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No. 53607-2-II

COURT OF APPEALS, DIVISION II OF THE  
STATE OF WASHINGTON

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TED NELSON, *Plaintiff / Appellant*

v.

DEPARTMENT OF LABOR AND INDUSTRIES, *Defendant*

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**REPLY BRIEF**

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## ARGUMENT

### **I. Mr. Nelson’s Protest and Appeal of the Department’s Continuing Offset of his Retirement Benefits is Not Fatal to his Appeal and was in Direct Response to the Department’s Invited Error**

Mr. Nelson’s non-protest of the initial August 2015 offset order is not fatal to his appeal. While Mr. Nelson probably should have protested the initial August 2015 order, he was not represented by counsel at the time or savvy to the nuances of Social Security offset law. The Department urges the Court to adopt an all or nothing stance under *Marley v. Dep’t of Labor and Indus.*, but this line of reasoning ignores all of the instances when the Department initiates an offset against a 62-65 year old worker’s supplemental retirement benefits<sup>1</sup> and fails to terminate the offset when the worker reaches 66.<sup>2</sup> Following the Department’s reasoning, the Department correctly offsets a worker’s retirement benefits during the 62-65 year window, but fails to terminate the offset upon attainment of full retirement age (66), the worker would have already waived his right to protest or appeal the initial offset order in the first place because he allowed the order

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<sup>1</sup> Social Security does authorize an offset to a worker’s **early** retirement benefits between ages 62-65 (as defined by 42 U.S.C. §§ 402 and 416) per 42 U.S.C. § 424a(a). Pursuant to *Harris*, supra, and RCW 51.32.225, our state also applies a “reverse offset” between ages 62-65. Mr. Nelson assumes that Washington has the authority to take the reverse offset between 62-65, but not after the worker reaches full retirement age, which is currently 66.

<sup>2</sup> This of course, assumes the State has a valid right of offset against supplemental retirement benefits during a worker’s age from 62-65 years old.

to become final and binding. Under *Marley*, the offset decision would become *res judicata* and the worker would be stuck with a patently incorrect and damaging order for the rest of his life. Under this scenario, a worker would have no legal recourse or future ability to stop the Department from wrongfully taking his supplemental retirement benefits.<sup>3</sup> If a worker did not appeal a presumptively correct offset order at its issuance, that worker would simply have to trust the Department to terminate its own offset when the worker reached 66, or be stuck with a never ending offset. This creates an unfair Hobson's choice: one requiring a worker to assume the time and expense of appealing an accurate Department order for the sake of preserving his right to future appeal in the event the Department failed to terminate the offset at 66, versus one where the worker is forced to allow the same order to become final and binding and thereby waive his right to any legal recourse because at the time of its issuance, the Department's offset was correct – at least until the worker reached 66.

Here, Mr. Nelson acted on the only remedy he had, which was to object to the *continuation* of the offset against his *supplemental* retirement benefits. The Department issued the order on its own accord, un-prompted by any action of Mr. Nelson. The Department created the very predicament

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<sup>3</sup> This firm currently represents at least two other workers who are facing this exact dilemma.

by which it now claims it should not be bound. The agency issued an *order* that extended appeal rights to Mr. Nelson, which he rightfully acted upon. The Department could have issued an informational *letter*, but it chose instead to issue an *appealable order*. Mr. Nelson cannot now be faulted for appealing an order to which he had a legal right to object. The fact that the Department was *continuing* to offset his supplemental retirement benefits was the error itself. The Department conflated the error, perhaps unintentionally, by including appealable language in that unnecessary order, that reopened the issue of *continued* offset against Mr. Nelson's retirement benefits. The plain language of the order speaks for itself. The Department cannot at this late stage, take it back or otherwise legitimately say the order meant something else. Mr. Nelson properly exercised his right to object to the *continued* offset of his supplemental retirement benefits. At the most fundamental level, he is entitled to be heard.

## **II. RCW 51.32.225 is Preempted by Federal Passage of *The Senior Citizens Freedom to Work Act of 2000***

Since the time that *Harris v. Dep't of Labor & Indus.*, *supra*, was decided in 1993, federal law has changed. The federal Reduction in Disability Benefits law, 42 U.S.C. § 403(f)(3), was changed in 2000. When Congress changed the law to eliminate the "retirement earnings test," it created a conflict between state and federal statutes, such that RCW

51.32.225 as it **existed prior** to the June 2018 amendment, became a direct obstacle to the full accomplishment of Congressional objectives.

On April 7, 2000, the federal government expressed a preference and intent to **eliminate all offsets against wages and wage replacement benefits** for all persons who reached full retirement age, which was in 2000, reduced to age 65. *The Senior Citizens Freedom to Work Act of 2000* **eliminated** the *retirement earnings test* under 42 U.S.C. 403(f)(3) for all Social Security beneficiaries who **reached full retirement age 65**. Since 2000, all workers who attained full retirement age (65 or older) are no longer subject to any reduction in *retirement or disability* benefits. 42 U.S.C. § 403(f)(3). As acknowledged by the majority in *Harris* and the 7<sup>th</sup> Circuit in *Raskin v. Moran*, if federal preemption clearly applied when a state statute attempted to reduce social security benefits for persons older than 70 years (the former age at which all offsets were eliminated) then surely the same reasoning applies when the same federal statute reduced the age to 65 (the current age at which all offsets are eliminated). Since the federal retirement earnings test has been eliminated for all persons 65 and older who continue to earn income, § 403(f)(3) preempts RCW 51.32.225 from 2000 to June 2018.

Federal preemption of state law occurs whenever there is a conflict between state and federal statutes such that the **state law is an obstacle to**

**the full accomplishment of Congressional objectives.** *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982); *see generally* L. Tribe, *American Constitutional Law* §§ 6-25 through 6-26 (2d ed. 1988). Our state law, RCW 51.32.225 is preempted because it conflicts with both the federal reverse offset provision and the overall purposes of the Social Security Act.

Even when *Harris* was first decided, the amicus correctly pointed out that Congress's limitation of the use of reverse offsets in the **field of disability** law should have preempted RCW 51.32.225. Federal law as it existed from 1993 to 2000 only authorized states to reduce state workers' compensation benefits by the amount of federal **disability** benefits a worker received. *See* 42 U.S.C. § 424a(d). The federal statute did not authorize, and never even mentioned, offsets against federal **retirement** benefits. Furthermore, § 424a only applied to injured workers **under the age of 65**. Thus, it never on its face authorized a state offset for those who, like Harris and Mr. Nelson, were receiving supplemental retirement benefits **over age 65**. Because Congress expressly authorized reverse offsets **only for disability benefits** and only for recipients **under the age of 65**, it was improper for the *Harris* court to **assume** that 42 U.S.C. § 424a(d) allowed states to offset federal **retirement** benefits. *See Kreidler v. Eikenberry*, 111 Wn.2d 828, 835, 766 P.2d 438 (1989) (express mention of one thing in a

statute implies the *exclusion* of other things not mentioned); *State v. Williams*, 94 Wn.2d 531, 537, 617 P.2d 1012 (1980) (when a statute specifically designates one class of things upon which it operates, it can be inferred the Legislature intended to *omit* all other classes unless such an interpretation would defeat clear legislative intent). The language of 42 U.S.C. § 424a(d) clearly expressed congressional intent to only provide for state offset against *disability* benefits.

The purposes underlying the enactment of 42 U.S.C. § 424a support this interpretation. The overall purpose of § 424a was to avoid "duplication of *disability* benefits". S. Rep. No. 404, 89th Cong., 1st Sess., *reprinted in* 1965 U.S. Code Cong. & Ad. News 1943, 1944 (emphasis added). Congress was concerned that an employee who collected both state and federal *disability* might receive more money than if he or she were working and *therefore have no incentive to rehabilitate and return to work*. *Richardson v. Belcher*, 404 U.S. 78, 82-83, 30 L. Ed. 2d 231, 92 S. Ct. 254 (1971). Those concerns are **not present in the case of retired workers** such as Mr. Nelson who continue working after retirement to *supplement* their retirement income. Like Harris, Mr. Nelson was not collecting duplicate *disability* benefits. He only started receiving *state disability* benefits *after* he had already been collecting *federal retirement* benefits. He is **entitled** to both.

In 1993, our Supreme Court reasoned in *Harris*:

Unlike other benefits cases *where preemption has been found*, congressional intent to preempt state law is lacking here. For example, in *Rose v. Arkansas State Police*, 479 U.S. 1, 93 L. Ed. 2d 183, 107 S. Ct. 334 (1986) the Court held that Arkansas's attempts to reduce state death benefits under its workers' compensation act by the amount received under the Public Safety Officers Death Benefits Act were preempted. The federal statute explicitly provided that the benefit was to be in addition to any other benefits. 42 U.S.C. § 3796(e). In *Raskin v. Moran*, 684 F.2d 472 (7th Cir. 1982), the court held that a Wisconsin statute which reduced state "reserve" judges' salaries by an amount equal to any Social Security retirement benefits conflicted with federal policy expressed in 42 U.S.C. § 403(f)(3), which **prohibits reduction in Social Security benefits of persons over age 70 who continue to earn income**. By contrast, 42 U.S.C. § 424a does not contain clear evidence of congressional intent to preempt state reverse offsets of Federal Social Security retirement benefits. We decline to infer preemption from Congress's silence.

*Harris, supra* at 469-70.

The majority's conclusion in *Harris* that disability benefits and retirement benefits were essentially the same for offset purposes, while fundamentally flawed, is now moot. The majority's reasoning ignored important historical and policy differences between the two types of benefits. Federal retirement benefits, or "old age security", have been a part of the Social Security Act since its inception in the 1930's. *See generally* R. Stevens, *Statutory History of the United States: Income Security* (1970). Disability benefits were not added until 1956. *Statutory History*, at 505.

Retirement benefits were designed "to assure support for the aged as a **[distinctive] right** rather than as a public charity, and in amounts which will insure not merely subsistence but some of the comforts of life . . . ." H.R. Rep. No. 615 (Economic Security Bill), 74th Cong., 1st Sess. (1935), *quoted in Statutory History*, at 147. Disability benefits, on the other hand, were added to the Social Security Act out of a concern that state workers' compensation benefits were inadequate to compensate injured workers for their loss. *Statutory History*, at 501. Thus, the two types of benefits have **different histories** and **different purposes**. While the Court in the past chose to ignore these significant differences in attempting to justify RCW 51.32.225, these differences are rendered moot once a worker, disabled or not, reaches full retirement age, which is now age 66.

Congress only authorized reverse offsets against *disability* benefits. Because Congress **eliminated** the retirement earnings test in 2000, thereby preempting any offset against disability or retirement benefits once a worker reaches age 65, RCW 51.32.225 (as it existed between 2000 and the June 2018 amendment) directly conflicted with 42 U.S.C. § 424a(d). Between the years 2000 and June 2018, RCW 51.32.225 was preempted and Mr. Nelson is entitled to a **full refund** of the Department's offsets beginning in 2015 – during the preempted period. In the alternative, Mr. Nelson is entitled to a refund of all offsets collected by the Department from the date

of his timely appeal to the *continuation* of the offset against his supplemental retirement benefits.

In June 2018, our legislature amended RCW 51.32.225 to add:

This reduction does not apply to workers who had applied to receive social security *retirement* benefits prior to the date of their injury or to workers who were receiving social security benefits prior to their injury.

RCW 51.32.225(1). There is no statement of legislative intent on record for this change. The effect of the amendment, however, made our state offset provision consistent with the federal law, which has never authorized the offset of retirement benefits under 42 USC 424a. As of June 2018, our state should no longer, at least in theory, be making any future offsets of worker's supplemental retirement benefits.

Prior to the June 2018 amendments, however, RCW 51.32.225 should have been preempted because it conflicted with the overall goals of the Social Security Act. Federal law preempts any state law that is an obstacle to the full accomplishment of congressional objectives. *Fidelity Fed. Sav.*, 458 U.S. at 153. Congress's objective in establishing federal retirement benefits was to assure retired workers had an adequate income. The retirement program must be construed liberally in favor of the *retired* worker. *Tsosie v. Califano*, 651 F.2d 719, 723 (10th Cir. 1981); *Delno v. Celebrezze*, 347 F.2d 159, 162 (9th Cir. 1965). Thus, the

*Harris* Court should have started with the premise that workers were entitled to his or her federal supplemental retirement benefits unless a specific exception clearly applied. Because no such exception existed in this case, and certainly now that Congress has expressed a direct prohibition against any kind of offset once a worker reaches full retirement age, RCW 51.32.225 hindered the full accomplishment of the congressional objective of assuring that workers received their supplemental retirement benefits.

The *Harris* Court's reliance on *Raskin v. Moran*, 684 F.2d 472 (7th Cir. 1982) supports this conclusion. The plaintiffs in *Raskin* challenged a Wisconsin statute that reduced certain judges' salaries by an amount equal to the Federal Social Security retirement benefits they received. The Court of Appeals for the Seventh Circuit ruled that the Wisconsin statute ***conflicted with the goals*** of the Social Security Act and was therefore **preempted**. *Raskin*, at 477. Specifically, the court held that the statute conflicted with a provision of the Social Security Act that prohibited any reduction in Social Security benefits for income earned past the age of 70. *Raskin*, at 478. The Social Security Act did not, however, expressly prohibit the application of the Wisconsin statute, and that statute did not directly prevent or impede the receipt of the benefits. *Raskin*, at 476-77. Instead, the Wisconsin statute ***thwarted federal policy*** because the statute effectively deprived recipients of federal benefits. *Raskin*, at 477-78. The

purposes of the Social Security Act were thwarted because "the federal government put[] money in the plaintiffs' left pocket while [the state took] a precisely equal amount of money from their right pocket *solely because* the money was received through the social security program." *Raskin*, at 479-80. This analysis applies equally to Mr. Nelson's case.

Between 2000 and 2018, our state law, RCW 51.32.225, thwarted the objectives of the Social Security Act. Congress intended for qualified workers to receive federal benefits upon their *retirement*, unless specific provisions of the Social Security Act provided otherwise. Since passage of *The Senior Citizens Freedom to Work Act of 2000* and its elimination of the retirement earnings test for all workers age 65 and older per 42 U.S.C. 403(f)(3), RCW 51.32.255 allows the state to take from the worker's right pocket what the federal government put in the left pocket. Because that action was never specifically authorized by Congress, and has been expressly prohibited since 2000, RCW 51.32.225 (as it existed between 2000-2018) conflicted with federal law and was preempted.

**III. Mr. Nelson's Right to Due Process was Violated when he was Denied an Opportunity to Protest or Appeal the Continued Reduction of his Time Loss Benefits**

The Department admits that Mr. Nelson had no legal mechanism to challenge "provisional" time loss because none of these orders were "final".

See Defendant's Brief at 22-25. Therein lies the rub. Because the Department kept issuing "provisional" time loss orders, all of which contained an additional monthly offset against Mr. Nelson's supplemental retirement benefits, he was effectively deprived due process. It doesn't get any more basic than this.

The Department argues that Mr. Nelson is not entitled to challenge his provisional time loss orders for the first time on appeal. Due process is flexible and calls for such procedural protections as the particular situation demands. *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 897, 47 L.Ed.2d 18, 26 (1976). To determine the process due, courts balance (1) the private interests involved, (2) the likelihood of erroneous deprivation, and (3) the government interest involved. *City of Bremerton v. Hawkins*, 155 Wn.2d 107, 110, 117 P.3d 1132 (2005), citing *Prostov v. Dep't of Licensing*, 186 Wn. App. 795, 810-11, 349 P.3d 874, 882 (2015) ("A process satisfies minimum constitutional requisites inherently due when it provides adequate *safeguards* to the citizen confronted by an action instigated against him by the state."), (emphasis added), citing *Nguyen v. Med. Quality Assurance Comm'n*, 144 Wn.2d 516, 524, 29 P.3d 689 (2001).

Here, the Department's action provided Mr. Nelson no safeguards whatsoever. Because there was no mechanism for Mr. Nelson to challenge time loss orders that reflected the *continuation* of the offset, which further

reduced his benefits below, he was deprived of his Constitutional right to due process. Procedural **due process** prohibits the State from depriving an individual of protected liberty interests without appropriate procedural **safeguards**. *In re Pers. Restraint of Bush*, 164 Wn.2d 697, 704, 193 P.3d 103 (2008). Procedural **due process** “[a]t its core is a right to be meaningfully heard, but its minimum requirements depend on what is fair in a particular context.” *In re Det. of Morgan*, 161 Wn. App. 66, 78, 253 P.3d 394, 400 (2011), (citing, *In re Det. of Stout*, 159 Wn.2d 357, 370, 150 P.3d 86 (2007) ,citing *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). The appellate court can and should consider this issue raised for the first time on appeal because the error alleged affects a Constitutional right. See RAP 2.5(a)(3).

#### CONCLUSION

Mr. Nelson timely protested the January 2016 order that at the very least, contested the continued reduction in his time loss benefits by the Department’s application of the reverse offset contained in RCW 51.32.225. By broader application, because the Department incorporated by reference the original August 2015 offset order and thereby created the very error it now complains should not apply, the invited error doctrine applies. Applying the majority’s original reasoning in *Harris*, our state reverse offset law, RCW 51.32.225, as it existed between 1993 and 2000 should

have been preempted. However, in light Congressional passage of the *Senior Citizen's Right to Work Act of 2000*, federal law undisputedly preempted RCW 51.32.255 between 2000 and June 2018, the time RCW 51.32.255 was amended. Mr. Nelson had a Constitutional right to due process.

Because the Department issued only “provisional” time loss orders that in effect, continued to reduce Mr. Nelson’s time loss benefits by the amount of his supplemental Social Security retirement benefits, the worker was denied any kind of procedural safeguards. At the most fundamental level, Mr. Nelson was entitled to a right to be heard and was never given the opportunity. This by itself resulted in a Constitutional deprivation of his right to due process. Mr. Nelson suffered a \$93,000 taking at the hands of the Department, which he asks this Court to correct.

RESPECTFULLY SUBMITTED this \_\_\_\_ day of March 2020.

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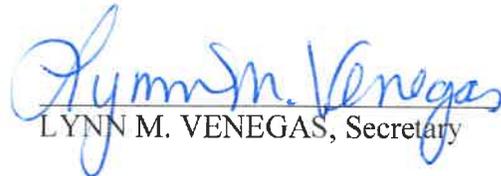
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DATED this 4<sup>th</sup> day of March, 2020.

  
LYNN M. VENEGAS, Secretary

# VAIL CROSS AND ASSOCIATES

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