U.S. Merit Systems Protection Board

CASE REPORT DATE: July 18, 2008

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

BOARD DECISIONS

► **Appellant: Deborah A. Fearon**
Agency: Office of Personnel Management
Decision Number: 2008 MSPB 152
Docket Number: PH-831M-07-0022-B-1
Issuance Date: July 15, 2008
Appeal Type: CSRA - Overpayment of Annuity
Action Type: Retirement/Benefit Matter

Retirement
- Overpayment of Annuity

The appellant petitioned for review of the initial decision on remand that granted her a partial waiver of her overpayment, reducing the amount to be recovered from $10,366 to $7866. In its earlier decision, the Board found the appellant was without fault in causing the overpayment and might be entitled to at least a partial waiver based on financial hardship, and remanded the case in order to obtain updated financial information.

Holding: Where the appellant is without fault and recovery of some portion, but not all, of the overpayment would be against equity and good conscience, a partial waiver is warranted. In the absence of a specific challenge by OPM, an appellant seeking a waiver of an annuity overpayment should not be required to substantiate her expenses and income unless the information submitted appears incomplete or unreasonable on its face. In determining whether an expense is ordinary and necessary, the Board gives the annuitant in an overpayment case the benefit of the doubt unless the expense constitutes an extravagance or a luxury. Here, the AJ disallowed charges in the appellant's Comcast bill. The Board found it could not say with certainty that digital cable service without premium channels is an extravagance and that it will not disallow a charge for high speed internet access given the importance of the internet in ordinary business affairs. Moreover, as a combined cable and internet bill of $120.76 was not unreasonable on its face, the

AJ should have accepted this figure at the outset without further inquiry. The appellant was left with a positive income/expense margin of $81.18 but because the liquidation of the debt of $10,366 would require 127 monthly installments, the Board found, after acknowledging OPM no longer imposes a mandatory cap on length of recovery, that recovery of the entire debt would be against equity and good conscience and that the appellant had established by substantial evidence her entitlement to a partial waiver of 50 percent of the full overpayment.

COURT DECISIONS

► **Petitioner: Peter J. Lizzio**
Respondent: Department of the Army
Court: U.S. Court of Appeals for the Federal Circuit
Docket Number: 2007-3224
Issuance Date: July 16, 2008

Constitutional Issues
- Due Process
Settlement
- Breach

The agency removed Lizzio from the position of special agent with the agency's Criminal Investigation Command because it found he had breached a last chance agreement pertaining to a previous removal action. The last chance agreement provided that any misconduct by Lizzio would constitute a breach of the agreement and would permit the agency to immediately execute its original decision to remove him. It also contained a waiver of appeal rights. Following a hearing, the AJ held that the waiver of appeal rights in the last chance agreement was unenforceable because Lizzio had established he had not committed the breach of the last chance agreement asserted by the agency in its Notice of Intention to Invoke the last chance agreement. She therefore reversed the removal action. The Board reversed the initial decision and dismissed the appeal for lack of jurisdiction, finding that the AJ had erred in limiting the issue of the appellant's compliance to the grounds relied upon by the deciding official in his determination that Lizzio had engaged in misconduct.

Holding: The court vacated and remanded the Board's final decision, finding the Board had erred in its analysis by relying on a ground for breach of the last chance agreement different from the one found by the AJ to have been asserted by the agency in the notice of breach. The AJ determined the agency relied solely on AR 195-3 in deciding Lizzio had committed misconduct in violation of the last chance agreement (AR 195-3 provides that employees must maintain the highest standards of personal conduct and professionalism to avoid embarrassment to the Army and the Government). After considering the evidence, the AJ found that, although Lizzio's conduct was rude and obnoxious, it was not embarrassing to the government. The Board concluded that it need not decide whether Lizzio violated AR 195-3 because Lizzio's conduct was rude and discourteous towards members of the public and this constituted misconduct. The court held that in order for an

appellant to establish he did not breach the agreement, he must be told in what way he allegedly breached the agreement. Otherwise the appellant will not know what he has to prove was not done. By relying on a ground for breach different from the ground found by the AJ to have been asserted by the agency in the notice of breach - a finding not disturbed by the Board – the Board deprived Lizzio of due process.