



## **FACTUAL HISTORY**

On September 21, 2010 appellant, a 51-year-old police officer, sustained a traumatic injury in the performance of duty during firearms qualification. OWCP accepted his claim for lumbar sprain and aggravation of degenerative lumbar or lumbosacral intervertebral disc.

Appellant received wage-loss compensation beginning November 7, 2010. OWCP based his compensation on a weekly pay rate of \$966.29 plus additional weekly pay of \$201.60 for night differential and \$144.48 for Sunday premium, for a total weekly pay rate of \$1,312.37.

In 2013 the employing establishment notified OWCP that it was paying appellant twice what he should receive for additional pay. Although the hourly rates for night differential (\$2.40) and Sunday premium (\$6.02) were correct, appellant worked 84 hours of night shift and 24 hours on Sunday every two weeks, and therefore should receive additional pay of \$100.80 and \$72.24 per week respectively. OWCP had inadvertently used the biweekly figures, \$201.60 and \$144.48, to calculate appellant's weekly pay rate.

On July 26, 2013 OWCP made a preliminary determination that appellant received an overpayment of compensation in the amount of \$9,570.72 from November 7, 2010 to April 6, 2013 due to the incorrect pay rate. It found that he was not at fault in creating the overpayment.

Appellant's counsel argued that the employing establishment was correct that appellant had received night differential and Sunday premium at a biweekly rate every week. He argued, however, that appellant was entitled to mandatory overtime pay for working 87.5 hours per pay period, 84 hours of which were scheduled and 3.5 hours of which represented the 15 minutes of mandatory time he spent before and after each of his seven 12-hour shifts. Counsel submitted a supporting statement from a former supervisor, who advised that appellant's work hours were 5:45 a.m. to 6:15 p.m. per tour of duty.

Appellant completed an overpayment recovery questionnaire indicating that he had \$3,209.96 in monthly income and \$2,688.14 in monthly expenses. He also indicated that he had \$15,000.00 in his checking account.

In a decision dated February 6, 2014, an OWCP hearing representative finalized the preliminary overpayment determination. He explained that appellant's overtime did not appear to be irregular or unscheduled, and therefore failed to qualify for inclusion as premium pay for administratively uncontrolled overtime. The hearing representative denied waiver of recovery of the overpayment on the grounds that appellant had over \$500.00 in discretionary monthly income and assets that exceeded the established resource base for recovery. He found that OWCP could recover the debt at a rate of \$400.00 per month from continuing compensation payments.

Counsel argues that mandatory overtime is not a statutory exclusion. He cites the case of *K.H.*,<sup>2</sup> for the proposition that mandatory overtime is not subject to exemption and should be

---

<sup>2</sup> Docket No. 07-98 (issued March 19, 2008).

included in determining an employee's pay rate. Counsel also cites 5 U.S.C. § 8114(k) and Chapter 2.908(b)(2) of FECA procedure manual.

### **LEGAL PRECEDENT**

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his duty.<sup>3</sup> "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.<sup>4</sup>

In computing monetary compensation for disability, the employee's pay is based on average annual earnings.<sup>5</sup> Account is not taken of overtime pay.<sup>6</sup> It has been determined administratively that night differential and Sunday premium are to be included in determining an employee's rate of pay.<sup>7</sup> Premium pay for administratively uncontrollable overtime under 5 U.S.C. § 5545(c)(2) is also included,<sup>8</sup> but pursuant to the statutory exclusion, overtime pay is not. The extra pay required by the Fair Labor Standards Act (FLSA) for hours worked in excess of the standard prescribed under the FLSA is not to be included in computing pay for the purposes of continuation of pay or compensation. Such extra pay is earned only if the actual hours are worked and is considered to be overtime pay for the purposes of 5 U.S.C. § 8114(e).<sup>9</sup>

OWCP may consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment.<sup>10</sup> If it finds that the recipient of an overpayment was not at fault, repayment will still be required unless: (1) adjustment or recovery of the overpayment would defeat the purpose of FECA (2) adjustment or recovery of the overpayment would be against equity and good conscience.<sup>11</sup>

The purpose of FECA is to provide at least a subsistence of income for beneficiaries.<sup>12</sup> Recovery of an overpayment will defeat the purpose of FECA if such recovery would cause hardship to a currently or formerly entitled beneficiary because: (a) the individual from whom

---

<sup>3</sup> 5 U.S.C. § 8102(a).

<sup>4</sup> 20 C.F.R. § 10.5(f).

<sup>5</sup> 5 U.S.C. § 8114(c).

<sup>6</sup> *Id.* at § 8114(e)(1).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Determining Pay Rates*, Chapter 2.900.6.b(1), .b(4) (March 2011).

<sup>8</sup> *Id.* at Chapter 2.900.6.b(7).

<sup>9</sup> *Id.* at Chapter 2.900.7.a(1).

<sup>10</sup> 20 C.F.R. § 10.433(a).

<sup>11</sup> *Id.* at § 10.434.

<sup>12</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.a (June 2009).

OWCP seeks recovery needs substantially all of his current income (including compensation benefits) to meet current ordinary and necessary living expenses; and (b) the individual's assets do not exceed the resource base of \$4,800.00 for an individual or \$8,000.00 for an individual with a spouse or one dependent, plus \$960.00 for each additional dependent. This base includes all of the claimant's assets not exempted from recoupment.<sup>13</sup> Assets may include liquid assets such as cash, the value of stocks, bonds, savings account, mutual funds, and certificates of deposit, and nonliquid assets such as the fair market value of an owner's equity in property, such as a camper, boat, second home and furnishings/supplies, any vehicles above the two allowed per immediate family, jewelry, and artwork.<sup>14</sup>

Recovery of an overpayment is considered to be against equity and good conscience when any individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>15</sup> Conversion of the overpayment into a different form, such as food, consumer goods, real estate, etc., from which the claimant derived some benefit, is not to be considered a loss.<sup>16</sup>

Whenever an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decreased later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship.<sup>17</sup>

### ANALYSIS

There is no dispute that OWCP miscalculated appellant's compensation. In determining his weekly pay for the purpose of compensation, it used biweekly figures for night differential and Sunday premium. The employing establishment well explained the error, and appellant's counsel acknowledged that the employing establishment was correct. In its preliminary determination, OWCP documented that appellant had received \$107,554.78 in compensation from November 7, 2010 to April 6, 2013 but should have received \$97,984.06, thereby resulting in a \$9,570.72 overpayment of compensation. The Board will therefore affirm OWCP's February 6, 2014 decision on the issues of fact and amount of overpayment.

---

<sup>13</sup> *Id.* at Chapter 6.200.6.a(1)(b).

<sup>14</sup> *Id.* at Chapter 6.200.6.a(4). Assets do not include the value of household furnishings (primary residence), wearing apparel, one or two vehicles, family burial plot or prepaid burial contract, a home that the person maintains as the principal family domicile, or income-producing property, if the income from such property has been included in comparing income and expenses.

<sup>15</sup> 20 C.F.R. § 10.437(b).

<sup>16</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.6.b(3) (June 2009).

<sup>17</sup> 20 C.F.R. § 10.441(a).

Appellant's counsel argues that appellant worked 7.5 hours of mandatory overtime every two weeks. FECA, however, broadly excludes overtime in the determination of an employee's pay rate for the purpose of compensation. FECA procedures allow account to be taken of administratively uncontrollable overtime, but as OWCP's hearing representative found, appellant's overtime did not appear to be irregular or unscheduled and therefore failed to qualify for inclusion.

In the case of *K.H.*,<sup>18</sup> as cited by counsel, the Board remanded the case for further development on the issue of pay rate. The Board cited no authority other than section 8114(d) of FECA. The Board did not cite or discuss section 8114(e)(1), which explicitly excludes overtime from consideration of an employee's pay rate. The Board made no distinction between overtime and mandatory overtime. The Board simply followed, without comment, the elements OWCP had included in that case. The Board finds that *K.H.* is not authoritative precedent on the issue.

Counsel also cites Chapter 2.908(b)(2) of the FECA procedure manual. There is no such chapter.

As appellant was without fault in creating the overpayment, the issue became whether he was entitled to waiver of recovery of the overpayment. According to his overpayment recovery questionnaire, appellant had over \$500.00 in discretionary monthly income and assets that exceeded the established resource base. Either one of these, standing alone, is sufficient to find that recovery will not defeat the purpose of FECA. Further, appellant does not argue, and the record does not support, that he gave up a valuable right or changed his position for the worse in reliance on the overpaid compensation. Recovery is therefore also not considered to be against equity and good conscience. Accordingly, the Board will affirm OWCP's February 6, 2014 decision on the issue of waiver.

Because appellant was not entitled to waiver of recovery of the overpayment, the law requires OWCP to recover the debt from continuing compensation. OWCP gave due regard to relevant factors, such as the probable extent of future payments, the rate of compensation, and appellant's financial circumstances, so as to minimize any resulting hardship in recovering the debt as promptly as circumstances would allow. The Board therefore finds that OWCP properly set the rate of recovery at \$400.00 per month and will affirm OWCP's February 6, 2014 decision on that issue.

### **CONCLUSION**

The Board finds that appellant received an overpayment of compensation in the amount of \$9,570.72. The Board also finds that OWCP properly denied waiver of recovery thereof and properly set the rate of recovery at \$400.00 per month from continuing compensation benefits.

---

<sup>18</sup> Docket No. 07-98 (issued March 19, 2008).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 6, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 1, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board