

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

**2009 MSPB 105**

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Docket No. DC-0845-09-0016-I-1

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**Doreen P. Maseuli,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

OPM Claim No. CSA 8 238 844

June 9, 2009

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Doreen P. Maseuli, Concord, North Carolina, pro se.

Roxann Johnson, Washington, D.C., for the agency.

**BEFORE**

Neil A. G. McPhie, Chairman  
Mary M. Rose, Vice Chairman

**OPINION AND ORDER**

¶1 The appellant petitions for review of the initial decision that affirmed, in part, a reconsideration decision of the Office of Personnel Management (OPM). For the reasons set forth below, we DENY the petition for review under [5 C.F.R. § 1201.115](#)(d), but REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118 and AFFIRM the initial decision AS MODIFIED by this Opinion and Order.

### BACKGROUND

¶2 In a reconsideration decision, OPM found that the appellant had received an overpayment of disability retirement payments under the Federal Employees' Retirement System (FERS) in the amount of \$20,222. Initial Appeal File (IAF), Tab 3, Subtab 2a. OPM found that, from May 1, 2005 through February 28, 2008, the appellant received the full monthly payment of both her FERS disability retirement annuity and Social Security Administration (SSA) benefits. *Id.* OPM found that such receipt was contrary to the statute that provides that, under FERS, a disability retirement annuity must be reduced by "100 percent of the annuitant's assumed disability insurance benefit." *Id.* OPM sought repayment of the debt in monthly installments of \$250.

¶3 The appellant appealed OPM's reconsideration decision, seeking waiver of the overpayment or "some kind of relief." IAF, Tab 1. The administrative judge found that the appellant was not without fault and was not entitled to waiver of the overpayment. IAF, Tab 9 (Initial Decision (ID)) at 2-4. However, the administrative judge found that monthly payments of \$250 would cause the appellant financial hardship and adjusted the payments to \$150 per month. ID at 4-5.

¶4 The appellant petitions for review. Petition for Review File (RF), Tab 1. OPM has responded. RF, Tab 4.

### ANALYSIS

¶5 In her petition, the appellant asserts that she is entitled to waiver of the overpayment because repayment would cause her financial hardship. Because the administrative judge properly found that the appellant was not entitled to waiver, we deny her petition.

¶6 Under FERS, the appellant bears the burden of establishing her entitlement to a waiver by substantial evidence. [5 C.F.R. § 845.307\(b\)](#). A waiver may be granted when the annuitant is without fault and recovery would be against equity

and good conscience. [5 U.S.C. § 8470\(b\)](#); [5 C.F.R. § 845.301](#). Substantial evidence is the degree of relevant evidence that a reasonable person, considering the record as a whole, might accept as adequate to support a conclusion, even though other reasonable persons might disagree. 5 C.F.R. § 1201.56(c)(1).

¶7 In determining fault, pertinent considerations generally include: (1) whether payment resulted from any statement the appellant should have known to be incorrect; (2) whether payment resulted from any failure on her part to disclose material facts in her possession that she should have known to be material; and (3) whether she accepted a payment that she knew or should have known to be erroneous. [5 C.F.R. § 845.302\(a\)](#). Only the third of these considerations applies to this case.

¶8 OPM policy provides that individuals who know or suspect that they are receiving erroneous payments are expected to set aside the amount overpaid pending recoupment, and that in the absence of exceptional circumstances-which do not include financial hardship-recovery in these cases is not against equity and good conscience. Policy Guidelines on the Disposition of Overpayments under the Civil Service Retirement System and Federal Employees' Retirement System, § I.C.4; *see Maxwell v. Office of Personnel Management*, [78 M.S.P.R. 350](#), 360 (1998) (where the appellant is aware of the set-aside requirement, she is required, by the principles of equity and good conscience, to set aside the SSA payments for repayment of any FERS overpayment; an appellant who fails to meet her obligation to set aside erroneous payments is not entitled to waiver). Contrary to the analysis in the initial decision, ID at 4, the set-aside rule goes to the question of whether recovery would be against equity and good conscience, not whether the annuitant is at fault in the overpayment.

¶9 Here, the administrative judge correctly found that the appellant was overpaid annuity benefits in the amount of \$20,222, that OPM twice gave her notice of the possibility that an overpayment would accrue if she began receiving social security disability benefits in addition to her FERS disability benefits and

that she was obligated to set aside the extra benefits she received pending recalculation of her FERS disability benefits. After the appellant was advised of her eligibility for a disability retirement annuity under FERS, she received notification from OPM that she must do the following: (1) apply for SSA disability benefits; (2) notify OPM as to the amount of those benefits because she was under age 62 and the law requires that her disability under FERS be reduced by 100% of her SSA benefit; and (3) not negotiate any SSA checks until her FERS benefits were reduced. IAF, Tab 3, Subtab 2d; *see Ewing v. Office of Personnel Management*, [100 M.S.P.R. 224](#), ¶ 5 (2005). As the administrative judge further found, the appellant did not set aside the overpayment, and thus she did not meet her burden of proof to show that she is entitled to waiver of repayment of that amount.

¶10 An annuitant who is ineligible for waiver nevertheless may be entitled to an adjustment in the recovery schedule if she shows that it would cause her financial hardship to make payment at the rate scheduled. [5 C.F.R. § 845.301](#). Pursuant to OPM's regulations, financial hardship may exist where the annuitant needs substantially all of her income and liquid assets to meet current ordinary and necessary living expenses and liabilities. [5 C.F.R. § 845.304](#). In determining whether living expenses are “ordinary and necessary,” the Board applies a reasonable person test, regardless of the individual's accustomed standard of living. *Miller v. Office of Personnel Management*, [99 M.S.P.R. 104](#), ¶ 6 (2005), *aff'd*, [449 F.3d 1374](#) (Fed. Cir. 2006).

¶11 The administrative judge properly found that the appellant is entitled to an adjustment in the repayment schedule because repayment at the scheduled rate would cause her financial hardship. When calculating the adjustment to the repayment schedule, however, the administrative judge did not include \$50 for emergency expenses in the appellant's monthly expenses. We reopen this appeal to correct this error and readjust the appellant's repayment schedule. *See Ewing*,

[100 M.S.P.R. 224](#), ¶ 6; *Dorrello v. Office of Personnel Management*, [91 M.S.P.R. 535](#), ¶ 6 (2002).

¶12 The Board has long recognized that OPM allows \$50 in emergency expenses per month in calculating repayment schedules for overpayment of annuity benefits. *E.g.*, *Martin v. Office of Personnel Management*, [49 M.S.P.R. 134](#), 137 (1991), *aff'd*, 960 F.2d 156 (Fed. Cir. 1992) (Table). The record shows that the administrative judge did not include this amount in the appellant's monthly expenses when calculating her adjustment to the repayment schedule. The administrative judge's list of the appellant's monthly expenses in the initial decision does not include \$50 per month in emergency expenses. ID at 5. Accordingly, we readjust the appellant's repayment schedule from \$150 per month to \$100 per month.

#### ORDER

¶13 We ORDER OPM to adjust the appellant's payment schedule to 202 monthly payments of \$100 per month and a final payment of \$22. OPM must complete this action no later than 20 days after the date of this decision.

¶14 We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board's Order. We ORDER the appellant to provide all necessary information OPM requests to help it carry out the Board's Order. The appellant, if not notified, should ask OPM about its progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

¶15 No later than 30 days after OPM tells the appellant it has fully carried out the Board's Order, the appellant may file a petition for enforcement with the office that issued the initial decision on this appeal if the appellant believes that OPM did not fully carry out the Board's Order. The petition should contain specific reasons why the appellant believes OPM has not fully carried out the

Board's Order, and should include the dates and results of any communications with OPM. *See* [5 C.F.R. § 1201.182\(a\)](#).

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT  
REGARDING YOUR RIGHT TO REQUEST  
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. § § 1201.201](#), 1201.202 and 1201.203. If you believe you meet these criteria, you must file a motion for attorney fees **WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION**. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING  
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. 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 your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. 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](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, [www.cafc.uscourts.gov](http://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](#).

FOR THE BOARD:

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William D. Spencer  
Clerk of the Board  
Washington, D.C.