

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

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Docket No. 16-0075

In re:

CHARLES MAXIMOWICZ,

Petitioner.

**ORDER VACATING DECISION AND ORDER FILED MAY 13, 2016 AND  
DISMISSING PETITION AS MOOT**

On April 8, 2016, Charles Maximowicz (“Petitioner”) requested a hearing pursuant to the regulations governing Federal Salary Offset (7 C.F.R. Subpart G, 7 C.F.R. § 3.70 *et seq.*). The purpose of the hearing was to determine whether Petitioner owed a debt to the Office of Administrative and Financial Management (“AFM”; “Respondent”) of the United States Department of Agriculture (“USDA”) and, if so, the propriety of imposing administrative wage offset.

On May 11, 2016, the Hearing Clerk’s Office received a copy of an email dated April 26, 2016 in which Renee Picanso, Associate Director of the National Agricultural Statistics Service (“NASS”), notified Petitioner of a “retirement code error update.” Due to a clerical error, however, OALJ was not immediately notified of the correspondence. The email advised that NASS would pay the employee retirement contributions that Petitioner had been retroactively billed for. Specifically, the email stated:

. . . . Today, I can share that the USDA Office of General Counsel has now authorized NASS to pay the employee contribution to the Federal Employee Retirement System (FERS) for which you were being retroactively billed. This was

a long and tedious path that has thankfully led us to a favorable outcome. As of now:

- All bills for employee insufficient contributions from the day you were hired until the error was corrected have been cancelled.
- If you do see another payroll deduction for retroactive payment, please contact Paulicia Cato ([Paulicia.Cato@ARS.USDA.GOV](mailto:Paulicia.Cato@ARS.USDA.GOV)) immediately so she can address the issue.
- You will be reimbursed for any retroactive payments you have made, whether through payroll deductions or through a lump sum payment.

You will not be back-billed further and you will be reimbursed for any payments you have made. Your current and future retirement contributions will continue to be at the corrected level as indicated by law based on your hiring date. It may take some time before you receive the reimbursement, as it will require actions by AFM, the National Finance Center, and others whose timing is outside NASS control. However, we wanted to notify you of this good news as soon as possible. We will continue to stay on top of the issue until each of your individual situations has been resolved.

On May 12, 2016, Administrative Law Judge Janice K. Bullard (“Judge Bullard”) conducted a telephonic hearing in the matter. Petitioner appeared as his own representative and testified. Vivian Brooks-Marshall, Operations Specialist, Office of the Director, National Institute of Food and Agriculture, represented Respondent and testified.

On May 13, 2016, Judge Bullard issued a Decision and Order subjecting Petitioner to salary offset and holding Petitioner responsible for the government’s overpayments to the retirement system. The Decision and Order did not take into account the April 26, 2016 correspondence that was received by the Hearing Clerk’s Office two days prior.

Upon consideration of the newly acquired evidence in this matter, I find that the Decision and Order must be vacated. I further find that the April 26, 2016 correspondence from NASS referenced *supra* provides Petitioner with the relief requested in the Petition and, therefore, that the Petition should be, and the same hereby is, dismissed as moot.

Accordingly, it is hereby ordered that the Decision and Order entered May 13, 2016 is **VACATED** and the Petition is **DISMISSED**.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk via regular mail.

So ORDERED this 26<sup>th</sup> day of May, 2016, at Washington, D.C.



*[Handwritten signature]*  
**Bobbie J. McCartney**  
Chief Administrative Law Judge

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BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 16-0075

In re:

CHARLES MAXIMOWICZ,

Petitioner

**DECISION AND ORDER**

**I. PRELIMINARY STATEMENT**

This matter is before the Office of Administrative Law Judges (“OALJ”) upon the March 3, 2016, filing of a request by Charles Maximowicz (“Petitioner”) for a hearing to address the existence or amount of a debt alleged to be due to the Office of Administrative and Financial Management (“AFM”; “Respondent”) of the United States Department of Agriculture (“USDA”), and if established, the propriety of imposing administrative wage offset.

**II. PROCEDURAL HISTORY**

I set a hearing to commence by telephone on May 12, 2016. On April 8, 2016, Respondent filed documents in support of its position and on May 11, 2016, Petitioner filed documents in support of his position. A telephonic hearing commenced as scheduled. Petitioner appeared as his own representative and testified. Vivian Brooks-Marshall, Administrative Operations Specialist, Office of the Director, National Institute of Food and Agriculture, represented Respondent and testified.

All of the documentary evidence is hereby admitted to the record and the record is closed. This Decision and Order is based on the documentary and testimonial evidence and the arguments of the parties.

### III. DISCUSSION

The facts underlying this appeal are not in dispute. Respondent mistakenly offered Petitioner a retirement benefit to which he was not legally entitled, and for some time, erroneously enrolled him in an improper retirement system.

On June 17, 2014, William A. Duggan of AFM mailed Petitioner an employment package that referenced eligibility for benefits, including participation in retirement programs, including the Federal Employees Retirement System (“FERS”). Petitioner began his employment with USDA on July 13, 2014, and was enrolled in FERS. Petitioner paid an employee contribution of 0.8% under that program. Several Standard Form 50s (notice of personnel action) issued in 2015 reflect that Petitioner’s FERS participation was changed to FERS Further Revised Annuity Employee (“FERS-FRAE”) which increased employee contributions to 4.4%. Congress created FERS-FRAE upon the enactment of the Bipartisan Budget Act of 2013 (“Budget Act”), on December 26, 2013.

The Budget Act required an employee hired after December 31, 2013, to be covered by FERS-FRAE, unless the employee met certain exceptions, including previous coverage under FERS for a period of five years. Petitioner had been enrolled in FERS while working for the census in 2010, and his prior service was credited for purposes of accumulating leave. However, Petitioner’s prior service was of insufficient duration to entitle him to FERS coverage. Petitioner does not meet any other exception to exclude him from FERS-FRAE coverage.

Petitioner’s salary was subsequently offset to reimburse the government for the overpayment that occurred as the result of USDA’s error regarding Petitioner. Several offset payments were captured from Petitioner’s salary after Respondent’s error was corrected. Petitioner argues that because he accepted and worked in his position for some time under FERS coverage, he should be permitted to participate in FERS, and demands for repayment of the

overpayment should be dismissed. Alternately, Petitioner seeks that Respondent pay the difference between FERS and FERS-FRAE employee contributions for the duration of his employment with USDA.

The scope of my authority in the instant adjudication is to determine whether there exists a valid debt owed by Petitioner to the creditor agency and to establish a repayment schedule. 5 C.F.R. §§ 550.1104 (b)(2); (e)(1) and (2). I am not authorized to determine whether Petitioner was harmed by relying upon an offer of employment that contained erroneous information. While I sympathize with Petitioner's position and agree that the agency was at the very least careless in failing to comprehend and communicate the effects of the Budget Act legislation on hires after December, 2013, I am not empowered to address that issue.

The circumstances clearly establish that Respondent erroneously led Petitioner to believe that he was entitled to enrollment in the FERS retirement system, and that the error resulted in a significant economic disadvantage to Petitioner. However, since the enactment of the Budget Act requires new hires, or reinstated federal hires who do not meet exception criteria, to be enrolled in FERS-FRAE, Petitioner has no standing to request reinstatement in FERS.

In addition, I am not authorized to direct Respondent to pay the difference between FERS and FERS-FRAE contribution. Ms. Brooks-Marshall testified that the agency has agreed to cover the overpayments generated by the agency's erroneous retirement placement for affected employees. However, the total amount of overpayment has not yet been calculated, as a portion of the balance due must be calculated manually. Therefore, I am unable to determine the amount of the valid debt due by Petitioner. In addition, the date of the correction of Petitioner's retirement calculation has not been firmly established.

Accordingly, Respondent is hereby directed to provide to Petitioner an accurate and complete calculation of the amount due to the agency by not later than sixty (60) days from the

date of this Decision and Order. That calculation must include credit for those amounts deducted from Petitioner's salary through offset.

As I have concluded that Petitioner owes a valid debt to USDA, the agency's error in collecting overpayment through salary offset does not prejudice Petitioner. However, if Respondent reimburses employees for overpayments, those salary offset deductions should be considered in the final calculation of what Respondent shall pay.

#### IV. FINDINGS OF FACT

1. Respondent's job offer to Petitioner included reference to his eligibility for enrollment in the FERS retirement system.
2. Petitioner was enrolled in FERS for some period of time after commencing his employment on July 13, 2014.
3. Petitioner is not eligible for FERS retirement because he began his employment after December 31, 2013, and his circumstances do not provide exception to enrollment in FERS-FRAE.
4. Respondent corrected Petitioner's retirement enrollment, thereby creating an overpayment in the amount of the difference between FERS employee contributions of .8% and FERS-FRAE contributions of 4.4%, for the period commencing with the start of his employment in July, 2014, until the date that Respondent made the correction in Petitioner's retirement coverage.
5. Petitioner's debt to Respondent for overpayment is valid.
6. The date of correction has not been determined, and therefore, the amount due cannot be determined.

#### V. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. Petitioner is indebted to USDA for the difference in the employee contributions for erroneous enrollment in FERS and the employee contributions for the correct retirement system, FERS-FRAE.
3. All procedural requirements for administrative salary offset have been met.

### **ORDER**

For the foregoing reasons, Petitioner shall be subjected to administrative salary offset, upon the calculation of the amount of the indebtedness.

Respondent must provide a complete and accurate calculation of the debt to Petitioner within sixty (60) days of this Decision and Order. The calculation must consider the amounts of offsets that have been taken against Petitioner's salary.


Petitioner is encouraged to negotiate repayment of the debt in installments, unless Respondent waives the right to repayment.

No offsets of Petitioner's salary shall be made until after 120 days from the date of this Decision and Order.

Petitioner is further advised that a debtor who is considered delinquent on debt to the United States may be barred from obtaining other federal loans, insurance, or guarantees. See, 31 C.F.R. § 285.13.

Copies of this Decision and Order shall be served upon the parties and counsel by the Hearing Clerk's Office.

So Ordered this 13<sup>th</sup> day of May, 2016, in Washington, D.C.

  
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Janice K. Bullard  
Administrative Law Judge