

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Departmental Appeals Board

In the Case of:)	
)	
Department of Health)	DATE: Oct 11, 1988
and Human Services,)	
)	
- v. -)	Docket No. D-2
)	
Robert H. Meyer,)	DECISION CR 14
)	
Respondent.)	
)	

DECISION AND ORDER

This Debt Collection Act case was heard pursuant to a request for hearing filed by the Respondent wherein he denied allegations made by the Department of Health and Human Services (DHHS) that he was indebted to it for a salary overpayment in the amount of \$844.55. After considering the entire record, I find that DHHS has shown that an overpayment occurred and that a debt in the amount of \$844.55 is due and owing from Respondent. I find further that waiver is not available in this case, and that Respondent must repay DHHS the full amount of the debt.

BACKGROUND STATEMENT

By notice dated July 2, 1988, Respondent was informed by DHHS that a salary overpayment existed in the amount of \$844.55, and that failing voluntary repayment by Respondent, DHHS intended to take action to collect the debt. This notice constituted a notice of debt according to the provisions of the Debt Collection Act of 1982 as amended. 5 U.S.C. 5514. Essentially, DHHS claimed that the alleged overpayment consisted of compensation for 60.5 hours of compensatory time claimed by Respondent that had not been lawfully ordered or approved by his supervisors.

Respondent timely filed a request for hearing. Although he did not deny that he received compensation in the amount of the alleged overpayment, or that the compensation at issue was for compensatory time claimed by him, he denied that an overpayment existed. Respondent

alleged that he had properly claimed compensatory time either with the approval of his supervisors, or according to established and recognized procedures. He asserted, in effect, that he had acted in good faith reliance on what he understood to be acceptable practices for requesting, working, and reporting compensatory time. Respondent also requested that, in the event I found a debt to exist, that I waive the requirement that he repay it.

I conducted a prehearing conference by telephone on August 30, 1988. In response to my Prehearing Order, and consistent with an extension of time that I granted to Respondent, the parties submitted sworn statements of witnesses, documents and written arguments. I conducted a second telephone conference on September 27, 1988, at which time I admitted into evidence without objection the sworn statements previously submitted and certain of the documents the parties had submitted. With the consent of the parties, I also received Respondent's sworn testimony over the telephone. Based on the parties' representations that they had no further evidence to submit, I closed the record of the proceeding.*/

ISSUES

The issues are:

- 1.) Whether the debt claimed by DHHS from Respondent in the amount of \$844.55 is due and owing, and if so;
- 2.) Whether Respondent should be granted a waiver from his obligation to repay the debt.

APPLICABLE STATUTES, REGULATIONS AND POLICIES

Statutes:

5 U.S.C. 5514; 5 U.S.C. 5542; 5 U.S.C. 5543;
5 U.S.C. 5584.

*/ The method I used to conduct the proceeding, telephone conferences, reflected my concern that the Respondent be given due process of law. Respondent presently resides in Honolulu, Hawaii, the DHHS representative is in San Francisco, California; and witnesses who potentially might have been called by both parties reside in Atlanta, Georgia, and Denver, Colorado. The cost to both parties of conducting a face-to-face hearing would far exceed the amount in controversy.

Federal Regulations and Policies

45 C.F.R. Part 30; 5 C.F.R. 550.114
DHHS Personnel Manual, 550-1; 550-9; SSA Personnel
Manual for Supervisors, Ch. S550.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

- 1.) The Departmental Appeals Board has jurisdiction in this matter pursuant to 5 U.S.C. 5514; 45 C.F.R. Part 30; and DHHS Personnel Manual 550.9 (May 5, 1988).
- 2.) At all relevant times, Respondent was employed by the Social Security Administration (SSA) in SSA's Atlanta Region.
- 3.) For more than 10 years, ending in late 1987, Respondent was SSA's Northern Florida Area Director. In this management position, Respondent managed or supervised 350 employees. Respondent's testimony 9/27/88. He was responsible for approving overtime and compensatory time for these employees. He was required to know or should have known the substance of Federal laws and regulations, and DHHS and SSA policies concerning overtime and compensatory time. See HHS Ex. 2; HHS Ex. 3.**/
- 4.) Respondent's first line supervisor was Deputy Assistant Regional Commissioner Jane H. Simmons. Respondent's second line supervisor was Assistant Regional Commissioner for Field Operations Francis A. McDougal. HHS Ex. 6.
- 5.) Beginning in February 1980, Respondent and the employees he managed worked pursuant to an Alternate Work Schedule which permitted them to work "credit hours" under appropriate circumstances. Credit hours consist of time worked by an employee in addition to the eight hour tour of duty and may be used for time off in lieu of leave. R. Ex. 2.
- 6.) DHHS policy does not specify how an employee is required to provide notice of intent to work credit hours.

**/ Exhibits will be cited as follows:

DHHS Exhibit	HHS Ex.(exhibit number/(page)
Respondent Exhibit	R. Ex. (exhibit number/(page)

DHHS policy does require, at a minimum, that the employee's supervisor be informed of the employee's intent to work credit hours so that the supervisor may concur or nonconcur, as may be appropriate. HHS Ex. 5/6-8.

7.) Respondent was not authorized to work credit hours without providing his supervisor with the requisite notice of his intent to do so. HHS Ex. 5/1.

8.) "Overtime" and "compensatory time" differ from credit hours in significant respects. Overtime is defined by 5 U.S.C. 5542(a):

For full-time, part-time and intermittent tours of duty, hours of work officially ordered or approved in excess of 40 hours in an administrative workweek, . . . in excess of 8 hours in a day performed by an employee are overtime work. . . .

This section provides rates of compensation for overtime, generally at one and one-half times the compensation rate for regularly scheduled work.

9.) 5 U.S.C. 5543(a)(1) provides that an agency head may:

On request of an employee, grant the employee compensatory time off from his scheduled tour of duty instead of payment for an equal amount of time spent in irregular or occasional overtime work

Compensatory time is a form of overtime which provides the employee time off in lieu of leave and of overtime pay. Unlike credit hours, it must be specifically requested by the employee, and it must be ordered or approved by the supervisor. Exercise of authority to approve compensatory time is within the discretion of the supervisor. See 5 C.F.R. 550.114.

10.) DHHS and SSA policies provide for strict controls over the authorization and performance of overtime and compensatory time. The DHHS Personnel Manual provides that employees may not be compensated for overtime unless the work is "ordered or approved in advance of its being performed." DHHS Personnel Manual, 550-1-50C, at p.5 (1987); HHS Ex. 2/3. The SSA Personnel Manual for Supervisors contains identical policies. SSA Personnel Manual for Supervisors, Ch. S550, IVB, at p.4 (August 22, 1986). HHS Ex 3/4. DHHS policy requires that employees who perform overtime work must sign a record that indicates the times of the beginning and end of the overtime work performed. HHS Ex. 2/3. Both DHHS and SSA

policies require that overtime will be directly supervised whenever practicable, and that when such direct supervision is not practicable, the quantity and quality of the work completed must be reviewed by the employee's supervisor HHS Ex. 2/3; HHS Ex. 3/5. DHHS policy also provides that compensatory time that is not used by the employee within eight pay periods will automatically be paid at the overtime rate at which it was earned HHS Ex. 2/4.

11.) Area Directors have been delegated authority by SSA to assign or order employees to work overtime. R Ex. 6. Area Directors have not been delegated authority to order or approve overtime or compensatory time for themselves. HHS Ex. 5/1.

12.) While serving as Area Director in 1987, Respondent instructed his timekeeper to record credit hours on his timesheet, and Respondent then used many of these hours in lieu of leave. HHS Ex. 4/2, 3.

13.) Beginning with the pay period which started on August 30, 1987, and through the pay period which ended on October 24, 1987, Respondent instructed his timekeeper to record 60.5 hours on his timesheet as compensatory time performed by him. HHS Ex. 4/3.

14.) Respondent's claimed compensatory time was not ordered or approved by his supervisors. HHS Ex. 6. Because it was not ordered or approved by them, it was not compensable overtime. See Finding 8.

15.) Respondent did not use the compensatory time he had claimed in lieu of leave. After eight pay periods had elapsed, Respondent was compensated for the compensatory time as overtime in the amount of \$844.55. HHS Ex. 4/4-6.

16.) Because the compensatory time claimed by Respondent was not compensable overtime, the overtime pay of \$844.55 which he received is a salary overpayment in that amount.

17.) The debt in the amount of \$844.55 alleged by DHHS against Respondent is valid, due, and owing.

18.) A waiver of the debt may not be granted by me because the amount of the debt exceeds \$500, and the Comptroller General of the United States has exclusive authority to consider waiver requests for debts exceeding \$500. 5 U.S.C. 5584(a)(1).

ANALYSIS

The issue in this case is whether \$844.55 in overtime pay to Respondent for 60.5 hours of compensatory time claimed by him between August 30 and October 24, 1987, was a salary overpayment and a debt owed by Respondent to DHHS. I conclude that the pay at issue is a salary overpayment and a debt.

Respondent is an employee of SSA, an agency of DHHS. For more than 10 years, ending in late 1987, Respondent served as SSA's Area Director for North Florida. This was a management position and Respondent managed or supervised 350 employees. He was delegated authority to order or approve overtime for these employees and was charged with knowledge of laws, regulations, and DHHS and SSA policies pertaining to overtime.

Between August 30 and October 24, 1987, Respondent instructed his timekeeper to record 60.5 hours of compensatory time as having been worked by him. Respondent in effect credited himself with 60.5 hours of compensatory time. Respondent did not use this time in lieu of leave. After eight pay periods had elapsed from its posting, and in accord with DHHS policy, Respondent was compensated for the compensatory time with overtime pay in the amount of \$844.55.

DHHS claims this overtime pay is a salary overpayment to Respondent and a debt. It asserts that neither of Respondent's supervisors ordered or approved the compensatory time as required by DHHS or SSA policies. DHHS has produced the sworn statements of Respondent's first and second line supervisors, Deputy Assistant Regional Commissioner Jane H. Simmons, and then-Assistant Regional Commissioner for Field Operations Francis P. McDougal. These individuals deny that Respondent ever requested the compensatory time at issue; or that they ordered or approved it.

Respondent has made several arguments to support his denial that the overtime payment at issue constitutes a salary overpayment and a debt. He avers that he was specifically authorized to work the compensatory time he claimed because he "discussed it with both" Ms. Simmons and Mr. McDougal "without giving specific hours, which I could not predict in advance." R. Ex. 1/1. He asserts that he had been delegated the authority to approve "credit hours" for himself and the employees he managed or supervised and this delegation at least implied the authority to approve his own claims for compensatory time.

As an adjunct to this, he alleges that it has been a common practice for Area Directors in SSA's Atlanta Region to approve their own compensatory time. Respondent also claims that he acted on the good faith belief that his actions were proper, and he avers that he worked the hours in question. Finally, he requests that if I conclude that he was overpaid and that a debt exists, that I waive the overpayment.

I have carefully considered Respondent's allegation that he requested compensatory time from his supervisors and that it was "specifically authorized" against the legal and policy criteria for ordering or approving overtime and compensatory time. I am persuaded by the evidence in this case that Respondent's supervisors did not order or approve the compensatory time claimed by Respondent. They have denied authorizing it, and Respondent has offered no evidence, aside from his recitation of offhand conversations with his supervisors, to suggest that it was ordered or approved. I find Respondent's version of the facts unpersuasive in light of overtime approval and reporting policies which required very precise and specific accounting of overtime ordered and worked, and the sharp contrast between what these policies required and what Respondent now says happened. Given their duties to faithfully apply these policies, it would not be reasonable to conclude that both of Respondent's supervisors approved his use of compensatory time in the offhand way he asserts. However, even if Respondent's recitation of conversations is accurate, the communications he had with his supervisors would not constitute lawful ordering or approving of compensatory time.

Federal law requires that overtime work be compensated with premium pay. 5 U.S.C. 5542. Compensatory time is a form of overtime which, if not used in lieu of leave, will be compensated at premium rates. DHHS and SSA policies mandate that ordering or approving compensatory time is never a casual action; because of the budget implications attendant with overtime pay, such action demands a high standard of specificity by both the requesting employee and the authorizing supervisor. At the very least, an order to work compensatory time must specify the dates and hours to be worked.

Respondent's depiction of his conversation with his supervisors concerning his need to work extra time is of a casual and nonspecific communication -- "not the type of thing that would be remembered." R. Ex. 1/1. Respondent admits that his communications did not involve discussion

of either the dates when compensatory time would be worked by him or the number of hours of such overtime which would be required. Id. The conversations described by Respondent, therefore, fail to embody the specific request, order, or approval required by law and by DHHS and SSA policy.

Nor can Respondent legitimately assert that he relied on these conversations to his detriment. Respondent served for many years as an SSA manager with responsibility for ordering or approving overtime for 350 employees. Respondent knew or should have known DHHS and SSA overtime policies. It would not have been reasonable for him to rely on the vague and casual conversations he describes as an order or approval of his compensatory time.

Respondent claims that he asked his timekeeper to "check to be sure reporting of comp(ensatory) time was correct" R. Ex. 1/1. He avers that she did check with "Regional Office and found it to be correct." Id. Such request could logically have been interpreted by "Regional Office" to be a request to verify the clerical accuracy of entries on forms, rather than to ratify claimed compensatory time, as Respondent asserts. But had the request had been an effort to establish that approval to work compensatory time had been given, Respondent could not have reasonably relied on the answer his timekeeper obtained. Respondent was required to obtain approval to work compensatory time from his supervisors. Communications between lower-level employees could not be used to verify approval when approval had never been given.

Respondent also asserts that "installation heads at my level and below commonly work and approve their own comp(ensatory) time." R. Ex 2/2. From this he concludes that: (1) he was similarly entitled to approve compensatory time for himself; and (2) he believed he was permitted to work the compensatory time at issue, and relied on this belief to work extra hours and claim compensatory time. He has offered no evidence to substantiate this allegation, beyond his assertion, and it has been denied by Ms. Simmons and Mr. McDougal. I find it to be without substance. However, assuming this allegation were true, it would not legitimize the compensatory time claimed by Respondent. The possibility that other Federal employees may be engaged in illegal actions could not legitimize Respondent's unlawful conduct. And given Respondent's management responsibilities and knowledge of policy, he could not justifiably rely on other employees' unlawful conduct to support his actions.

Respondent attempts to blur the distinctions between "credit hours" and compensatory time and to argue from his analysis that he legitimately believed that he could approve his own taking of compensatory time. Respondent avers that he was authorized by his supervisors to approve his own use of credit hours. He asserts that credit hours and compensatory time "seem very similar" (R. Ex. 1/1), that they serve the same purpose, and that inasmuch as he was authorized to approve his own use of credit hours, he inferred that he could approve his own use of compensatory time. Respondent's supervisors strongly dispute his assertion that he was authorized to approve his own use of credit hours. Neither Respondent's statements nor the documents he has produced (see R. Ex.2.) convince me that he had such authority. But even if he did, Respondent would not have been justified in believing that authorization to approve his own use of credit hours encompassed authorization to approve his own use of compensatory time.

There are significant differences between credit hours and compensatory time and Respondent should have understood such differences. Compensatory time is a form of overtime compensation and is subject to the statutes, regulations, and policies which I have previously discussed. Respondent has admitted knowing that unused compensatory time would, after eight pay periods, be compensated at overtime rates. Credit hours cannot be converted to cash compensation. Credit hours are a way for employees to adjust their work schedules by working extra hours in a day and by using these hours to reduce their workday on another occasion. Whereas overtime and compensatory time are statutorily mandated in appropriate cases, the use of credit hours is an option that rests with management. See R. Ex. 2. Compensatory time must be expressly ordered or approved in advance to be legitimate, whereas supervisors are merely required to concur or nonconcur in an employee's expression of intent to work credit hours. See Findings 5/6.

Respondent also asserts that inasmuch as he worked extra hours as compensatory time, he is entitled to be paid for that time (see Respondent's request for hearing at p.2). This claim is clearly without merit. By law, overtime or compensatory time cannot be credited to an employee unless it has been ordered or approved by that employee's supervisor. If overtime has not been directed, the fact that an employee may have worked extra hours is irrelevant. Respondent's claimed compensatory time was not ordered or approved by his supervisors. Therefore, he

may not be compensated for it even if he worked extra hours.

This is not to suggest that a supervisor could knowingly lure an employee into working overtime without technically ordering or approving it, and then withhold compensation. Nor am I suggesting that a supervisor could direct an employee to perform extra work and then refuse to approve overtime compensation. But the facts of this case do not conform to either circumstance.

Respondent has requested that I order a waiver of any salary overpayment found to exist. I am without authority to order a waiver in this case. 5 U.S.C. 5584(a)(2)(A) provides, in effect, that I may only consider a waiver request for an amount not exceeding \$500, and the amount of the debt in this case exceeds \$500. Authority to review waiver requests for amounts greater than \$500 rests with the Comptroller General of the United States.

Therefore, I find that a salary overpayment to Respondent exists in the amount of \$844.55, and that this constitutes a debt due and owing from Respondent to DHHS. I find further that I lack authority to grant a waiver to Respondent.***/

***/ This is the final administrative determination of the Department of Health and Human Services in this case; there are no other administrative remedies. If Respondent wishes to seek judicial review he may do so in the appropriate court of the United States, provided he acts within prescribed time limits.

ORDER

Based on the evidence of record, on applicable law, regulations and policies, I Order that:

- (1) Respondent is indebted to DHHS in the amount of \$844.55;
- (2) Respondent's request for a waiver is denied.

/s/

Steven T. Kessel
Administrative Law Judge