



## **FACTUAL HISTORY**

The case was before the Board on prior appeals. In a decision dated July 19, 2012, the Board found that the evidence supported a finding of an \$11,936.00 overpayment from April 1 to August 28, 2010 due to a forfeiture of compensation. The Board noted that appellant had pleaded no contest on April 1, 2010 to a “falsification” charge under Ohio law and found that OWCP may forfeit appellant’s compensation as of April 1, 2010 under 5 U.S.C. § 8148. As the Board noted, an employing establishment Office of the Inspector General’s (OIG) report dated April 7, 2010 had indicated that appellant had earnings that were not reported on CA-1032 forms. With respect to fault, the Board found that OWCP had not made adequate findings on the issue. In addition, the Board affirmed an overpayment from March 28, 2008 to March 31, 2010 based on an incorrect pay rate, but found OWCP did not clearly explain how the overpayment amount of \$1,589.64 was calculated.

By order dated May 13, 2013, the Board set aside a September 20, 2012 OWCP decision and remanded the case to clarify the grounds for the finding of fault with respect to the \$11,936.00 overpayment of compensation from April 1 to August 28, 2010. The history of the case as provided by the Board is incorporated herein by reference.

By decision dated July 13, 2013, OWCP made final determinations with respect to overpayments of compensation. It found that a no contest plea was equivalent to a guilty plea and since appellant had entered the equivalent to a guilty plea on April 1, 2010 for fraud related to application for FECA benefits, her compensation should be forfeited from April 1, 2010. The amount of the overpayment from April 1 to August 28, 2010 was \$11,935.71. With respect to fault, OWCP noted that appellant had attempted to withdraw her no contest plea. It found that she had made an incorrect statement that she knew or should have known was incorrect and had accepted payments she knew or should have known were incorrect. As to the overpayment from March 28, 2008 to March 31, 2010, OWCP found that the actual amount of the overpayment was \$1,692.15, but since appellant had previously paid the original overpayment amount of \$1,589.64, no additional overpayment would be collected.

## **LEGAL PRECEDENT -- ISSUE 1**

Public Law No. 103-333, enacted on September 30, 1994, amended FECA by adding section 8148, which provides for forfeiture of compensation benefits by an individual convicted of fraud with respect to receipt of compensation and prohibits the payment of compensation benefits to an individual while incarcerated pursuant to a felony conviction. Section 8148(a) states:

“Any individual convicted of a violation of section 1920 of title 18 or any other Federal or *State criminal statute relating to fraud in the application for a receipt of any benefit under this subchapter or subchapter 3 of the this chapter*, shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under this subchapter of subchapter 3 for any injury occurring on or before the date of such conviction. Such forfeiture

shall be in addition to any action the Secretary may take under section 8106 or 8129.”<sup>2</sup> (Emphasis added.)

### **ANALYSIS -- ISSUES 1 & 2**

In a prior appeal, the Board addressed the issue of whether appellant had forfeited her compensation under 5 U.S.C. § 8148. Subsequent development has raised issues regarding the conviction under Ohio state law that have not been addressed by OWCP. As OWCP stated in its July 19, 2013 decision, appellant pleaded no contest to Ohio Revised Code § 2921.13(B). The Board notes in this appeal that the statute provides: “No person, in connection with the purchase of a firearm, as defined in section 2923.11 of the Revised Code, shall knowingly furnish to the seller of the firearm a fictitious or altered driver’s or commercial driver’s license or permit, a fictitious or altered identification card or any other document that contains false information about the purchaser’s identity.”<sup>3</sup>

According to OWCP procedures, the documents necessary to establish a conviction for fraud under 5 U.S.C. § 8148 include a copy of the indictment, the plea agreement and the guilty verdict.<sup>4</sup> The documents of record with respect to the conviction on April 1, 2010 include a December 15, 2009 complaint that charges appellant with a violation of section 2921.13(B)<sup>5</sup> and a judgment entry that she pleaded no contest to violating section 2921.13(B) on April 1, 2010 and was found guilty. Therefore the documentary evidence of record establishes that appellant was charged and found guilty based on a plea of no contest to a violation of a state statute that involves providing false information to the seller of a firearm.<sup>6</sup> Moreover, the brief narrative of the misdemeanor offense charged contained no reference to fraud or theft involving the receipt of public benefits.

The Board finds that this is not a conviction of a violation of a state statute relating to fraud in the application for a receipt of FECA benefits as required by 5 U.S.C. § 8148. In the absence of a conviction the finding of forfeiture will be reversed.

In view of the Board’s finding as to the issue of forfeiture, the remainder of the issues concerning overpayment are moot.

---

<sup>2</sup> 5 U.S.C. § 8148(a).

<sup>3</sup> Ohio Rev. Code § 2921.13(B) (2010).

<sup>4</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.17(c) (February 2013).

<sup>5</sup> The complaint alleges that appellant knowingly made a false statement to mislead a public official, but states that the violation was Ohio Rev Code § 2921.13(B).

<sup>6</sup> *Cf. Harvey P. Milstein*, Docket No. 95-1907 (issued May 27, 1998) (the Board found evidence established and the claimant acknowledged, that he pled guilty on March 15, 1994 to violating 18 U.S.C. § 1920. The Board noted that one court document had a typographical error referring to a guilty plea on that date of violating 18 U.S.C. § 1001, but it was noted that this was also a statute relating to making false statements to a government agency).

**CONCLUSION**

The Board finds that OWCP failed to establish that appellant forfeited her compensation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated July 19, 2013 is reversed.

Issued: September 25, 2014  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge, Concurring:

I concur with my colleagues holding in this appeal. OWCP's decision in this appeal should be reversed because appellant was not "convicted" within the definition of FECA forfeiture provision.<sup>1</sup> As explained above, the purported conviction of appellant in the Municipal Court of Warren Ohio of a violation of Ohio Revised Code § 2921.13(B) does not and cannot form the basis for finding an overpayment from April 1 to August 28, 2010 and for a forfeiture of future FECA benefits.

It appears this question may be one of first impression for the Board. The case merits some further exploration.

The first question is whether a ruling on the forfeiture is within the authority of the Board in this specific appeal. The Board, in a prior decision states:

"The record establishes that appellant was charged with violation of Ohio Revised Code § 2921.13(B) in connection with providing false information on her Form

---

<sup>1</sup> 5 U.S.C. § 8148(a).

CA1032. Appellant pled no contest and the Municipal Court accepted the plea and entered a guilty verdict on April 1, 2010.”<sup>2</sup>

In its prior opinion, the Board did not examine the text of the charging document mentioned above, nor did it show awareness of other defects in the Ohio proceedings. The validity of the Warren, Ohio misdemeanor conviction was not reached and certainly not affirmed in the Board’s prior decision. The Board again considered the claim and issued an Order Remanding Case without a substantive review of the issues raised in the appeal now before us.<sup>3</sup> That issue was clearly raised by a January 4, 2014 letter from appellant which stated her basis for taking this appeal. The issue now presented to the Board in this appeal was not previously decided and it is before us. The Board is correct to consider and decide it.<sup>4</sup>

The second question is how 5 U.S.C. § 8148(a) defines a conviction that will trigger a forfeiture of the right to future compensation and whether OWCP complied with the statute. The provision in question reads:

**5 U.S.C. § 8148. Forfeiture of benefits by convicted felons:**

(a) Any individual convicted of a violation of section 1920 of title 18 or any other Federal or State criminal statute relating to fraud in the application for or receipt of any benefit under this subchapter or subchapter III of this chapter, shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under this subchapter or subchapter III for any injury occurring on or before the date of such conviction. Such forfeiture shall be in addition to any action the Secretary may take under section 8106 or 8129.<sup>5</sup>

At a minimum, the statute prohibits “fraud” for in “application for a receipt” of FECA benefits and requires a “conviction” for its provisions to operate. The statute allows certain unspecified state law convictions to serve as the equivalent of a conviction under 18 U.S.C. § 1920. However, the state laws in question must actually be equivalent.

Appellant, in her letter, mentions that the Ohio Code section under which she was convicted pertains to false statements made to obtain a firearm. This is correct, as my colleagues note.

Beyond appellant’s assertion in her letter, there are several reasons to question whether the proceeding in the Municipal Court in Warren, Ohio resulted in a verdict that would sustain an overpayment finding and forfeiture of all her future benefits. First, in addition to providing the

---

<sup>2</sup> *T.P.*, Docket No. 12-97 (issued July 19, 2012) (the Board remanded the case on the issue of whether appellant was at fault regarding an overpayment of \$11,936.00 found by OWCP for the period April 1 to August 28, 2010).

<sup>3</sup> *See T.P.*, Docket No. 13-509 (issued May 13, 2013) (the Board remanded the case to OWCP specifically for findings as to fault and waiver regarding the alleged overpayment for April 1 to August 28, 2010).

<sup>4</sup> *S.C.*, Docket No. 12-776 (issued August 9, 2012); *Paul R. Kuyoth*, 27 ECAB 498 (1976) (the Board possesses *de novo* review authority).

<sup>5</sup> *Supra* note 1.

citation of an unrelated section of criminal law, the complaint provides a one sentence statement of the offense charged and this fails to allege that appellant obtained benefits under FECA.<sup>6</sup> A criminal charge must describe a specific act or acts which violate a specific criminal law. Rather, the charge reads that appellant “did knowingly make a false statement or knowingly affirm the truth of a false statement previously made when the statement was made with the purpose to mislead a public official in performing his official function...”<sup>7</sup>

The Board’s majority includes the full text of 5 U.S.C. § 8148(a). It is not a general prohibition on all lies told to a “public official.” It has a limited definition which OWCP has failed to recognize. Perhaps more importantly, a court cannot find a defendant guilty of offenses that are not charged. If the offense of fraud in connection with obtaining FECA benefits is not charged, there can be no conviction.<sup>8</sup>

Second, the Ohio rules distinguish between a plea of no contest and a guilty plea as follows:

**“(B) Effect of guilty or no contest pleas**

With reference to the offense or offenses to which the plea is entered:

- (1) The plea of guilty is a complete admission of the defendant’s guilt.
- (2) The plea of no contest is not an admission of defendant’s guilt, but is an admission of the truth of the facts alleged in the indictment or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding.”<sup>9</sup>

There is no Board precedent on whether State laws and rules, if they differ from federal rules, are relevant in FECA forfeitures if the conviction is entered by a state court, to a state offense, following state rules of procedure. It is reasonable, however, that in this instance, where the OIG chose to take its case to state rather than federal court, it accepted the provisions of the Ohio Rules of Criminal Procedure. Finally, contrary to an argument made by the solicitor, it is undeniable that a plea of “no contest” under Ohio’s rule is not equivalent to a plea of “guilty.” If OWCP contends otherwise in this case, it must prove the point.

---

<sup>6</sup> The complaint also fails to mention fraud in an attempt to obtain a firearm, FECA prohibited under Ohio Revised Code § 2921(B). It fails to state an offense under either subsection of the relevant Ohio statute.

<sup>7</sup> The complainant was a special agent of the postal service, OIG who must be presumed to have known the code section he wished to use and how to state a criminal charge.

<sup>8</sup> It is possible that the guilty verdict may be meaningless because no offense is stated. It is not possible to assign defendant’s conviction to an offense which exists but was not pled to.

<sup>9</sup> Rules of Criminal Procedure Ohio, Crim R 11, Pleas, rights upon plea.

Third, the trial judge erred in failing to explain to appellant, at the time of her plea, that she had rights under Ohio Rule 11.<sup>10</sup> The court did not explain to her the consequence of her plea. Appellant has consistently asserted that she did not understand the implications of her plea when she offered it. On the one hand, it is clear she had counsel. On the other hand, it is also clear the court failed in its obligation to inform her, on the record, of her options at trial and the effects of her plea. While not before us, the question of whether, because of the proceedings in Warren, Ohio, appellant knew or should have known that her future benefits would be affected is far from clear.

There must be a point at which a formal conviction of a criminal offense becomes too flawed to be given credit as a finding of actual guilt. The charge, plea and conviction in this case do not justify the application of 5 U.S.C. § 8148(a). I agree with my colleagues that this conviction cannot support OWCP's July 19, 2013 decision. More broadly, this case calls into question whether state statutes and state courts should be a regular forum for an employing establishment and indirectly, OWCP, to file a legal action intended to result in a forfeiture of benefits and the finding of an overpayment.

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board

---

<sup>10</sup> See 2011 WL 3273960 (Ohio App. 11 Dist.), *Parish v. Ohio*. (The Appeals Court did not allow appellant to withdraw her guilty plea.)