounding corrections from 1/06-3/07 owed to Petitioner.

P. Br. 2, January 29, 2009, at 3, 13; January 31, 2009, at 1.

At DFAS Br. 2, at 2, DFAS asserts that the disputed amount consists of:

1. \$397.60 Retention Allowance.
2. \$1.54 Base Pay from 1/8/06-4/15/06.
3. \$4.86 Base Pay 4/29/06-12/23/06.
4. \$26.01 PCA.
5. \$3.63 Petitioner's Adjustment.
6. \$.15 Unknown.

The majority of the amount in dispute, related to the disputed retention allowance payments for pay periods 1/6/06 to 4/15/06, is outside the period covered by either of the notice letters. As Petitioner notes in P. Br. 2 January 31, only disputes of pay alleged during the pay periods covered by the two notice letters in this case are at issue. If I were to consider pay periods not reflected in the notice letters, the parties could bring up discrepancies occurring in Petitioner's pay at any point during Petitioner's tenure with the FDA, CDER (and Petitioner has asserted problems with her pay going back a number of years). DFAS's response to Petitioner's assertion with regard to the fact that a majority of the \$433.79 was not covered by either of the two debt letters was not helpful to me. DFAS stated:

Although the overpayments were made to Petitioner in January through April 2006, the actual debt was generated by Defense Finance and Accounting System) (sic) DFAS in June 2006, placing it within the debt letter period. In all Agency Responses, it was made clear that the sources for payroll documents calculations are from DFAS, which handles payroll for FDA employees. The RHRC is the source of personnel actions and coordinates pay actions with DFAS. The RHRC simply processed pay actions from FDA CDER worksheets.

DFAS Reply 2, at 2. DFAS's response does not explain why I should consider anything other than payments made during the periods covered by the notice letters. Moreover, the assertion that payments made during January through April were somehow generated by DFAS in June 2006, when the notice letters clearly refer to overpayments during pay periods ending April 29, 2006 through September 30, 2006 and October 14, 2006 through February 3, 2007, makes no sense. Petitioner appears to clear up the discrepancy by noting that the disputed \$397.60 consists of payments offset by DFAS in June 2007, payments DFAS noted in its initial brief dated April 9, 2008 were "unrelated to either of the debt letters." DFAS Brief at 3. Since this amount was unrelated to the debt letters, I will not consider in contention as an overpayment the Retention Allowance through pay periods ending 4/15/06.⁹ For the same reason, I also will not consider as an overpayment the PCA of \$26.01 for pay periods ending 4/15/06.

This leaves in contention the \$4.86 in base pay from 4/29/06-12/23/06. This is based on a difference in calculations between the parties, Petitioner calculating that she should have been paid \$4092.27 per pay period and DFAS calculating that Petitioner should have been paid \$4092 per pay period. DFAS Br. 2. I am not authorized to look into the formula by which DFAS calculates pay, and I would normally find that Petitioner owes the \$4.86. However, as noted by Petitioner, DFAS's submissions do not respond directly to Petitioner's arguments with regard to the \$4.86 base pay correction. Therefore, I find that Petitioner was not overpaid \$4.86 during these pay periods. The only other money at issue here is Petitioner's contention that rounding errors of \$4.76 occurred from 1/06-3/07. Roughly one third of that time was outside of the pay periods noticed. Thus, Petitioner is arguing approximately \$3.00 worth of rounding errors during the pay periods

⁹ Petitioner also argues that DFAS should not have offset this money and that \$397.60 should be returned to her. P. Addendum Response, at 8-11. I am not authorized to order DFAS to do so, although the evidence submitted by Petitioner indicates she may well be correct that the \$397.60 is owed to her. P. Ex. P2, at 5, 29. The payment in question was generated outside of the pay periods delineated in the notice letters, and my authority is limited to deciding whether a debt exists and the amount of the debt, whether or not it would be more economical for me to decide this issue since it has already been raised and briefed. Such economies do not confer the authority to take action upon me.

covered by the notice letters. I find Petitioner was overpaid \$3.00 during those pay periods. Thus, I find that Petitioner was overpaid \$3.00 out of the \$433.79 in contention as an overpayment.

IV. Conclusion

During the relevant pay periods Petitioner was overpaid. The overpayment in this case amounts to \$8461.01.

/s/
Alfonso J. Montano
Administrative Law Judge