



employment earnings as a pastor; (2) whether he received an overpayment of compensation in the amount of \$271,743.45; and (3) whether OWCP properly found that appellant was at fault in the creation of the overpayment and that the overpayment was therefore not subject to waiver of recovery.

On appeal counsel argues that appellant was not working when performing pastoral duties and, therefore, did not forfeit his right to wage-loss compensation and medical benefits.

### **FACTUAL HISTORY**

On May 16, 2007 appellant, then a 52-year-old truck driver, filed a traumatic injury claim (Form CA-1) alleging that on May 14, 2007 he injured his neck and arm when a trailer door jammed as he pulled it down. He stopped work on the date of injury. OWCP accepted the claim for right upper arm rotator cuff tear, right shoulder sprain, and rotator cuff syndrome. It authorized right shoulder arthroscopic surgery, which was performed on July 24, 2007. By letter dated January 9, 2008, OWCP placed appellant on the periodic rolls for temporary total disability.<sup>3</sup>

Between 2009 and 2014, appellant completed EN1032 forms which contained language advising him of the types of employment activities, earnings, and volunteer activities that he was required to report for each 15-month period prior to the time he signed each form.

The EN1032 forms instructed appellant to report all employment for which he received a salary, wages, income, sales commissions, piecework, or payment of any kind. Appellant was directed to report all self-employment or involvement in business enterprises, including (but not limited to) farming, sales work, operating a business, and providing services in exchange for money, goods, or other services. Examples of services that he was required to report included such activities as carpentry, mechanical work, painting, contracting, child care, keeping books and records, odd jobs, and managing and overseeing a business of any kind, including a family business. Such activities had to be reported even if they were part time or intermittent.

Moreover, the EN1032 forms instructed appellant to report any work or ownership interest in any business enterprise, even if the business lost money or if profits or income were reinvested or paid to others. If appellant performed any duties in a business enterprise for which he was not paid, he had to show what the rate of pay would have cost the employing establishment or organization to hire someone to perform the work or duties he did, even if the work was for him or a family member or relative. The forms contained certification clauses which informed him of the consequences of failing to accurately report his employment activities, such as being subjected to criminal penalties and losing the right to receive federal workers' compensation benefits.

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<sup>3</sup> By decision dated November 14, 2014, OWCP suspended appellant's benefits, effective November 16, 2014, for failing to submit the required completed annual EN1032 form. On November 20, 2014 OWCP received his EN1032 form dated November 15, 2014. It reinstated benefits for the period November 14 to December 13, 2014 on November 24, 2014. In a November 3, 2015 decision, OWCP suspended appellant's benefits for failing to submit the required completed EN1032 form effective November 15, 2015. On March 23, 2016 it received a completed EN1032 form. Appellant's benefits were reinstated beginning November 16, 2015.

On January 12 and November 18, 2009, October 22, 2010, October 20, 2011, November 13, 2012, October 18, 2013, and November 15, 2014 appellant completed EN1032 forms indicating that he had not engaged in any employment, self-employment, or volunteer work during the 15-month periods prior to the completion of each form.<sup>4</sup> These EN1032 forms collectively covered the period October 12, 2007 through November 15, 2014.

On April 7, 2015 OWCP received a February 9, 2015 investigative memorandum and an April 3, 2015 report of investigation by the employing establishment's Office of Inspector General (OIG), which concluded that appellant had engaged in employment activity as the main pastor for the Union Missionary Baptist Church in East Point, GA during the period of October 12, 2007 to November 15, 2014. The OIG noted that appellant's EN1032 forms did not disclose his involvement with the Union Missionary Baptist Church. It further noted that on March 11, 2013 appellant indicated his inability to perform an offered limited-duty job because of his physical ailments. Appellant responded to an employing establishment job offer noting that he could not lift, hold objects, or even "wipe his butt" due to his work injury. He also reported that he could not stand for long periods of time and that he walked many times with a cane. Appellant concluded his response by noting that he sometimes cannot leave his house or even get out of his bed due to his pain.

In an April 3, 2015 report of investigation, the reporting OIG agent noted the investigation had covered the period of December 11, 2013 to February 9, 2015 and concluded that appellant had served as the primary pastor for the Union Missionary Baptist Church during this period. In support of the findings of its investigation, the OIG reported that on December 22, 2013 an OIG agent observed appellant addressing the congregation as its pastor from the podium at approximately 10:55 a.m., dismissing Sunday School at approximately 11:03 a.m., and beginning a two and one-half hour service at approximately 11:30 a.m. During this period, the OIG agent observed that appellant appeared to function with no difficulty as he was seen walking, bending, standing, and raising his arms during the service. According to the OIG agent, congregation members and appellant himself related that he had been the pastor of the church for the past 17 years.

Follow-up observation was conducted in furtherance of the OIG investigation. On January 19, 2014 an OIG agent observed appellant addressing the congregation starting at approximately 11:30 a.m. The service lasted until approximately 1:10 p.m. and he was observed walking up and down stairs, singing, pacing on the stage, and reaching with both arms outstretched continuously until the end of the service. Appellant was also observed on January 26, 2014 addressing the congregation beginning at 11:33 a.m. and ending at 2:00 p.m. During this time, the OIG agent observed appellant picking up, holding, and carrying a large bible; singing and conducting the choir; walking and swaying back and forth on stage; going down stairs; motioning with both arms and hands as well as swinging his arms; unscrewing a cap

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<sup>4</sup> The EN1032 forms appellant completed between January 12, 2009 and October 22, 2010 asked, "During the past 15 months, did you perform any volunteer work for which ANY FORM of monetary or in-kind compensation was received?" The EN1032 forms he completed on October 20, 2011, November 13, 2012, October 18, 2013, and November 15, 2014 contained a change in language and asked, "During the past 15 months, did you perform any volunteer work including volunteer work for which ANY FORM of monetary or in-kind compensation was received?"

and drinking from a water bottle several times; grasping a microphone continuously throughout the service; and waving a towel. On April 6 and 13, 2014 two OIG agents observed appellant at the church with similar movements as on January 26, 2014. The service on April 6, 2014 lasted from 11:33 a.m. to 1:15 p.m. while the service conducted on April 13, 2014 began at 11:05 a.m. and ended at 1:00 p.m. At the April 13, 2014 service appellant introduced a guest minister, D.M., who gave the sermon, but he later addressed the congregation for approximately 1 hour and 25 minutes following the guest sermon. Appellant told the OIG agent that D.M. preached most of the time at the church and that his own title of pastor was in name only. The OIG report does not indicate, and the record does not otherwise establish, that appellant was ever paid a salary or received in-kind compensation for activities related to Union Missionary Baptist Church.

The OIG agent who completed the report indicated that in the Articles of Incorporation, filed on January 16, 2005 with the Georgia Secretary of State, appellant was recorded as an incorporator and an initial director of Union Missionary Baptist Church, along with a number of other individuals. This document also related that the Church was tax exempt as a charitable or religious organization.

A church bulletin for the worship service of April 16, 2014 noted in the Order of Worship that appellant was to perform both the sermon and the benediction. The church bulletin also lists appellant as pastor and includes his email address, home telephone number, and his cell phone number. Neither D.M. nor any other individual is included in the bulletin as a pastor or in any other capacity.

In addition to the activities observed within the Union Missionary Baptist Church, the OIG report also confirmed physical activities performed by appellant including yard work, pulling a trash bin from the curb to his garage, driving a car, removing items from the trunk of a car, working on a car for three hours continuously, driving his van on vehicle ramps to crawl underneath the van, unraveling and taking a water hose from his yard to his home, carrying and painting a coffee table at his residence, raising his then 9-year-old son onto a garbage can and then pulling the garbage can across his yard, dragging tree branches in his yard, mowing his lawn with a riding lawn mower, and hand washing a minivan in his driveway including the top of the vehicle. The OIG report listed these activities and then cited to an October 9, 2014 medical assessment evaluation form in which appellant alleged that he could not cut his grass or work on cars. In an assessment form, noted in the OIG report, he indicated that he led a lifestyle of almost no activity as he could not reach, squat, kneel, bend, or grasp.

A copy of the investigative DVD/CD was included in the record. Appellant was interviewed by the investigator concerning his work injury and involvement with the Union Missionary Baptist Church. He related that the majority of the preaching was conducted by M.A. and that he was a pastor by name only. Appellant explained that due to physical limitations he was unable to conduct services. The investigator showed appellant the surveillance videotape of his conducting sermons and performing activities around his home and asked for his response. Appellant replied that he made statements and filled out paperwork based on what he felt he could do physically. He also claimed that he really did not read the forms thoroughly and just filled it out. The investigative memorandum reported appellant's

statement that the church owed him \$18,000.00 for work he performed prior to his injury and that he was not paid by the church as they could not afford to pay him.

By decision dated July 27, 2015, OWCP determined that appellant forfeited his right to compensation from October 12, 2007 to November 15, 2014 because he failed to report employment activities on EN1032 forms covering this period. The decision set forth the applicable language in the EN1032 forms for employment activities and for volunteer activities and noted that appellant reported no employment or volunteer activities. OWCP found that he had worked as a pastor of Union Missionary Baptist Church and noted that the wording of the EN1032 forms advised him of the need to report such employment activities even if he was not paid for them. OWCP noted that appellant's activities were documented by evidence such as his name being listed as pastor on the church bulletin and that he had not denied involvement with church management. It also noted that he had begun this work prior to his injury and therefore his continuation of the work required reporting.

In a July 27, 2015 letter, OWCP advised appellant of its preliminary determination that he received an overpayment of compensation in the amount of \$271,743.45 because he forfeited his right to any compensation from October 12, 2007 to November 15, 2014.<sup>5</sup> It also made a preliminary determination that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP indicated that appellant was aware or reasonably should have been aware of the reporting requirements of the EN1032 forms. It requested that he complete and return a financial information questionnaire (Form OWCP-20).

Appellant requested a prerecoumpment telephonic hearing with an OWCP hearing representative, which was held on March 18, 2016. During the hearing, the hearing representative noted that appellant had submitted an OWCP-14 form without any supporting financial evidence. Counsel argued that appellant's work as a pastor could not be considered a hobby or volunteer work and therefore appellant was not required to report this activity. He further argued that appellant's activity of serving God was exempt from OWCP and the United States government laws and that this matter was not subject for review. Appellant testified that he received no money from the church or its parishioners for praying for the parishioners or when he preached. He also provided testimony regarding his income and expenses.

On March 21, 2016 OWCP received a January 5, 2016 Nolle Prosequi Order by the Superior Court of Clayton County, GA, dismissing a criminal indictment for making false statements and theft by deception as crimes appellant had been charged with as the acts had occurred outside the venue of Clayton County.<sup>6</sup>

On April 15, 2016 OWCP received information regarding appellant's income and expenses and supporting financial evidence.

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<sup>5</sup> The record contains payment records and worksheets showing that appellant had received \$271,743.45 in compensation from October 12, 2007 to November 15, 2014.

<sup>6</sup> On May 12, 2016 the special agent reported that OIG ultimately declined to prosecute appellant.

In a May 13, 2016 decision, the hearing representative affirmed the finding that appellant forfeited his right to compensation from October 12, 2007 to November 15, 2014 because he failed to report employment and earnings on EN1032 forms covering this period. He noted that the July 27, 2015 forfeiture decision had not been appealed. The hearing representative also found that appellant had received an overpayment of compensation in the amount of \$271,743.45 and that he was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

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

The section 8106(b) of FECA provides that an employee who fails to make an affidavit or report when required or knowingly omits or understates any part of his earnings, forfeits his right to compensation with respect to any period for which the affidavit or report was required.<sup>7</sup>

The Board has held that it is not enough merely to establish that there were unreported earnings or unemployment. Appellant can be subjected to the forfeiture provisions of 5 U.S.C. § 8106(b) only if he “knowingly” failed to report employment or earnings.<sup>8</sup> The term “knowingly” as defined in OWCP’s implementing regulation, means “with knowledge, consciously, willfully, or intentionally.”<sup>9</sup>

Section 10.5(g) of OWCP’s implementing federal regulations defines earnings from employment or self-employment as follows:

“(1) Gross earnings or wages before any deduction and includes the value of subsistence, quarters, reimbursed expenses and any other goods or services received in kind as remuneration; or

“(2) A reasonable estimate of the cost to have someone else perform the duties of an individual who accepts no remuneration. Neither lack of profits, nor the characterization of the duties as a hobby, removes an unremunerated individual’s responsibility to report the estimated cost to have someone else perform his or her duties.”<sup>10</sup>

OWCP procedures recognize that forfeiture is a penalty.<sup>11</sup> As a penalty provision, it must be narrowly construed.<sup>12</sup> To meet this burden, OWCP is required to examine closely appellant’s activities and statements. It may meet this burden without an admission by an employee if the

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<sup>7</sup> 5 U.S.C. § 8106(b).

<sup>8</sup> *Barbara L. Kanter*, 46 ECAB 165 (1994).

<sup>9</sup> 20 C.F.R. § 10.5(n).

<sup>10</sup> *Id.* at § 10.5(g).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Forfeiture*, Chapter 2.1402.8 (May 2012).

<sup>12</sup> *See Christine P. Burgess*, 43 ECAB 449, 458 (1992).

circumstances of the case establish that he failed to reveal fully and truthfully the full extent of his employment activities and earnings.<sup>13</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that appellant forfeited his compensation between October 12, 2007 and November 15, 2014 as he knowingly failed to report employment and or volunteer activities related to being a pastor of Union Missionary Baptist Church on the EN1032 forms submitted into the record. These forms cover an entire period during which appellant served in the position of pastor and was observed performing actual labor activities.

The EN1032 forms of record expressly indicate that if work was performed in furtherance of another's business, the employee must show the rate of pay of what it would have cost the employer or organization to hire someone to perform the work actually performed. The Board has held that the test of what constitutes reportable earnings on an EN1032 is not whether appellant received a salary, but what it would have cost to have someone else do the work.<sup>14</sup>

Appellant was interviewed by an OIG investigator in the course of its investigation. He was shown a copy of video surveillance which included his activities while acting in the position of pastor, as well as performing additional activities around his home and on his motor vehicles. Appellant did not deny that he was the individual surveilled or that he performed the activities as recorded. Rather, he explained that he made statements and filled out paperwork based on what he believed he could do physically. Appellant presented himself in documentation he submitted to OWCP as significantly disabled and unable to return to any work because he could not lift, hold objects, or even perform the most basic of self-care activities. Such statements lack credibility given the undisputed performance of activities both at his home and in his church as discovered and documented by the OIG investigator. Such lack of candor by appellant is persuasive evidence that he failed to reveal fully and truthfully the full extent of his employment activities and or earnings from Union Missionary Baptist Church.

While the investigative report was not supported by signed affidavits or declarations of witnesses such as a church parishioner, the Board finds that such support is unnecessary in this case to prove appellant's activities as he confirmed the allegations contained in the report during the course of the investigative interview.<sup>15</sup> Appellant's admissions are sufficient, on their own, to establish the extent of his activities as a pastor and to undercut his claims of total disability. The Board finds that appellant's statements justifying his EN1032 entries are not credible given the undisputed observations of the OIG investigators, appellant's own admissions that he was the individual on the surveillance video performing the activities witnessed by the investigators, and

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<sup>13</sup> *Terry A. Geer*, 51 ECAB 168 (1999).

<sup>14</sup> *See Anthony Derenze*, 40 ECAB 504 (1988); *see also Monroe E. Hartzog*, 40 ECAB 322 (1988); *B.S. Docket No. 09-0076* (issued September 30, 2009); *G.R.*, Docket No. 15-1047 (issued July 8, 2016).

<sup>15</sup> *Cf. D.O.*, Docket No. 13-1809 (issued September 11, 2014) (finding that an investigative report, lacking a transcript and signed statement of each witness cited within the report, is insufficient to establish a finding of forfeiture).

documentary evidence including the church bulletin which listed him as pastor and provided his contact information to parishioners.

Counsel asserts on appeal that work as a pastor cannot be considered employment under FECA and is an activity that cannot be considered by OWCP to trigger forfeiture. The Board has previously held work as a pastor or performing volunteer activities for a church is required to be included on EN1032 forms.<sup>16</sup> However, the mere fact that a claimant was listed on the Articles of Incorporation of the Church does not establish that he or she either performed work for or volunteered for the church.<sup>17</sup>

The Board finds that appellant did knowingly omit employment activities and/or volunteer work under section 8106(b)(2) of FECA on each of the EN1032 forms completed between January 2, 2009 until November 15, 2014, forms which covered the period of earnings from October 12, 2007 through November 15, 2014, as he failed to reveal fully and truthfully the full extent of his employment activities and/or earnings.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 10.529 of OWCP's implementing regulations provide as follows:

“(a) If an employee knowingly omits or understates any earnings or work activity in making a report, he or she shall forfeit the right to compensation with respect to any period for which the report was required. A false or evasive statement, omission, concealment or misrepresentation with respect to employment activity or earnings in a report may also subject an employee to criminal prosecution.

“(b) Where the right to compensation is forfeited, OWCP shall recover any compensation already paid for the period of forfeiture pursuant to 5 U.S.C. § 8129 and other relevant statutes.”<sup>18</sup>

### **ANALYSIS -- ISSUE 2**

As noted above, OWCP regulations provide that it must declare an overpayment of compensation for any compensation already paid for the period of a given forfeiture of compensation. If a claimant has any employment, including self-employment or involvement in a business enterprise, during a period covered by an EN1032 form which he or she fails to report, the claimant is not entitled to any compensation for any portion of the period covered by the report, even though he may have not had earnings during a portion of that period. The record of evidence contains payment records and worksheets from OWCP showing that appellant received \$271,743.45 in compensation for the period from October 12, 2007 to November 15, 2014. The

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<sup>16</sup> See *C.D.*, Docket No. 14-1165 (issued July 8, 2015).

<sup>17</sup> *Id.*

<sup>18</sup> 20 C.F.R. § 10.529.

Board therefore finds that appellant received an overpayment of compensation in the amount of \$271,743.45.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless “incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”<sup>19</sup>

Section 10.433(a) of OWCP’s regulations provide that OWCP:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits. A recipient who has done any of the following will be found to be at fault in creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).<sup>20</sup>

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment.

The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.<sup>21</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly determined that appellant was at fault in the creation of the overpayment because he failed to provide information which he knew or should reasonably have known to be material on the EN1032 forms dated January 2, 2009 to

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<sup>19</sup> 5 U.S.C. § 8129; *See Linda E. Padilla*, 45 ECAB 768 (1994).

<sup>20</sup> 20 C.F.R. § 10.433(b); *see Sinclair Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

<sup>21</sup> *Id.* at § 10.433(b); *Duane C. Rawlings*, 55 ECAB 366 (2004).

November 15, 2014. The evidence of record establishes that appellant had unreported employment activity during this period and knowingly failed to furnish this material information to OWCP as required by law.

Appellant signed a certification clause on the EN1032 forms which expressly advised him that he might be subject to civil, administrative, or criminal penalties if he knowingly made a false statement or misrepresentation or concealed a fact to obtain compensation. By signing the annual EN1032 forms, he is deemed to have acknowledged his duty to report any employment, self-employment, or involvement in a business enterprise. The Board therefore finds that appellant failed to furnish information which he knew or reasonably should have known to be material to OWCP. As he is at fault in the creation of the overpayment, it is not subject to waiver of recovery.<sup>22</sup>

In cases such as here, where appellant is no longer receiving FECA compensation benefits, the Board does not have jurisdiction over either the amount or method of recovery of the overpayment under the Debt Collection Act.<sup>23</sup>

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant forfeited his right to compensation pursuant to § 8106(b)(2) of FECA, for the period October 12, 2007 to November 15, 2014. The Board further finds that OWCP properly determined that an overpayment of compensation in the amount of \$271,743.45 was created and that, as appellant was at fault in the creation of the overpayment, it was not subject to waiver of recovery.

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<sup>22</sup> *Harold F. Franklin*, 57 ECAB 387 (2006).

<sup>23</sup> *Albert Pineiro*, 51 ECAB 310 (2000).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 13, 2016 is affirmed.

Issued: October 3, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board