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FILE NO. S-1358

COMPENSATION:

No Hearing Required Before
Offsetting Pay Under State
Comptroller Act

Honorable Michael J. Bakalis
Comptroller, State of Illinois
201 State House
Springfield, Illinois 62706

Dear Comptroller Bakalis:

You have asked about the application of the Illinois Administrative Procedure Act to the pay setoff provision in the State Comptroller Act. Section 10.05 of the Comptroller Act (Ill. Rev. Stat. 1977, ch. 15, par. 210.05) provides that if the State owes money to someone who in turn owes money to the State, the Comptroller shall deduct the amount the person owes the State before issuing a warrant to pay the person:

" * * * Whenever any person shall be entitled to a warrant on the treasury or on other funds held by the State Treasurer, on any account whatever,

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against whom there shall be any account or claim in favor of the state, then due and payable, the comptroller, upon notification thereof, shall ascertain the amount due and payable to the state, as aforesaid, and draw a warrant on the treasury or on other funds held by the State Treasurer, stating the amount for which the party was entitled to a warrant, the amount deducted therefrom, and on what account, and directing the payment of the balance; * * *."

You indicate that such setoffs typically occur in situations in which a State employee or contractor has been overpaid or owes money to the State for reasons such as failure to pay taxes. I accordingly do not address the possibility of setting off payments to public aid recipients.

Section 10 of the Illinois Administrative Procedure Act (Ill. Rev. Stat. 1977, ch. 127, par. 1010), made applicable to the Comptroller beginning January 1, 1978 by Public Act 80-1035, sets certain procedural requirements such as notice and hearing in "contested cases." Section 3.02 of the Act, as recently amended by Public Act 80-1035 (Ill. Rev. Stat. 1977, ch. 127, par.1003.02) in turn defines "contested case":

"'Contested case' means an adjudicatory proceeding, not including rate making, rule-making, quasi-legislative, informational or similar proceedings, in which the individual legal rights, duties or privileges of a party are required by law to be determined by an agency only after an opportunity for hearing." (Emphasis added.)

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The question thus is whether the withholding provided for by the State Comptroller Act is a situation in which a person's rights are required by law to be determined only after an opportunity for a hearing. Initially it should be noted that the decision to withhold pay does not in itself appear to be a determination of legal rights. It might more accurately be described as a self-help action to preserve the State's legal rights, subject to a later legal determination if the payee disputes the debt.

But even assuming that the offsetting is a determination of legal rights within the meaning of the Act, it is not a "contested case" because it is not an action in which a hearing is required by law. The plain words of the Act state that a proceeding is a "contested case" only if it is required by law to be determined only after a hearing. Although this definition has not been interpreted in a reported Illinois case, it appears in the Model State Administrative Procedure Act, adopted in numerous other states. Courts of those states, construing a similar or identical definition of "contested case", appear to have held without exception that the definition applies only if some separate statute or other source of law requires a hearing.

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See, for example, Town of Norway v. State Board of Health (1966), 32 Wis. 2d 362, 145 N.W. 2d 790, 793; Kopper Kettle Restaurants, Inc. v. City of St. Robert (Mo. 1969), 439 S.W. 2d 1, 3; Murphy v. Berlin Board of Education (1976), 167 Conn. 368, 355 A. 2d 265, 268; Minnesota Public Interest Research Group v. Minnesota Env. Quality Council (Minn. 1975), 237 N.W. 2d 375, 381-82. The State Comptroller Act section quoted above does not require a hearing before pay is withheld, nor am I aware of any other statute that does so.

It might be argued, however, that a hearing is constitutionally required in such situations by Goldberg v. Kelly (1970), 397 U.S. 254. There, the United States Supreme Court held that a hearing must be available before termination of welfare benefits. However, the Court there emphasized the unusual urgency of a welfare recipient's need for a hearing:

" * * * Thus the crucial factor in this context— a factor not present in the case of * * * virtually anyone else whose governmental entitlements are ended—is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. * * *

* * *

(397 U.S. 264.)

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In Mathews v. Eldridge (1976), 424 U.S. 319, 340-45, the Court explicitly limited the Goldberg holding to welfare benefits, and stated that a pre-termination contested hearing is not required for termination of Social Security disability benefits. The Court pointed out that the likely harm to the recipient is less and the standards for determining eligibility are more objective in the case of medical disability benefits, making a hearing less necessary.

The Court's reasoning is even more applicable to the setoffs involved here. An employee or contractor is likely to suffer less than a recipient of disability benefits from a reduction in income; and the determination of apparent liability to the State can usually be made with a higher degree of accuracy than the determination whether a person is still eligible for disability benefits. For these reasons, I conclude that a hearing before setting off pay is not required.

Of course, due process requires that a person wishing to contest liability be given the opportunity to do so at some point. You state that your present procedure is to send a letter to the person from whom payments have been withheld. That person is allowed 30 days to protest the withholding. If the

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person does not protest, or if after considering a protest you find it unfounded, you pay the withheld money to the agency which requested the setoff. If you consider a protest valid, you forward the money to the payee. In my opinion this procedure, along with the possibility of suing in the Court of Claims if a protest is denied, are adequate to comply with constitutional requirements as currently interpreted by the courts.

Very truly yours,

A T T O R N E Y G E N E R A L