Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	)	
	)	Date: September 16, 2008
Gary R. Ramage,	)	
	)	Docket No. C-08-622
Petitioner,	)	Decision No. CR1842
	)	
v.	)	
	)	
Social Security Administration.	)	
	)	

DECISION

Petitioner, Gary R. Ramage, is indebted to the Social Security Administration (SSA) in the amount of $915.05, plus any accrued interest and penalty.

I. Background

Petitioner requested a hearing by letter dated March 11, 2008, to dispute the determination of SSA that he is indebted to the agency in the amount of $915.05 that he was paid due to claiming 13.25 hours of overtime work on January 8, 9, and 10, 2008. According to Petitioner, on February 29, 2008, he received a certified letter from the Debt Management Branch, National Business Center, Denver, Colorado charging him with the debt in the amount of $915.05.

Petitioner sent his March 11, 2008 hearing request to the Director, Division of Central Accounting Operations, Social Security Administration in Baltimore, Maryland. On July 8, 2008, Edwina Bailey on behalf of Michele Bailey, Debt Management Team Leader for SSA, forwarded the request for hearing to the Civil Remedies Division (CRD) of the Departmental Appeals Board (DAB), Department of Health and Human Services (HHS) for assignment to an administrative law judge (ALJ). The case was assigned to me for hearing and decision on July 30, 2008.

On August 5, 2008, I ordered that SSA show cause not later than August 12, 2008, why a decision should not issue in favor of Petitioner. I also directed that SSA file any documents upon which it relies for the existence of the alleged debt and any argument in

support of the existence of the indebtedness. I also ordered that not later than August 22, 2008, Petitioner should file any documents and argument he wanted me to consider regarding the existence of the alleged indebtedness. On August 13, 2008, SSA requested additional time to submit its response to my order of August 5, 2008.

On August 18, 2008, SSA filed its Response to the order to show cause and brief on the existence of the debt (SSA Brief) with exhibits (SSA Ex.) 1 through 6. Petitioner filed his response (P. Response) on August 29, 2008, with three attachments that I have marked Petitioner's exhibits (P. Ex.) 1 through 3. SSA filed a reply brief on September 4, 2008 (SSA Reply). No objections have been made to my consideration of the exhibits and all are admitted.

II. Discussion

A. Findings of Fact

The following Findings of Fact are based upon the request for hearing, the undisputed assertions in the parties pleadings, and the exhibits admitted.

1. Petitioner is a federal employee and employed by SSA as a Senior Attorney Adviser in the Office of Disability Adjudication Review. Request for Hearing (RFH); SSA Ex. 2.

2. Petitioner is a member of the National Treasury Employees Union (NTEU) and from January 7 through 11, 2008, he was Vice President-at-Large for the NTEU Chapter 224 and designated to negotiate with SSA management officials regarding the implementation of a new Personal Identification Verification system also known as the Smart Card system. RFH Exhibit (RFH Ex.) 1.

3. Petitioner's supervisor authorized "official time" for Petitioner pursuant to 5 U.S.C. § 7131(a) to permit him to travel to and participate in negotiations from January 7 through 11, 2008, during the time Petitioner would otherwise have been in normal duty status. RFH Ex. 1.

4. SSA's chief negotiator requested that negotiations continue beyond normal working hours on January 8, 9, and 10, 2008. RFH.

5. Petitioner participated in negotiations more than eight hours per day on January 8, 9, and 10, 2008. RFH.

6. Although Petitioner had been approved to work overtime at his normal job during the period January 7 through 12, 2008 (RFH Ex. 2), he was not in an overtime status at his normal job when the requirement for him to perform representational duties arose, rather he was in an "official time" status.

7. Petitioner's work beyond the normal eight-hour workday on January 8, 9, and 10, 2008, was not under the control of his agency as he could have declined to continue and it was not for the benefit of the agency but rather for the benefit of the union he was representing.

8. On January 14, 2008, Petitioner requested overtime pay for 13.25 hours for the additional hours beyond the normal eight-hour workday on January 8, 9, and 10, 2008. RFH.

9. Petitioner was paid for the overtime in the gross amount of $915.05.

10. Petitioner's timecard was subsequently amended by SSA to delete the overtime entitlement. RFH.

11. Petitioner was notified on February 29, 2008, that he was indebted to the United States in the amount of $915.05, the amount of overtime for which he was paid. RFH; SSA Brief at 3-4; SSA Ex. 4.

B. Conclusions of Law

1. Petitioner's request for hearing was timely and I have jurisdiction.

2. Petitioner was not entitled to claim or be compensated for overtime work on January 8, 9, and 10, for working beyond the normal eight-hour workday because he was acting in a representational capacity and the requirement to function in that capacity did not arise while he was in an overtime status to perform his normal duties.

3. Petitioner is indebted to the United States in the amount of $915.05, plus any accrued interest and penalty.

4. Petitioner is entitled to no remedy based on the fact that this decision could not be issued within 60 days of the date of his request for hearing.

5. Petitioner is entitled to no remedy based on the premature collection of the debt.

C. Issue

Whether Petitioner is indebted to the SSA in the amount of $915.05.

D. Applicable Law

Debts owed to the United States from a federal employee, may be collected from the current pay account of the employee, including basic pay, special pay, incentive pay, retired pay, retainer pay or other authorized pay. The amount that may be deducted is limited to 15 percent of disposable pay per pay period, unless the employee consents in writing to the collection of a larger amount. 5 U.S.C. § 5514(a)(1).

Before an agency head may direct collection of indebtedness from the salary of an employee, due process must be provided. The employee must be given written notice a minimum of 30 days prior to any attempt to collect and the notice must inform the employee of the nature and amount of the debt determined to be due; the intention of the agency to effect collection through deduction from the employee's pay; and the notice must explain the employees rights under 5 U.S.C. § 5514. The employee must be given the opportunity to inspect and copy government records related to the debt. The employee must be offered an opportunity to enter a written agreement agreeable to the agency head establishing a repayment schedule. The employee must also be given the opportunity for a hearing on the determination of the agency regarding the existence or the amount of the debt and any repayment schedule not established by written agreement. The statute requires that a hearing be provided only if requested within 15 days of receipt of the notice of indebtedness from the agency. The timely filing of a request for hearing automatically stays the commencement of collection proceedings. The statute requires that a decision be issued by the official designated to conduct the hearing not more than 60 days from the date of filing the request for hearing. 5 U.S.C. § 5514(a)(2).

The head of each executive agency is required by 5 U.S.C. § 5514(b)(1) to issue regulations implementing its provisions. The regulations of the Secretary of HHS (the Secretary) implementing the provisions of 5 U.S.C. § 5514 are found at 45 C.F.R. Part 33. Pursuant to 45 C.F.R. § 33.2, the hearing to be provided pursuant to 5 U.S.C. § 5514 (a)(2)(D) includes review of the documentary evidence to confirm the existence of the amount of a debt or the terms of a repayment schedule that is challenged. I construe the regulatory definition of the hearing to be provided broadly to include possible refutation of the existence of an alleged debt. The regulation provides that an oral hearing may be conducted where the validity of an alleged debt turns on an issue of credibility or

veracity. 45 C.F.R. §§ 33.2; 33.6(c). The Secretary has specified that there are two issues to be addressed in the decision of the hearing official: (1) the existence and amount of the debt; and (2) the repayment schedule if one has not been established in writing. 45 C.F.R. § 33.3(c)(2).

E. Analysis

(1) Jurisdiction.

This case is before me upon Petitioner's request for hearing that was forwarded by SSA to the CRD, DAB for assignment of a hearing official. Pursuant to an interagency agreement between HHS and SSA, DAB assigns Board Members or ALJs to conduct certain hearings for SSA, including debt collection cases involving current employees, except for members of the American Federation of Government Employees, and former employees. SSA Ex. 1. I find that that Petitioner's request for hearing is properly before me and I have jurisdiction.

(2) Existence and Amount of Debt.

Petitioner listed the names of two proposed witnesses in his request for hearing. However, after review of the parties' briefs and exhibits I find no dispute as to the facts or issues of credibility that require an oral hearing. 45 C.F.R. § 33.3(c)(3). Petitioner does not suggest in his brief in response that an oral hearing is necessary. The facts set forth as Findings of Fact above are undisputed and need not be restated here.

Petitioner argues in his request for hearing that, pursuant to regulations of the Office of Personnel Management (OPM),[1] overtime is work that is officially ordered and performed by an employee in excess of eight hours in a day. He reasons that he was officially requested to work in excess of eight hours per day on January 8, 9, and 10, 2008, he did work in excess of eight hours on those three days, and denying him overtime pay by collecting the alleged debt would violate the regulations and the Fair Labor Standards Act. SSA does not deny Petitioner participated in negotiations more than eight hours on January 8, 9, and 10, 2008, at the request of the SSA management official involved in the negotiation. Nevertheless, Petitioner is in error in his rationale.

Pursuant to 5 U.S.C. § 5542, subject to exceptions not relevant to this case, work by a federal employee in excess of eight hours in a day or in excess of 40 hours in a workweek is considered to be overtime work that is paid at the rate specified by the statute. OPM

[1] Petitioner cites 5 C.F.R. § 550.11, however there is no such section. Petitioner likely intended to cite 5 C.F.R. § 550.111, which discusses overtime pay.

provides in 5 C.F.R. § 550.111, with certain exceptions not relevant to this case, that overtime work is work in excess of eight hours in a day or 40 hours in an administrative workweek, that is officially ordered or approved and performed by an employee. Pursuant to 5 U.S.C. § 7131(a), a federal "employee representing an exclusive representative in the negotiation of a collective bargaining agreement . . . shall be authorized official time for such purposes . . . during the time the employee otherwise would be in a duty status." SSA does not dispute that Petitioner was, from January 8 through 10, 2008, representing the NTEU, the exclusive representative for a group of SSA employees. OPM regulations regarding pay administration under the Fair Labor Standards Act of 1938 (29 U.S.C. Chap. 8) (FLSA)[2] are at 5 C.F.R. Part 551. "All time spent by an employee performing an activity for the benefit of an agency and under the control or direction of the agency is "hours of work." 5 C.F.R. § 551.401(a). Included within hours of work is time when the employee is required to be on duty, when the employee is suffered or permitted to work, and waiting time that is controlled by the agency and for its benefit. *Id.* "Hours of work" includes paid non-work hours such as paid leave, holidays, compensatory time off, and excused absences but not unpaid non-work hours such as leave without pay, furlough, or absence without leave. 5 C.F.R. § 551.401(b) and (c). Time that is "hours of work" is used to determine an employee's entitlement to minimum wages and overtime pay. 5 C.F.R. § 551.401(d). The time an employee spends adjusting his or her own grievances or performing representational functions is specifically addressed at 5 C.F.R. § 551.424. Section 551.424(b) provides:

> "Official time" granted an employee by an agency to perform representational functions during those hours when the employee is otherwise in a duty status shall be considered hours of work. This includes time spent by an employee performing such functions during regular working hours (including regularly scheduled overtime hours), or during a period of irregular, unscheduled overtime work, provided an event arises incident to representational functions that must be dealt with during the irregular, unscheduled overtime period.

The interpretation of the foregoing statutes and regulations and their application was addressed in *National Treasury Employees Union v. Gregg*, No. 83-546, 1983 WL 31224 (D.D.C. Sep. 28, 1983). In *Gregg*, the court concluded that federal employees negotiating collective bargaining agreements with their agency as representatives of their labor union for more than 40 hours in a week, are not entitled to overtime pay under the Civil Service Reform Act, Federal Employee Pay Act, or FLSA. The court found that 5 U.S.C.

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[2] There is no question that Petitioner is in a "nonexempt" status which means he is subject to the FLSA. SSA Ex. 2 (Block 35).

§ 7131(a) was clear on its face and provided that a employee engaged in collective bargaining as a union representative is entitled to compensation while the employee would otherwise be on the job, i.e., when the employee was actually scheduled to perform his or her normal job. The court discussed that while engaged in negotiations in a representational status an employee is not working for the benefit of the agency, but rather the union. Based on its review of the legislative history, the court commented that Congress created official time to avoid penalizing employees who agreed to perform representational duties while on the job, by preventing agencies from refusing to pay them for time spent negotiating rather than doing their normal job. Interpreting 5 C.F.R. § 551.424(b), the court concluded that the payment of overtime to an employee involved in negotiations as a union representative is limited to the circumstance where the employee is already in an overtime status at the direction of the agency to perform his or her normal duties when the event arises that requires the employee to act in a representational status. The interpretation of the District Court in *Gregg* has been consistently cited as authoritative and applied as such by the Federal Labor Relations Authority (F.L.R.A.). *See e.g.*, *Warner Robins Air Logistics Center Warner Robins, Georgia and American Federation of Government Employees, Local 987*, No. 0-AR-1068, 23 F.L.R.A. 270, 1986 WL 75778 (Aug. 19, 1986); *American Federation of Government Employees, Local 2022 and U.S. Department of the Army Headquarters, 101st Airborne Division Fort Campbell, Kentucky*, No. 0-NG-1737, 40 F.L.R.A. 371, 1991 WL 96746 (Apr. 26, 1991) (agency may not schedule a union representative for overtime to permit them to conduct representational functions); *American Federatation of Government Employees Local 900 and U.S. Department of the Army U.S. Army Reserve Personnel Center St. Louis, Missouri*, 46 F.L.R.A. 1494, 1993 WL 59199 (Feb. 24, 1993).

The case before me is similar to the situation in *Gregg.* In *Gregg*, the union representatives were required to negotiate on the weekend and in excess of the normal workweek. They were not entitled to overtime pay because they were not otherwise scheduled to perform overtime as part of their regular job. In this case, there is no question that Petitioner, as a union representative engaged in negotiations, he was requested to continue negotiations beyond the end of the normal eight-hour day, and he agreed. Although Petitioner had been approved to work overtime at his normal job during the same period (RFH Ex. 2), he was not in an overtime status at his normal job when the requirement for him to perform representational duties arose, rather he was in an "official time" status representing the union. Petitioner's work beyond the normal eight-hour workday on January 8, 9, and 10, 2008, was not under the control of his agency as he could have declined to continue and it was not for the benefit of the agency but rather for the benefit of the union he was representing. Accordingly, I conclude that Petitioner was not entitled to claim or receive a total of 13.25 hours of overtime pay for January 8, 9, and 10, 2008. The evidence shows, and Petitioner does not deny, that he was paid $915.05 based upon his claim for 13.25 hours of overtime. SSA Ex. 4, at 9 shows that Petitioner is responsible to pay directly as debt to the government a total of $868.21, plus

any accrued interest and penalty. The balance of the $915.05 is recoverable by the agency directly from the entity or entities to which it was paid on Petitioner's behalf. SSA Ex. 4, at 9. There is no evidence that there exists a written agreement establishing a repayment schedule. Accordingly, recovery by offset is authorized within the limits established by 5 U.S.C. § 5514, except to the extent that part or all of the indebtedness has already been collected from Petitioner's disposable pay.

(3) Petitioner's Request for an Order to Cease Collection Efforts.

Petitioner advises me in his response that $539.00 was withheld from his pay for pay period 8 that ended on April 12, 2008 and $340.84 was withheld from his pay for pay period 9 that ended on April 26, 2008. P. Response at 2; P. Exs. 2 and 3. SSA concedes that the amounts collected were for the debt presently before me. SSA Reply at 1. Pursuant to 5 U.S.C. § 5514(a)(2), Petitioner's timely filing of his request for hearing should have stayed any collection attempt by SSA until a final decision was made on the existence of the debt. Further, SSA's delay in forwarding the request for hearing to the DAB precluded issuance of a decision within 60 days of the date of the request for hearing as required by 5 U.S.C. § 5514(a)(2) and 45 C.F.R. § 33.6(d). SSA does not deny that collection of the debt from Petitioner's pay was in violation of the stay but asserts it was due to administrative error which can be corrected by returning the money collected to Petitioner pending my final decision. SSA Reply. SSA argues that its delay in forwarding the request for hearing to the DAB was harmless error that caused no prejudice to Petitioner. SSA also argues that 5 U.S.C. § 5514 provides no remedy for violation of the 60 day requirement. SSA Brief at 3. Petitioner argues that he has been prejudiced due to the premature collection of the debt and violation of 5 U.S.C. § 5514 and requests that SSA be ordered to return the amount collected and to cease collection efforts.

Petitioner's request for relief is denied. Congress provided no remedy for a violation of the requirement of 5 U.S.C. § 5514(a)(2) that a decision be issued within 60 days. Further, I find no authority that permits me to fashion a remedy for a violation, particularly in a case such as this were the debt is shown to exist and requiring SSA to cease collection efforts would negatively impact the public fisc. I also find no evidence of actual prejudice to Petitioner due to the premature collection of the debt. To the contrary, the collection stopped the accrual of interest and penalties.

I conclude based upon review of all the evidence and arguments of the parties, that Petitioner's petition for hearing was not a baseless attempt to delay collection.

III. Conclusion

For the foregoing reasons, I conclude Petitioner is indebted to the government in the amount of $915.05, plus any accrued interest and penalty.

/s/
Keith W. Sickendick
Administrative Law Judge