

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

M. Dwight Evans,

Petitioner,

v.

Social Security Administration.

Docket No. C-14-552

Decision No. CR3143

Date: March 5, 2014

DECISION

The Social Security Administration (SSA) determined that Petitioner, an administrative law judge employed by SSA, received an overpayment of his salary. Petitioner filed a Notice of Disagreement, Request for Waiver and Request for Oral Hearing. For the reasons stated below, I conclude that Petitioner owes a debt of \$2,637.71 to the United States Government.

I. Background

In a letter dated August 13, 2013, SSA informed Petitioner, that “[t]he processing of an amended time and attendance record or a personnel action has shown that you previously received employee pay that was higher than it should have been” and indicated that Petitioner needed to repay this alleged overpayment. Accompanying the letter were various notices including Petitioner’s right to a hearing to dispute the existence and basis of the alleged debt and right to seek waiver of the debt. SSA Exhibit (Ex.) 3.

Because the August 13, 2013 letter was sent to an address where Petitioner was not residing, Petitioner did not receive the letter. SSA resent the letter, which Petitioner received on November 6, 2013. *See* Notice of Disagreement, Request for Waiver and

Request for Oral Hearing at 1. In response, Petitioner filed with SSA a Notice of Disagreement, Request for Waiver and Request for Oral Hearing dated November 25, 2013. Under the terms of an interagency agreement, on January 13, 2014, the Director of SSA's Division of Reimbursable and Administrative Collections forwarded this matter to the Departmental Appeals Board, Civil Remedies Division for adjudication by an administrative law judge. *See Portia L. Pierce*, DAB CR2049 at 5 (2009).¹ The Director of the Civil Remedies Division assigned this case to me and on January 16, 2014, I issued an Acknowledgment and Prehearing Order (Order) establishing a schedule for the parties to submit their prehearing exchanges.²

On January 29, 2014, SSA mailed a brief (SSA Br.), three exhibits (SSA Exs. 1-3), and a list of proposed witnesses. SSA's brief included a motion to dismiss. Also on January 29, 2014, Petitioner mailed two exhibits (P. Exs. 1-2). I have not received any further filings from the parties.

II. Ruling

SSA filed a motion to dismiss this matter. SSA "concedes that Petitioner should not be bound by the initial deadline [in the August 13, 2013 letter concerning Petitioner's alleged debt] to request a hearing." SSA Br. at 4. However, SSA asserts that Petitioner received the notice on November 6, 2013, and failed to file a request for hearing within 15 days (i.e., by November 21, 2013) because his hearing request is dated November 26, 2013. SSA, therefore, urges me to dismiss the request for hearing as untimely. SSA Br. at 3-4.

SSA's August 13, 2013 letter stated that Petitioner's request for hearing had to be postmarked within 15 days of the date on the letter. SSA Ex. 3, at 9. This statement accurately reflects the regulations; however, the regulations recognize that this provision is only applicable unless "otherwise provided by statute or regulation." 45 C.F.R.

¹ Administrative decisions cited in this decision are accessible on the internet at: <http://www.hhs.gov/dab/decisions/index.html>.

² A decision in this case must be issued "not later than sixty days after the filing of the petition requesting the hearing." 5 U.S.C. § 5514(a)(2); *see also* 45 C.F.R. § 30.15(o) (1995). In the present matter, Petitioner's hearing request is dated November 25, 2013; however, there is no indication when SSA received it. SSA did not forward the hearing request to the Civil Remedies Division until January 13, 2014. The Order I issued established an expedited prehearing schedule and I issue this decision less than 60 days after the Civil Remedies Division received the hearing request.

§ 30.15(l) (1995). The statute authorizing these proceedings requires that an employee be provided a hearing if he files the request for hearing within 15 days of receiving a notice concerning an alleged debt. 5 U.S.C. § 5514(a)(2). Therefore, the regulatory provision requiring that a request for hearing be postmarked by the fifteenth day after the date on the notice concerning the debt conflicts with the statute (unless the notice is delivered on the same day as it is dated), and as indicated in the regulation itself, this provision is not operative because it conflicts with the statute.

SSA provided incorrect notice that Petitioner only had fifteen days from date of the August 13, 2013 letter to file a request for hearing. Because SSA did not send a newly dated letter to Petitioner after its first attempt failed, SSA's notice of the date on which the hearing request was due was not provided to him. *See* 5 U.S.C. § 5514(a)(2)(A); 45 C.F.R. § 30.15(j)(4) (1995). Petitioner, upon receiving the letter dated August 13, 2013, immediately knew that he could not timely file a request for hearing. Further, in his hearing request, Petitioner raised the issue of non-receipt of the August 13, 2013 letter, until November 6, 2013, based on mailing to an incorrect address.

Under the regulations, the Commissioner

may grant an extension or excuse a delay if the debtor shows good cause for the late filing of a request for a hearing. A reasonable extension will be granted only if the debtor shows that the delay was caused by circumstances beyond the debtor's control or because the debtor did not receive notice, and was not otherwise aware of the time limit.

45 C.F.R. § 30.15(l) (1995).

It is clear from the facts in this matter that Petitioner had good cause to receive a reasonable extension in the filing deadline. Petitioner did not receive the August 13, 2013 letter because SSA sent it to an address where Petitioner would not receive it, and the August 13, 2013 letter provided confusing and inaccurate information about when the request for hearing was due. While 5 U.S.C. § 5514(a)(2) requires that an employee be given a hearing if he files a hearing request within 15 days of receiving the notice of the debt, that statute does not preclude an agency from accepting a hearing request that is filed later than 15 days. The regulations reflect this interpretation because they expressly allow the Commissioner to permit a late filing.

Because SSA sent Petitioner's hearing request to the Civil Remedies Division for adjudication, I conclude that SSA accepted Petitioner's hearing request, filed 19 days after receipt of the August 13, 2013 letter, as being reasonably delayed. If SSA had not

made such a determination, it would not have forwarded the hearing request. SSA would have dismissed the request. In the alternative, if I, rather than SSA, have the authority to consider whether Petitioner met his burden for showing good cause exists for Petitioner's late filing of the hearing request, I conclude Petitioner made such a showing and that his late filing is excused. Therefore, I deny SSA's motion to dismiss.

III. Decision on the Record

Neither party objected to any of the proposed exhibits. Therefore, I admit SSA Exs. 1-3 and P. Exs. 1-2 into the record.

I directed each party to submit written direct testimony for all proposed witnesses. Order ¶ 7. Further, if the opposing party wanted to cross-examine any of the proposed witnesses, then the opposing party needed to affirmatively request to cross-examine the witnesses. Order ¶ 8. Neither party submitted written direct testimony for any witnesses. The regulations state that a "hearing will normally be a review of the record, unless . . . a decision cannot be made without resolving an issue of credibility or veracity. . . ." 45 C.F.R. § 30.15(n)(1). I conclude that an in-person hearing is not necessary and I issue this decision based on a review of the entire written record. Order ¶ 10. Consequently, I cancel the hearing scheduled for March 3, 2014, in this case. Order ¶ 9.

IV. Issues³

1. Whether Petitioner owes a debt to the United State Government based on receiving a salary overpayment.
2. If Petitioner owes a debt, what amount does Petitioner owe.

³ SSA forwarded Petitioner's Notice of Disagreement, Request for Waiver and Request for Oral Hearing to the Departmental Appeals Board, Civil Remedies Division. Although Petitioner combined his request for hearing under 5 U.S.C. § 5514 and his request for waiver under 5 U.S.C. § 5584 in one document, those requests are "distinct, but not mutually exclusive methods of seeking relief from the agency's intended action" to collect a debt from a federal employee. *Petra A. Illig, M.D.*, DAB CR2559, at 2 (2012). Because SSA forwarded Petitioner's combined request, I asked SSA counsel to clarify whether SSA had referred the waiver request for my consideration under 45 C.F.R. § 30.15(n)(3)(v) (1995). Order ¶ 4. SSA counsel responded that the Commissioner of Social Security would determine the waiver issue. SSA Br. at 3. Consequently, I have no jurisdiction to decide Petitioner's waiver request. *See Alfred H. Varga*, DAB CR342, at 1-3 (1994).

V. Findings of Fact, Conclusions of Law, and Analysis⁴

If SSA determines that an SSA employee is indebted to the United States, SSA may offset the debt from that employee's salary. 5 U.S.C. § 5514(a)(1); 20 C.F.R. § 422.310(a). Before SSA offsets the debt, the employee has the right to request a hearing before an administrative law judge (or another individual who is not under the supervision or control of the Commissioner of Social Security) in order to dispute the existence of the debt, the amount of the debt, and/or the payment schedule established by the agency. 5 U.S.C. § 5514(a)(2); 20 C.F.R. § 422.310(c)(6). The 1995 version of 45 C.F.R. pt. 30 applies to SSA employee salary overpayment cases. *See Kelly S. Jennings*, DAB CR1991, at 6 (2009); 71 Fed. Reg. 38,066, 38,067 (July 5, 2006).

- 1. From September 26, 2010 (pay period 21) through April 23, 2013 (pay period 9), Petitioner's official duty station was at SSA's Fort Myers, Florida Hearing Office and SSA paid Petitioner at a rate of \$21,600 in locality pay per year during that time period.***

Before and during part of 2010, Petitioner was assigned to SSA's Fort Lauderdale, Florida, Hearing Office as an administrative law judge.⁵ SSA Ex. 2, at 1. In a September 15, 2010 Notice of Personnel Action, SSA informed Petitioner that his reassignment from the Fort Lauderdale Hearing Office to SSA's Fort Myers, Florida, Hearing Office would be effective September 26, 2010. However, in box 39 on the September 15, 2010 Notice of Personnel Action, SSA indicated that Petitioner's duty station was Fort Lauderdale. Further, box 20B of the Notice of Personnel Action indicated that the locality pay adjustment for Fort Myers was \$21,600, which was the same amount as shown for Fort Lauderdale in box 12B. SSA Ex. 2, at 1.

⁴ My numbered findings of fact and conclusions of law appear in bold and italics.

⁵ Agencies "may appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with [the Administrative Procedure Act]." 5 U.S.C. § 3105. Administrative law judges are paid on a special pay scale that is different than the General Schedule for federal employees. *See* 5 U.S.C. § 5372. An administrative law judge is comparable to a trial judge, and the Administrative Procedure Act ensures that an administrative law judge "exercises his independent judgment on the evidence before him, free from pressures by parties or other officials within the agency." *Butz v. Economou*, 438 U.S. 478, 513-14 (1978).

On November 21, 2011, and again in December 3, 2012, SSA approved Petitioner's requests for six-month details to the Fort Lauderdale Hearing Office in 2012 and 2013. P. Exs. 1; 2.

On May 2, 2013, SSA issued a Notice of Personnel Action that retroactively corrected Petitioner's duty station (box 39) to Fort Myers, Florida, and Petitioner's locality adjustment to \$20,348 per year (box 20B).⁶ The effective date for these corrections was September 26, 2010. SSA Ex. 2, at 3.

Petitioner does not dispute these facts. Therefore, I find that between September 26, 2010 and April 23, 2013, Petitioner's official duty station was SSA's Fort Myers Hearing Office and that Petitioner was paid a locality pay adjustment during that time of \$21,600 per year.

2. Petitioner is indebted to the United States Government in the amount of \$2,637.71.

Generally, for most Federal employees, "[c]omparability payments shall be payable within each locality determined to have a pay disparity greater than 5 percent." 5 U.S.C. § 5304(a)(1). If the President so directs, comparability payments may be made to administrative law judges. 5 U.S.C. § 5304(h)(1)(A), (h)(2); *see also* 5 C.F.R. § 930.205(a)(2). Comparability payments are called "locality payments" or "locality rates of pay" in Office of Personnel Management (OPM) regulations. *See* 5 C.F.R. §§ 531.601, 531.603(a).

OPM regulations designate Fort Lauderdale as a locality pay area. 5 C.F.R. § 531.603(b)(19). Fort Myers, as an area not specifically designated as locality pay area, receives the locality for "Rest of U.S." 5 C.F.R. § 531.603(b)(34). From 2010 through 2013, the annual locality pay adjustment for Fort Lauderdale was \$21,600. SSA Ex. 1; OPM 2013 Locality Rates of Pay Administrative Law Judges available at https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2013/executive-senior-level/alj_loc.pdf (stating that "RATES FROZEN AT 2013 LEVELS"). The annual locality pay for the "Rest of the U.S." during that time-period was \$20,348 per year. *Id.*

⁶ Also on May 2, 2013, SSA issued a Notice of Personnel Action that purported to correct Petitioner's duty station from Fort Lauderdale to Fort Ogden, Florida. SSA Ex. 2, at 2. SSA concedes that it erroneously issued this Notice of Personnel Action. SSA Br. at 3 n.1.

In the present matter, SSA asserts that Petitioner received a salary overpayment from pay period 21 in 2010 through pay period 9 in 2013.⁷ SSA argues that Petitioner's annual salary while assigned to the Fort Myers Hearing Office was supposed to be \$164,048, rather than the \$165,300 SSA paid to him, and that overpayment was the result of paying Petitioner the Fort Lauderdale locality pay while Petitioner was stationed in Fort Myers. SSA Br. 4-5.

It does not appear that Petitioner contests this argument. However, Petitioner appears to take the position that his two six-month details to the Fort Lauderdale Hearing Office might entitle him to the locality pay for Fort Lauderdale during his details.

Although such an argument appears reasonable, OPM regulations do not support it. The locality pay is primarily determined by the location of the employee's "official worksite." 5 C.F.R. §§ 531.603(a), 531.604(b)(1). "[T]he official worksite is the location of an employee's position of record where the employee regularly performs his or her duties." 5 C.F.R. § 531.605(a)(1). However, "[i]f the employee's work involves recurring travel or the employee's work location varies on a recurring basis, the official worksite is the location where the work activities of the employee's position of record are based, as determined by the employing agency, subject to the requirement that the official worksite must be in a locality pay area in which the employee regularly performs work." 5 C.F.R. § 531.605(a)(2). This provision does not seem to include details, but even if it did, the regulation indicates that it is the agency, and not me, who has discretion to make this determination. It appears that SSA already rejected the theory that Petitioner's lengthy details to Fort Lauderdale warranted a change in the official duty station designation for locality pay purposes. *See* Ex. 7 attached to the Notice of Disagreement, Request for Waiver and Request for Oral Hearing.

SSA's calculation of the total gross adjustment as \$3,216.00 with a net amount Petitioner needed to pay SSA, "[l]ess [a]pplicable [r]ecoverables," is \$2,637.71. SSA Ex. 3, at 11-12. Petitioner has not directly disputed the calculation or submitted any exhibits to show that the calculation of the "applicable recoverables" is incorrect. Therefore, I conclude Petitioner is indebted to the U.S. Government in the amount of \$2,637.71.

⁷ SSA stated that Petitioner's salary overpayment went until pay period 39 in 2013. Based on a review of the record in this case, I believe SSA meant that the overpayment extended to pay period 9 in 2013.

