

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

69 M.S.P.R. 346

Docket Number AT-0831-95-0576-I-1

ANNA G. DOPADRE, Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT, Agency.

Date: January 23, 1996

Anna G. DoPadre, Lutz, Florida, pro se.

John Pearson, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

OPINION AND ORDER

The appellant petitions for review of an initial decision that dismissed for lack of jurisdiction her appeal from the denial of a survivor annuity by the Office of Personnel Management (OPM). For the reasons discussed below, we GRANT her petition, VACATE the initial decision, and REMAND the appeal to OPM for its issuance of a reconsideration decision.

BACKGROUND

In 1987, the appellant and her husband, who was then a Federal civilian employee, divorced. See Initial Appeal File (IAF), Tab 4, Subtab 2d. The initial divorce decree did not provide the appellant any right to a survivor annuity. See IAF, Tab 1, July 8, 1993 decision by the Superior Court of the State of Arizona at 2; Tab 4, Subtab 2e at 1. The appellant's 1987 application for a survivor annuity was denied by OPM, ultimately in a July 18, 1990 reconsideration decision,[1] on the basis that the provision of law under which she applied was applicable only to employees who retired before May 7, 1985. See IAF, Tab 4, Subtabs 2a, 2c. In October 1988, the employee retired and elected a reduced annuity with a survivor annuity for his current spouse, Doris DoPadre. IAF, Tab 4, Subtab 2e at 4. In July 1993, the Superior Court of the State of Arizona issued a "THIRD AMENDED DECREE OF DISSOLUTION OF MARRIAGE NUNC PRO TUNC," amending the July 13, 1987 Decree of Dissolution of Marriage with

respect to the appellant's interest in the employee's "military and civil service" retirement benefits. With respect to the civil service retirement benefits, the decree provided:

b. United States Vested Civil Service Retirement Petitioner [the appellant] is awarded her interest in Respondent's [the employee's] Civil Service Retirement equal to 50% of such retirement.[2]

c. In the event Petitioner cannot be awarded her rights under the Survivor's Benefit Plan for whatever reason, then Respondent shall continue to provide a life insurance policy on his life, with Petitioner named as owner of such policy, with a death benefit equal to \$75,000.00. Petitioner shall be the sole, irrevocable beneficiary of such policy.

IAF, Tab 1, court decree at 5.

In a February 10, 1995 letter to OPM, the appellant requested "clarification and a final decision regarding ... my request for Survivors Benefits under my former husband's annuity." She attached a copy of the above-referenced court decree and submitted documentation showing that her former husband had appealed the decree all the way to the United States Supreme Court, which denied his writ of certiorari on November 14, 1994. She further noted that she had been "told verbally" on January 17, 1995 by OPM personnel that she was not entitled to a survivor annuity and that she could not appeal such a decision to the Board. IAF, Tab 1.

The appellant sent a copy of her February 10, 1995 letter to the Board's Atlanta Regional Office, and requested concurrent review, IAF, Tab 1, including a hearing, IAF, Tab 3.

OPM responded that an appeal from its July 18, 1990 reconsideration decision should be dismissed as untimely filed. OPM further contended that an appeal involving the July 1993 court decree should be "dismissed as premature" because there was no final or reconsideration decision by OPM regarding the matter. IAF, Tab 4.

The administrative judge (AJ) notified the appellant that the Board's jurisdiction "attaches only after OPM has issued a reconsideration decision," and ordered her to file evidence and argument establishing the Board's jurisdiction. IAF, Tab 9. In response, the appellant contended that:

3. After repeated correspondence [sic] and telephone calls to Agency requesting a decision, Appellant finally spoke with agency employee ... on January 17th, 1995, and was informed that she was denied survivor annuity benefits and that her request was "not valid" due to a "new law" that was passed in 1993 and that her request "cannot be reconsidered."

4. Appellant, despite her requests for a written decision and supporting reasons for same, has received [sic] none to date.

5. Based upon the Agency position that Appellant has been rendered a final decision that cannot be reconsidered, Appellants [sic] appeal is properly brought before [the Board]. IAF, Tab 10.

In her May 31, 1995 initial decision, the AJ noted that "OPM's representative before the Board has represented ... that OPM has issued no reconsideration decision and is in the process of issuing such decision now." She thus found that the Board lacked jurisdiction over the matter and dismissed the appeal without prejudice to refiling within 30 days after OPM's issuance of a reconsideration decision. Initial Decision, IAF, Tab 11.

In a June 1, 1995 letter, a Paralegal Specialist of OPM's Court Order Benefit Branch informed the appellant that OPM was "unable to process the court order" she submitted in support of her application for a former spouse survivor annuity because the order did "not expressly state that [she was] entitled to, or direct the employee to provide, a former spouse survivor annuity using terms that are sufficient to identify the survivor annuity as explained in § 838.912" of 5 C.F.R. IAF, Tab 12. OPM's representative before the Board submitted a copy of the June 1, 1995 letter to the AJ and contended that, pursuant to 5 C.F.R. § 838.806, the court order was not acceptable for processing because it was issued "after the date of retirement or death of the employee and modifie[d] or replace[d] the first order dividing the marital property...." He further contended that under 5 C.F.R. § 838.136, which is applicable to court orders received by OPM after January 1, 1993, OPM's actions applying part 838 of 5 C.F.R., pertaining to court orders, are not appealable to the Board.

The appellant has timely filed a petition for review, contending that OPM's June 1, 1995 letter was a final, appealable decision and that she had been previously informed by OPM that "[a]nyone whose rights or interests under the Civil Service Retirement law are affected by a final decision of the Office of Personnel Management has the right to appeal that decision to the Merit Systems Protection Board." The agency has not responded to the appellant's petition.

ANALYSIS

OPM's June 1, 1995 letter constituted a final decision, potentially subject to the Board's jurisdiction.

Regarding an individual's rights or interests under the Civil Service Retirement System, the Board's jurisdiction to review OPM's determinations attaches only after OPM has issued a reconsideration or final decision. See 5 C.F.R. §§ 831.109, 831.110; *Turner v. Office of Personnel Management*, 60 M.S.P.R. 55, 60-61 (1993); *Begosa v. Office of Personnel Management*, 41 M.S.P.R. 1, 3 (1989). Where OPM has in effect declined to issue a reconsideration decision, however, the Board will treat its initial decision as its final decision. See *Lary v. Office of Personnel Management*, 65 M.S.P.R. 291, 298 (1994).

According to the AJ's initial decision, OPM's representative informed the AJ that OPM would issue a "reconsideration decision." OPM thereafter issued its June 1, 1995 letter refusing to process the court order on the basis that it did not satisfy the requirements under 5 C.F.R. § 838.912. This letter did not include any notice of a right to reapply or request reconsideration, and was apparently issued pursuant to 5 C.F.R. § 838.723. Section 838.723 provides that, "[i]f OPM receives an application from a former spouse not based on a court order acceptable for processing, OPM will inform the

former spouse that OPM cannot approve the application and provide the specific reason(s) for disapproving the application." It does not require notice of the applicant's right to request reconsideration. *Compare* 5 C.F.R. § 838.1009(a)(2) (which is applicable to court orders received before January 1, 1993, *See* 5 C.F.R. § 838.101(c)(2), and provides for notice of a right to request reconsideration). In submitting a copy of this letter to the AJ, OPM's representative contended that OPM's actions applying part 838 of 5 C.F.R., as is involved here, were not appealable to the Board.

Thus, contrary to the prior assurance by OPM's representative, it appears that OPM does not intend to ever issue a "reconsideration decision" under 5 C.F.R. § 831.109(f). OPM's June 1, 1995 decision letter did not provide notice of a right to request reconsideration before OPM or, in the alternative, a right to appeal to the Board, as required by 5 C.F.R. § 831.109(c),(f). In addition, OPM's representative did not refer to the June 1, 1995 decision letter as an "initial decision" as to which a right to reconsideration attached. In fact, he contended that neither the decision letter nor any other decision regarding the appellant's court decree was appealable to the Board. Under these circumstances, we find that OPM's June 1, 1995 decision letter constitutes its final decision. Accordingly, although the AJ correctly dismissed this appeal for lack of jurisdiction, we now have before us a final, potentially appealable decision by OPM.

Section 838.136 of 5 C.F.R., which would preclude the Board's jurisdiction over this appeal, is invalid.

Section 838.136 of 5 C.F.R., which is applicable to court orders received by OPM on or after January 1, 1993, *See* 5 C.F.R. § 838.101(c)(1), provides, in pertinent part, as follows:

(a) Issues concerning application of these regulations are not appealable to the Merit Systems Protection Board. OPM's actions to apply these regulations are not subject to further administrative review.

OPM's interpretation of statutes which Congress charges it to administer, such as the retirement statutes, is normally entitled to great deference. *See, e.g., Newman v. Love*, 962 F.2d 1008, 1012 (Fed. Cir. 1992). The Board will not defer to the agency's interpretation, however, when it is in conflict with the plain language of the governing statute, *see id.*, absent compelling evidence of a contrary Congressional intent, *See Vallee v. Office of Personnel Management*, No. 94-3189, slip op. at 4 (Fed. Cir. June 23, 1995). *See also Brush v. Office of Personnel Management*, 982 F.2d 1554, 1558-59 (Fed. Cir. 1992).

Section 8347(d)(1) of 5 U.S.C. provides:

Subject to paragraph (2) of this subsection [pertaining to agency-initiated retirement based on mental disability], an administrative action or order [by OPM] affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board. *See also* 5 C.F.R. § 831.110. Subchapter III of chapter 83, the "subchapter" referred to in section 8347(d)(1), includes section

8341(h)(1). Section 8341(h)(1) provides for OPM's payment of survivor annuity benefits to a former spouse pursuant to a court decree.

Thus, section 8347(d)(1) unambiguously provides that an action by OPM affecting the rights or interests of an individual with respect to a former spouse survivor annuity, as here, is appealable to the Board. See *Bronger v. Office of Personnel Management*, 740 F.2d 1552, 1555 (Fed. Cir. 1984). OPM has made no reference whatsoever to a contrary legislative intent. Nor can we discover any. See, e.g., S. Rep. No. 96-1004, 96th Cong., 2d Sess. 2, reprinted in 1980 U.S. Code Cong. & Admin. News 5986, 5987; cf. *Brush*, 982 F.2d at 1559; *Bommer v. Department of the Navy*, 34 M.S.P.R. 543, 547-48 n.7 (1987) (the Board noted the legislative intent behind the Civil Service Reform Act that the Board's adjudicatory function should be separated from OPM's responsibilities).

In fact, before OPM promulgated this regulation, there was no regulation precluding Board review of such actions by OPM. See 5 C.F.R. Part 838, Subpart J. OPM routinely issued reconsideration decisions, and such reconsideration decisions were appealable to the Board and then to the U.S. Court of Appeal for the Federal Circuit. See, e.g., *Davenport v. Office of Personnel Management*, No. 94-3623, slip op. (Fed. Cir. July 27, 1995). Thus, the court has implicitly recognized that the Board, and in turn the court, have jurisdiction over such matters.

In promulgating 5 C.F.R. § 838.136, OPM asserted, *inter alia*, the following rationale:

Actions taken by OPM in cases under these regulations are those ordered by the State court and for this reason they are not appealable to MSPB. MSPB does not have authority to review the State court order, and because we are merely following the explicit instructions of the court, appeal to MSPB is inappropriate. This will assure that marital property distribution disputes will be resolved by the State courts, as Congress originally intended. ...

57 Fed. Reg. 33572 (July 29, 1992).

It is true that the Board has approved OPM's policy, currently expressed in part 838 of 5 C.F.R., that it will honor only those court orders that expressly and unambiguously provide specific survivor benefits and will not research, interpret or apply State law regarding community or marital property rights or divisions. *Turner*, 60 M.S.P.R. at 62; *Thomas v. Office of Personnel Management*, 46 M.S.P.R. 651, 654 & n.3 (1991). This does not mean, however, that the Board should not review OPM's actions in implementing or, as in this case, refusing to implement a court order.

Although OPM's rationale behind 5 C.F.R. § 838.136 suggests that the Board's review of OPM's actions concerning court decrees would be intrusive on the state courts' jurisdiction, OPM has not shown why it would be so. Cf. *Vagg v. Office of Personnel Management*, 1 F.3d 1208, 1210 (Fed. Cir. 1993) (the court applied state law in reviewing whether the Board properly apportioned retirement benefits under a divorce decree). Contrary to OPM's focus, the pertinent issue is not whether the Board has the "authority to review [the merits of] the State court order." It clearly does not. Rather, the pertinent issue is whether the Board has the authority to review OPM's actions in honoring or refusing to honor the order. The Board clearly has the latter authority under

5 U.S.C. § 8347(d)(1), *see generally Thomas*, 46 M.S.P.R. at 654-56 & n.4, and it is for Congress, not OPM, to limit the Board's statutory jurisdiction.

We therefore find that 5 C.F.R. § 838.136(a) is invalid, as contrary to the plain language of the governing statute.[3] Accordingly, we further find that the Board has jurisdiction over OPM's June 1, 1995 letter constituting its final decision. OPM's final decision was inadequate.

OPM's June 1, 1995 decision letter simply stated that the court order in question did not comply with the requirements of 5 C.F.R. § 838.912. The letter did not explain, and it is not otherwise clear from the record, how or why the court order was in noncompliance. For instance, the letter did not explain whether the noncompliance was due to the lack of language such as "survivor annuity" or "death benefits," as required by subsection (a), or was due to any other particular requirement under subsections (b) or (c). Thus, the letter did not "fully set forth the findings and conclusions," 5 C.F.R. § 831.109(f), and is inadequate for purposes of the Board's review.[4] Accordingly, we remand this case to OPM for its issuance of a new reconsideration decision that complies with the requirements of 5 C.F.R. § 831.109(f), including a notice of the right to appeal to the Board.

ORDER

Accordingly, we REMAND the case to OPM for issuance of a new reconsideration decision, as discussed above, within 60 days of the date of this Order. *See Decker v. Office of Personnel Management*, 59 M.S.P.R. 46 (1993).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

[1]: The appellant's current claim for a survivor annuity based on a court decree was not, and could not have been, raised in the course of this prior OPM proceeding. Therefore, the prior proceeding does not bar the instant appeal based on the doctrine of res judicata or collateral estoppel. *See Peartree v. U.S. Postal Service*, 66 M.S.P.R. 332, 337 (1995).

[2]: OPM's representative before the Board has contended that the appellant was "currently receiving a portion of Joseph G. DoPadre's [retirement] annuity, based on a prior Court award." IAF, Tab 11.

[3]: In a different context, the Board has found that OPM's regulations attempting to limit the appellants' right to the full range of appellate procedures were insufficient to do so in the face of a statutory mandate to the contrary. *Bommer*, 34 M.S.P.R. at 547.

[4]: As noted in the text above, OPM's representative contended that the appellant's divorce decree should be rejected under 5 C.F.R. § 838.806, because it modified the prior property division decree and was issued after her former husband retired. Although this contention may constitute a more specific basis for OPM's refusal to honor the decree, it was not part of OPM's June 1, 1995 decision letter.