

UNITED STATES OF AMERICA  
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

JENNIFER M. SMITH,

Petitioner.

HUDALJ No. 11-F-044-SO/1

August 30, 2011

**RULING AND ORDER ON GOVERNMENT'S  
MOTION FOR SUMMARY JUDGMENT**

Currently before the Court is the *Government's Motion for Summary Judgment*. ("Motion"), filed on August 11, 2011. In the Motion, the Department "asks this Court to determine that there is no genuine issue of fact concerning the existence and the amount of the \$3,116.19 debt owed by Petitioner, and respectfully requests that the Court enter an Order (1) finding that Petitioner owes a debt to the Department in the amount of \$3,116.19; and (2) upholding the Secretary's proposed offset schedule." (Mem. in Supp. of Gov't Mot. for Summ. J. [hereinafter Summ. J. Mot.], 1.) For the reasons given below, the Motion is **GRANTED** in part and **DENIED** in part.

**STANDARD OF REVIEW**

Pursuant to 24 C.F.R. § 26.29(l), this Court is authorized to "decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact[.]" Summary judgment will be granted where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574 (1985); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Summary judgment is a "drastic device" because when exercised, it cuts-off a party's right to present its case. Nationwide Life Ins. Co. v. Bankers Leasing Ass'n, Inc., 182 F.3d 157, 160 (2d Cir. 1999). "Accordingly, the moving party bears a heavy burden of demonstrating the absence of any material issues of fact." Id. In reviewing a motion for summary judgment, the reviewing court must "resolve all ambiguities and draw all reasonable inferences in favor of the party defending against the motion." Id.

**Undisputed Facts**

1. Sometime around September 2007, the Department's Human Resources/Pay, Benefits, and Retirement Division (PBRD) misinformed Petitioner that her disabled son would no longer be eligible for health insurance coverage under her Aetna Self and Family FEHB Plan

(“Family Plan”) once her son turned 22 years old. (Hr’g Req. 2; Summ. J. Mot. 3.)

2. Petitioner relied on this erroneous information and promptly enrolled her son in Temporary Continuation of Coverage (TCC) to ensure that her son’s medical coverage would not be cancelled. (Hr’g Req. 2; Summ. J. Mot. 3.)
3. Contemporaneously, Petitioner cancelled her family coverage and enrolled herself in the Aetna Self Only FEHB (“Self Only Plan”). (Summ. J. Mot. 3.)
4. From September 30, 2007 through December 19, 2009, Petitioner paid a total of \$2,337.26 for her Self Only Plan and \$8,572.15 for her son’s TCC. (Id.)
5. Sometime around November 2009, Petitioner contacted the National Finance Center (NFC) and was told that her son was still eligible for health insurance coverage under her Family Plan because he was disabled prior to turning 22 years old. (Hr’g Req. 2; Summ. J. Mot. 4.)
6. On or about November 17, 2009, Respondent contacted the PBRD and informed them of their error. (Hr’g Req. 2; Summ. J. Mot. 4.)
7. On or about November 25, 2009, documentation necessary for continuing/re-enrolling Petitioner’s son under her Family Plan was sent to the PBRD office by her son’s medical physician. (Hr’g Req. 2; Summ. J. Mot., Ex. 12.)
8. On December 22, 2009, L’Tanya Sesker, Supervisory H.R. Specialist for the Department’s PBRD, e-mailed Petitioner and confirmed details of an earlier conversation. (Summ. J. Mot., Ex. 11, (“Sesker E-Mail”).)
9. Ms. Sesker informed Petitioner that:
  - (1) her Family Plan would be retroactively reinstated effective September 30, 2007;
  - (2) her son’s TCC would be cancelled and all premiums paid since November 1, 2007 would be refunded;
  - (3) she would owe the difference between the premiums for her Self Only Plan and Family Plan; and
  - (4) she would be notified once the amount she owed for the difference between plans was calculated.

(Summ. J. Mot., Ex. 11.)

10. On December 24, 2009, Petitioner received another e-mail from Ms. Sesker informing her that “Sara Blank at Aetna confirmed that [Petitioner] and [her son] have been re-enrolled under Aetna’s family coverage, effective 9/30/07.” (Summ. J. Mot., Ex 13.)
11. On January 4, 2010, Petitioner contacted the PBRD and asked for an update regarding her son’s insurance coverage and the completion of the calculation of the amount Petitioner

owed for the difference between her Self Only Plan and Family Plan. (Summ. J. Mot., Ex. 13.)

12. On January 4, 2010, Ms. Sesker responded to Petitioner's inquiry and informed her that an emergency enrollment would be processed in 24 to 48 hours, and that her bill from NFC for the difference between the Self Only Plan and Family Plan would be approximately \$3,189. (Id.)
13. On January 11, 2010, Ms. Sesker sent an e-mail to Petitioner explaining that Petitioner would be receiving a refund check for \$8,572.14, which represented the amount Petitioner paid for her son's TCC. (Waiver Denial 2.)
14. The January 11<sup>th</sup> e-mail from Ms. Sesker also explained that Petitioner would be receiving a bill in the amount of \$3,116.19, which represented the difference between the Self Only Plan and the Family Plan. (Id.)
15. On or about February 3, 2010, Petitioner was issued a refund of \$8,572.14, which was the amount Petitioner paid for her son's TCC. (Hr'g Req. 1; Summ. J. Mot., Ex. 13.)
16. On March 4, 2010, Petitioner e-mailed Ms. Sesker to inquire when she could expect a bill from the PBRD or Aetna. (Id.)
17. On March 9, 2010, Petitioner sent an e-mail to Ms. Sesker and Zakiyyah Day, the Director of the PBRD, asking when she would receive a bill from PBRD or Aetna. (Id.)
18. On March 9, 2010, Ms. Sesker responded to Petitioner's inquiry by explaining that she was out of the office and would "have Patty Quattrone check to see if NFC has created the bill, and get back to you." (Id.)
19. On April 13, 2010, Petitioner e-mailed Ms. Sesker, Ms. Day, and Ms. Quattrone asking, "[a]gain, can someone please tell me when I will be receiving a bill for the insurance payment to Aetna?" (Id.)
20. Ms. Quattrone, HR Specialist for PBRD, responded on April 13, 2010 and informed Petitioner that she "proceesed [sic] the manual request 01/06/2010 . . . it takes approximately 4 to 6 weeks for the bill to generate. The bill was generated approximately in PP02 for \$3,116.19, and is [sic] mailed to the residence address you have in the system. NFC started collecting on the bill in PP05. \$57.58 was deducted in PP05 and PP06." (Id.)
21. On April 13, 2010, Ms. Quattrone again e-mailed Petitioner stating, "I've sent a request to NFC to put your bill on hold for 5 pay periods, and to refund you the deductions in PP05 and PP06. I will provide you a copy of the bill and options that are afforded you regarding repayment and a request to waive the salary offset." (Id.)

22. On May 10, 2010, Petitioner submitted a waiver request to the PBRD for the \$3,116.19 debt that she was alleged to have owed to the Department. (Summ. J. Mot., Ex. 15 ¶ 3; Notice of Intent 2.)
23. Petitioner's first waiver request was denied by the PBRD. (Notice of Intent, 2.)
24. The Policy Development Staff conducted a "second level of review of [Petitioner's] waiver request" and denied Petitioner's waiver request after "considering all relevant materials including e-mails transmitted between [Petitioner] and the PBRD." (Id. at 1.)

## DISCUSSION

This Court has been designated to conduct a hearing on the Secretary's determination of the debt, the amount of the debt, or the percentage of disposable pay to be deducted each pay period. 24 C.F.R. §§ 17.128(g) and 17.129(a) and (b).

The Department contends "the undisputed facts show that Petitioner owes a valid debt to the Department in the amount of \$3,116.19." (Summ. J. Mot. 2.) In support of its argument, the Department notes that employees "are responsible for paying the enrollee share of the cost of enrollment for every pay period during which they are enrolled." (Id. at 8 (citing 5 C.F.R. § 890.502(a)(1)).) The Department also cites 5 C.F.R. § 890.103(a) as its authority to "make retroactive corrections of administrative errors" (Summ. J. Mot. 8), and asserts that, "[w]hen such retroactive corrections are made, they are subject to withholdings and contributions under the provisions of § 890.502." (Summ. J. Mot., 8 (citing 5 C.F.R. § 890.103(e)).) The Department adds that, "Petitioner has provided no evidence to suggest that this debt does not exist or that the amount calculated is incorrect, instead focusing on the issue of hardship in her Request for Hearing." (Summ. J. Mot. 2.)

In response, Petitioner alleges that, "there is a genuine dispute as to the material facts that she owes the Government any funds. Further, Petitioner denies any indebtedness to the Government and has not been provided any proof of the debt alleged to be owed." (Opp'n to Summ. J. Mot. 1.) Petitioner also "maintains that if any debt is owed, collection would be against equity and good conscience and not in the best interest of the United States." (Id.) In support of her argument, Petitioner asserts that her "waiver request did not receive the fair consideration it should have due to retaliation from the agency for exposing or disclosing their failure to correctly provide information during the process. Petitioner clearly meets the criteria for a waiver being that Petitioner has acted in good faith and relied on the information provided to her. . . ." (Id. at 3-4.) Petitioner also claims that, "[a]s a direct result of the agency's failure to provide correct information, Petitioner has suffered and continues to suffer financial damages and mental anguish." (Id.)

Indeed, the Department acknowledges that Petitioner was given erroneous information by the PBRD, which resulted in Petitioner having to enroll her disabled son in a TCC at a higher cost to ensure his medical coverage. (Summ. J. Mot. 3.) Only after Petitioner made a separate inquiry directly to NFC in November 2009, did she discover that the information she received

from the office designated by HUD to handle its employees' benefits was erroneous. (Undisputed Facts (UF) 5.) Petitioner notified the PBRD on or about November 17, 2009 about its error and the PBRD began the process of correcting its error. (UF 6; Summ. J. Mot. 4-5.) After well over a month, the PBRD confirmed that Petitioner and her son had been re-enrolled in the Family Plan. (UF 10, 12.) It would not be until February 3, 2010, that Petitioner would receive a refund for the TCC coverage she paid on behalf of her disabled son due to the PBRD's mistake. (UF 15.) Then, after numerous inquiries by Petitioner—many of which were unanswered—the PBRD informed Petitioner that she owed \$3,116.19 for the difference in coverage, and that a portion of her balance had already been deducted from her pay check without her knowledge. (UF 20.)

The Court agrees with Petitioner that the undisputed facts certainly raise the issue of whether it was “against equity and good conscience” for the Department to deny Petitioner's waiver request. However, the statutes and regulations governing salary offsets by the federal government do not permit this Court to consider and resolve such an issue. The case at bar is limited to the existence and amount of the debt, and the Secretary's proposed offset schedule. 24 C.F.R. § 17.129(a). With regard to the existence and amount of the debt, the Secretary has established that Petitioner owes a valid debt to the Department in the amount of \$3,116.19 and that the Department had the authority to retroactively correct its administrative error. Once the retroactive correction was made, in this case clearly made with Petitioner's knowledge, Petitioner was responsible for paying the enrollee share of the cost of enrollment for every pay period in question. As such, the Department's summary judgment motion is **GRANTED** on the issues of the existence and amount of the debt alleged to be owed by Petitioner.

The Department also asserts that, “because Petitioner did not specifically object to the percentage of pay to be deducted from each check as required by 24 C.F.R. § 17.129(b), there is no need to have a hearing on that issue and the Government's proposed salary offset schedule should be upheld.” (Summ. J. Mot., 2.) 24 C.F.R. § 17.129(b) states:

The petition [for a hearing] must be signed by the employee and should admit or deny the existence of or the amount of the debt, or any part of the debt, briefly setting forth any basis for a denial. If the employee objects to the percentage of disposable pay to be deducted from each check, the petition should state the objection and the reasons for it. The petition should identify and explain with reasonable specificity and brevity the facts, evidence and witnesses which the employee believes support his or her position.

24 C.F.R. § 17.129(b).

In her request for hearing, Petitioner claims she “had to endure a second mortgage on [her] home to afford to pay for the additional monthly medical coverage which amounted to \$400 per month to ensure [her] son retained coverage” after she was erroneously told that her family plan would no longer cover him. (Hr'g Req. 1.) Petitioner argues that “[t]his additional debt created a major hardship for [her] and [her] family.” (*Id.*) Although Petitioner acknowledges that she received a refund for the TCC, she states that she is “making monthly

payments back to [her] bank to repay [her] second mortgage with interest.” (Id.)

The Court takes judicial notice of the fact that Petitioner was *pro se* when she made her request and finds that her hardship argument sufficiently constitutes an objection to the Secretary’s proposed offset schedule. As the Department has failed to produce any evidence to suggest that the percentage of disposable pay to be deducted from each of Petitioner’s pay checks is proper, the Court finds that a hearing is still warranted on this issue. As such, the Department’s summary judgment motion is **DENIED** on the salary offset schedule issue.

### CONCLUSION

When all inferences and ambiguities are drawn in the light most favorable to Petitioner’s allegations, the law requires that the Department’s Motion must be granted with respect to the existence and amount of the debt owed by Petitioner. However, a hearing is still necessary to decide the issue of the Secretary’s proposed offset schedule.

It is **ORDERED** that the Department’s Motion for Summary Judgment is **GRANTED** with respect to the existence and amount of the debt and **DENIED** with respect to the Secretary’s proposed offset schedule.

\_\_\_\_\_/s/\_\_\_\_\_  
Alexander Fernández  
Administrative Law Judge