

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

BADEBANA ATCHOLE,
Appellant,

DOCKET NUMBER
DC-0845-16-0086-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: September 16, 2016

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Badebana Atchole, Washington, D.C., pro se.

Kristopher L. Rogers, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

FINAL ORDER

¶1 The appellant has filed a petition for review of the initial decision, which affirmed the reconsideration decision of the Office of Personnel Management (OPM). Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).

BACKGROUND

¶2 The appellant filed an appeal of OPM's reconsideration decision, which found that he was overpaid \$4,595.93 in annuity benefits under the Federal Employees' Retirement System (FERS) and that he was not entitled to a waiver of the overpayment. Initial Appeal File (IAF), Tab 1. By notice dated March 1, 2011, OPM informed the appellant that it had placed him in an interim payment status while it completed processing his application for disability retirement benefits. IAF, Tab 8 at 15-16. OPM advised the appellant that, if the total annuity due to him was less than what OPM had provided in total gross interim payments, it would make adjustments to balance his account. *Id.* OPM's notice stated further that, if the overpaid interim payments exceed the amount of his next check, the appellant will be "notified and offered the opportunity to respond before we begin to withhold the excess from future annuity payments." *Id.* In a letter dated September 10, 2013, OPM notified the appellant that he had received an overpayment of \$4,595.93, and that his gross interim payments had exceeded the actual earned annuity payable from the date of his retirement. *Id.* at 20-23.

OPM further advised the appellant that it would collect the overpayment through monthly deductions from his FERS annuity. *Id.*

¶3 On October 4, 2013, the appellant submitted a Financial Resources Questionnaire (FRQ) listing his monthly income and expenses, and he requested a waiver of the overpayment. *Id.* at 29-38. In response to the appellant's request for reconsideration, OPM notified him in a letter dated April 7, 2015, of the criteria for establishing eligibility for waiver of an overpayment, and requested that he provide an updated FRQ. *Id.* at 17. In his May 4, 2015 request for reconsideration of OPM's decision, the appellant submitted an updated FRQ and asserted that he was eligible for a waiver as he was without fault in causing the overpayment. *Id.* at 26-28. The appellant also asserted that OPM had underpaid him in interim benefits because it neglected to include his service from July 31, 2009, to April 1, 2010.

¶4 OPM's September 29, 2015 reconsideration decision affirmed the overpayment and found that the appellant was not entitled to a waiver of the overpayment because he did not show both that he was "without fault and recovery would be against equity and good conscience." *Id.* at 7-10. OPM found that, while the appellant was without fault, recovery would not be against equity and good conscience. *Id.* Specifically, OPM found that the appellant had not shown that he relinquished a valuable right, changed positions for the worse, that recovery would cause financial hardship, or that it would be otherwise inequitable. *Id.* In evaluating his financial circumstances, OPM reduced as excessive the expenses the appellant claimed for food, clothing, and taxes. For example, OPM reduced his claimed monthly expense for food from \$2,400.00 to \$1,400.00, and his clothing expenses from \$280 to \$200. *Id.* at 9-10. After the reductions, OPM found that the appellant's income of \$6,637.00 exceeded his adjusted expenses of \$6,383.00, including a \$50 buffer, by \$254.00 per month. *Id.* Accordingly, OPM established a repayment schedule of 70 monthly installments of \$65.00 and one final installment of \$45.93. *Id.* at 10.

¶5 On appeal, the appellant challenged OPM's reduction of his expenses as excessive, and he argued that OPM neglected to provide him with retroactive disability benefits for the period from July 31, 2009, to April 1, 2010. IAF, Tabs 1, 9, 12. The appellant subsequently provided an amended FRQ, in which he increased his monthly expenses to \$8,639.46, which still included his claim of \$2,400.00 per month for food. IAF, Tab 10. His amended FRQ listed a total income of \$6,637.00, with a monthly income/expense differential of -\$2,002.46. *Id.* In response, OPM again reduced some of the appellant's expenses as excessive and found that he had \$807.79 in residual income, and thus found that he had sufficient monthly income after considering his ordinary and necessary expenses to repay the FERS overpayment as set forth in the repayment schedule. IAF, Tab 11.

¶6 Because the appellant did not request a hearing, the administrative judge decided the case on the written record. The administrative judge found that OPM established the existence and amount of the overpayment and that the appellant did not establish his eligibility for waiver of the overpayment or an adjustment of OPM's repayment schedule. IAF, Tab 13, Initial Decision (ID) at 6-7. Noting that, even though some of OPM's mathematical calculations were incorrect, the administrative judge agreed with OPM that the adjustments to the appellant's expenses left him with a sufficient monthly residual income such that he could easily afford 70 monthly payments at \$65 and 1 final payment of \$45.93 to repay the FERS overpayment that he received. ID at 5-6 n.1.

DISCUSSION OF ARGUMENTS ON REVIEW

¶7 A waiver of recovery of an overpayment may be granted when the annuitant is without fault and recovery would be against equity and good conscience. [5 U.S.C. § 8407\(b\)](#); [5 C.F.R. § 845.301](#). In this case, it is undisputed that the appellant is without fault in causing the overpayment.

¶8 On review, the appellant raises numerous procedural arguments directed at OPM's compliance with instructions from the administrative judge and the processing of the appeal below. Petition for Review (PFR) File, Tab 1. For example, the appellant asserts that OPM did not timely designate its representative and that OPM did not participate in prehearing conferences. However, OPM is not required by law or regulation to be represented in this appealed action before the Board. The provisions of [5 C.F.R. § 1201.31\(a\)](#) state that all parties to an appeal *may* be represented in any matter relating to the appeal, but does not require that a party be represented. Thus, OPM's delay in designating a representative in this case did not violate the Board's regulations. *Miller v. Office of Personnel Management*, [7 M.S.P.R. 469](#), 472 (1981). Further, while the appellant argues that OPM did not timely comply with the Board's orders, he has failed to identify how his substantive rights were harmed.²

¶9 In addition, the appellant argues that OPM failed to provide him with OPM's Policy Guidelines or other evidence that the administrative judge ordered produced as part of the agency's response file, and he appears to be asserting that he needed information or documents from OPM to pursue his appeal. Nonetheless, the administrative judge in the acknowledgment order properly informed the appellant below of available discovery procedures and the appellant could have obtained the disclosure of relevant information from OPM through the discovery process or any lawful means. IAF, Tab 2 at 3-4; *see Christofili v. Department of the Army*, [81 M.S.P.R. 384](#), ¶ 17 (1999); [5 C.F.R. § 1201.72\(a\)](#). In the event that an agency refuses to voluntarily make pertinent documents reasonably available prior to a Board proceeding, the Board's rules provide for the issuance of orders compelling discovery by interrogatory or deposition under [5 C.F.R. § 1201.81-85](#). *Kinsey v. U.S. Postal Service*, [12 M.S.P.R. 503](#),

² The appellant also asserts that a document he mailed on December 11, 2015, was improperly designated in the file as having a submission date of December 14, 2015. However, he fails to state how this error adversely affected the outcome of his appeal.

505 (1982). Because the appellant failed to avail himself of these procedures below, he may not now claim harm by the agency's refusal to assist voluntarily in his preparation for proceedings before the Board. *Id.* at 506.

¶10 Moreover, the record reflects that OPM did submit, along with its response to the appeal, the case file that included a copy of OPM's Policy Guidelines and the reconsideration decision, which specifically stated the reasons for denying the appellant's request for a waiver. IAF, Tab 8 at 68-106. The agency also replied to the appellant's response to the agency file. IAF, Tab 11. Thus, we find that OPM substantially complied with the requirements of [5 C.F.R. § 1201.25](#), and the appellant has not shown that he was prejudiced by OPM's responses to the appeal. Therefore, we find that the appellant has shown no error by the administrative judge in not sanctioning OPM. *Brown v. Office of Personnel Management*, 608 F. App'x 934, 936 (Fed. Cir. 2015).

¶11 In addition, the appellant continues to challenge the findings of both OPM and the administrative judge that his \$2,400 per month expense for food for a family of 4 adults is not a reasonable expense. The appellant argues that OPM's use of the U.S. Department of Agriculture (USDA) Food Chart was improper, arguing that it is out of date and does not account for his children being adults. The appellant also argues that Washington, D.C. is an expensive city and that his family dines out for almost every meal and even when they eat at home for dinner, "it does not mean that they necessarily have to cook. You can be at home but bring food from outside as family meal and everyone will be free to choose what he/she want[s] to eat." IAF, Tab 9 at 4.

¶12 However, the administrative judge thoroughly reviewed the appellant's monthly income and expenses, based upon an updated FRQ. IAF, Tab 9, Subtab 7. The administrative judge corrected OPM's calculation errors and addressed the appellant's challenges to OPM's reducing some of his claimed expenses as not "ordinary and necessary." As to the reductions for claimed expenses, the administrative judge found no error by OPM in this regard.

Further, after reviewing and correcting the mathematical calculations, the administrative judge found that the appellant was left with a monthly residual income such that he could easily afford 70 monthly payments at \$65.00 and 1 final payment of \$45.93 to repay the FERS overpayment that he received. To the extent the appellant argues that the administrative judge improperly determined that many of his expenses were not ordinary and necessary expenses—especially his claimed monthly food expense of \$2,400.00 and his \$309.45 monthly clothing expense—we disagree.³

¶13 Moreover, regarding the appellant's claimed food expenses, we have reviewed the USDA Food Plans issued for November 2015 and we note that there are 4 different levels of spending allotted for food under the USDA guidelines, i.e., Thrifty plan, Low-cost plan, Moderate-cost plan, and Liberal plan. Even allotting the appellant the sum allowed under the USDA's most generous Liberal plan, his claimed food expenses are still excessive. Specifically, under the Liberal plan, the monthly amount allotted for a male 51-70 years old is \$342.50, a female 51-70 years old is \$309.60, a male 19-50 years old is \$373.90, and a male 14-18 years old is \$356.00. Thus, assuming the appellant's children are both males, the monthly cost of food allotted based on USDA's Liberal plan would be \$1,378.30, lower by \$1,021.70 than the appellant's claimed expense of \$2,400.00. In comparison, the USDA's most stringent Thrifty plan monthly allotment for the appellant and his family is \$694.70, lower by \$1,705.30 than the appellant's claimed monthly food expense of \$2,400.00. Thus, we see no error by the administrative judge or OPM in reducing the appellant's monthly food expenses to a more moderate sum of \$1,067.90.

³ Although the appellant continues to argue that OPM has never provided him with FERS disability payments for the period from July 31, 2009, to April 1, 2010, the administrative judge thoroughly addressed this argument and we find no reason to disturb his determination that there is no evidence of record to establish that OPM failed to provide him with disability retirement benefits for the period in question. ID at 7.

¶14 Further, after OPM determined that the appellant was still able to repay his debt, but it requested an updated FRQ, the appellant increased his monthly clothing expenses from \$280.00 to \$309.45, and he provided receipts from numerous clothing and shoe purchases from Amazon and other merchants, including 12 pairs of men's shoes in approximately 6 months.⁴ IAF, Tab 9, Subtab 3. While these purchases and expenses may have occurred, we agree with OPM that many of the purchases are neither ordinary nor necessary expenses. Accordingly, because the appellant knew or should have known that OPM had estimated his annuity and that he was obligated to repay any overpayment, and because many of his expenses were neither ordinary nor necessary, the administrative judge correctly determined that he is not entitled to a waiver.⁵

⁴ In addition, even though OPM did not reduce the appellant's updated transportation expenses, we have taken note that, after OPM notified him that he would still be expected to repay his debt, his monthly itemized amount on the FRQ increased substantially from \$325.00 to \$665.25.

⁵ However, our decision in this matter does not preclude the appellant from exercising any right that he may have to make a mid-collection request to OPM for modification of the repayment schedule, compromise, suspension, or write-off, as provided for under any applicable law, rule, regulation, or OPM guideline. See [5 C.F.R. § 845.301](#) (stating that, when it has been determined that the recipient of an overpayment is ineligible for waiver, the individual nevertheless is entitled to an adjustment in the recovery schedule if he shows that it would cause him financial hardship to make payment at the rate scheduled); see also *Hundley v. Office of Personnel Management*, [83 M.S.P.R. 632](#), ¶ 16 (1999) (finding that a change in an appellant's financial situation may be the basis for an application to OPM for a new determination regarding an adjustment in the repayment schedule); *Martin v. Office of Personnel Management*, [49 M.S.P.R. 134](#), 137 (1991) (finding that any effects of a future medical emergency could be addressed by a mid-collection request to OPM for lower payments, compromise, suspension, or write-off), *aff'd*, 960 F.2d 156 (Fed. Cir. 1992) (Table).

**NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS**

You have the right to request review of this final decision by the U.S. Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after the date of this order. See [5 U.S.C. § 7703\(b\)\(1\)\(A\)](#) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See *Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the Federal law that gives you this right. It is found in title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode.htm>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and [Forms 5, 6, and 11](#).

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit.

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Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FOR THE BOARD:

Jennifer Everling
Acting Clerk of the Board

Washington, D.C.