UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2009 MSPB 120

Docket No. DC-831M-07-0811-X-1

Carolyn G. Davis,

Appellant,

v.

Office of Personnel Management,

Agency.

OPM Claim No. CSA 3 970 751

June 25, 2009

Carolyn G. Davis, Virginia Beach, Virginia, pro se.

Michael Shipley, Washington, D.C., for the agency.

BEFORE

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

OPINION AND ORDER

¶1 This case is before the Board on the administrative judge's recommendation, which found that the Office of Personnel Management (OPM) had not fully complied with the Board's final order in *Davis v. Office of Personnel Management*, 109 M.S.P.R. 48 (2008). For the reasons set forth below, the Board finds OPM in partial noncompliance.

BACKGROUND

¶2 Under terms of a final divorce decree issued on September 20, 2000, the appellant was apportioned 27.12 percent of her former spouse's gross annuity. *Davis*, 109 M.S.P.R. 48, ¶ 2. The decree further provided the appellant with a former spouse survivor annuity of either the maximum amount or 27.12 percent, at the appellant's option, with the deposit to be deducted from her apportionment. *Id*. The appellant's former spouse, Virgil Davis, retired under the Civil Service Retirement System (CSRS) on October 1, 2000, and elected an unreduced annuity. *Id*.

¶3 In a letter dated July 9, 2005, OPM informed the appellant that she had received two types of overpayments between October 1, 2000 and October 30, 2004. *Id*., ¶ 4. First, OPM stated that it had erroneously based the appellant's 27.12 percent apportionment on Mr. Davis's unreduced annuity instead of his gross annuity, i.e., the amount of monthly annuity payable after reducing the self-only annuity to provide for a survivor annuity. *Id*. OPM determined that the appellant had received overpayments totaling $5,329.98 as a result of this apparent miscalculation. *Id*. Second, OPM found that the appellant had been charged an insufficient amount for her former spouse survivor annuity deposits, resulting in overpayments of $8,877.42. *Id*. Thus, OPM concluded that the appellant had been overpaid a total of $14,207.40, which it began collecting in installments of $236.79 from the appellant's monthly apportionment. *Id*.

¶4 In an Opinion and Order issued on June 2, 2008, the Board determined that OPM was mistaken in finding that it had erred in computing the appellant's apportionment. *Id*., ¶ 7. The Board found that Mr. Davis was not responsible for paying survivor annuity deposits, and therefore his gross annuity is equal to his unreduced annuity and the appellant's share is 27.12 percent of the full amount. *Id*. The Board ordered OPM to recalculate the appellant's apportionment based on Mr. Davis's unreduced annuity and to reimburse the appellant for the amount

that had been collected from her former spouse annuity and for the amount that her annuity had been erroneously reduced. *Id*., ¶ 14.

¶5 The Board also ordered OPM to waive recovery of the overpayments resulting from the insufficient deposits for the appellant's former spouse survivor annuity. *Id*., ¶ 13. When Mr. Davis retired, the appellant should have been given the opportunity, pursuant to the divorce decree, to elect a survivor benefit of either 27.12 percent or a maximum annuity. *Id*., ¶ 2. However, OPM did not provide the appellant with information about making this election when Mr. Davis retired, but instead automatically made deductions for a survivor annuity, presumably at the 27.12 percentage rate. *Id*., ¶ 3. In 2004, after the appellant contacted OPM for more information about her annuity, OPM belatedly notified her of her right to make an election and the appellant chose a maximum survivor annuity. *Id*. As a result, OPM found that it had been charging her an insufficient amount for her survivor benefits, resulting in overpayments totaling $8,877.42. *Id*., ¶ 4. In its Opinion and Order, the Board determined that collection of that overpayment would be against equity and good conscience and ordered OPM to waive recovery. *Id*., ¶¶ 13-14.

¶6 Subsequently, the appellant filed a petition for enforcement in which she alleged that OPM had not complied with the Board's order. Compliance File (CF), Tab 1. OPM responded that it had reimbursed the appellant for the entire amount ($8,116.79) that it had withheld in its efforts to collect the overpayments and that it had waived the remainder. CF, Tab 10. However, OPM conceded that it had not yet recalculated the appellant's former spouse annuity as a 27.12 percent apportionment of Mr. Davis's unreduced annuity. *Id*. The administrative judge therefore found OPM in partial noncompliance and recommended that the Board order OPM to recalculate the appellant's apportionment at the rate of 27.12 percent and provide her with an explanation of its computations. *Davis v. Office of Personnel Management*, MSPB Docket No. DC-0831-07-0811-C-1 (Recommendation, Nov. 25, 2008); CF, Tab 12 at 3.

¶7 The case was then forwarded to the full Board for enforcement purposes. OPM submitted a response stating that it had complied with the administrative judge's recommendation. Compliance Referral File (CRF), Tab 3. OPM attached exhibits showing its calculations of the apportionment at 27.12 percent of Mr. Davis's unreduced annuity. *Id*. In her initial reply, the appellant requested a breakdown of Mr. Davis's monthly unreduced annuity in order to determine whether OPM was in compliance. CRF, Tab 4. The appellant subsequently filed another reply in which she states that she has not received the promised reimbursement check and questions OPM's calculations. CRF, Tab 5. OPM then filed a second response stating that it had fully reimbursed the appellant and complied with the Board's order. CRF, Tab 7. In her final submission, the appellant acknowledges partial reimbursement but asserts that OPM should not have deducted $780 from her reimbursement as an adjustment in survivor deposits, should not have withheld federal income tax, failed to pay her attorney fees, failed to reimburse her for $58,539 that had been collected from her former spouse annuity, and failed to reimburse her for an underpayment in her annuity of $15,763.80. CRF, Tab 8 at 1-2.

ANALYSIS

¶8 Pursuant to 5 U.S.C. § 1204(a)(2), the Board has jurisdiction to consider an appellant's claim of agency noncompliance with a Board order. *Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984). The agency bears the burden of proving that it has complied. *See Spates v. United States Postal Service*, 70 M.S.P.R. 438, 441 (1996). Here, the outstanding compliance issues are: (1) whether OPM refunded and waived the appellant's overpayments and (2) whether OPM correctly recalculated the appellant's apportionment and reimbursed her for the erroneously reduced payments.

OPM has reimbursed the appellant for the recovered overpayments and has waived the remainder

¶9 In the June 2, 2008 Opinion and Order, the Board held that OPM erred in finding that its original computation of the appellant's apportionment resulted in overpayments, and the Board further determined that collection of the overpayments caused by insufficient deposits for her former spouse survivor benefit would be against equity and good conscience. *Davis*, 109 M.S.P.R. 48, ¶¶ 7, 13. Accordingly, the Board ordered OPM to reimburse the appellant for the amount OPM recovered from the appellant's monthly annuity and to waive collection of the remainder. *Id.*, ¶¶ 13-14.

¶10 OPM has provided evidence that it has reimbursed the appellant for the $8,116.79 withheld due to the overpayments and separately for an additional $236.79 that had been withheld from the appellant's August 2007 annuity check. CF, Tab 10; CRF, Tab 3, Ex. 3. OPM further states that it has waived its scheduled collection of the remainder. CF, Tab 10 at 1.

¶11 The appellant responds that OPM has not reimbursed her for the $5,329.98 in overpayments caused by OPM's erroneous recalculation of her apportionment. CRF, Tab 8 at 1. However, that amount was part of the $14,207.40 total ($5,329.98 + $8,877.42 for the insufficient deductions for her former spouse survivor benefit) that OPM claimed she had been overpaid.

¶12 The appellant further asserts that OPM owes her an additional $58,539. CRF, Tab 8 at 2. She contends that $58,539 is the amount referred to by the Board in its final order directing OPM to "reimburse the appellant for the amount that has already been collected from her former spouse annuity...." *Id.*, *quoting Davis*, 109 M.S.P.R. 48, ¶ 14. In support of this claim, the appellant provides her calculation of the amounts that she believes OPM collected from her monthly annuity between 2000 and 2008. *Id.*, Ex. 5. However, as just noted, OPM has produced evidence that the total amount that it recovered from the appellant's monthly annuity was $8,353.58 ($8,116.79 + $236.79) and that it has reimbursed

her for that amount. CF, Tab 10; CRF, Tab 3. To the extent that the appellant believes that OPM has underpaid her annuity by $58,539, separate and apart from the collection of overpayments at issue here, she must first raise that claim with OPM and receive a final decision before bringing her claim to the Board. *See* 5 U.S.C. § 8347(d); 5 C.F.R. §§ 831.109, 831.110.

OPM has supplied evidence that it recomputed the appellant's apportionment in compliance with the Board's final order

¶13 In the Opinion and Order issued on June 2, 2008, the Board determined that OPM was mistaken in concluding that it had erred in computing the appellant's apportionment based on Mr. Davis's unreduced annuity. *Davis*, 109 M.S.P.R. 48, ¶ 7. The Board found that Mr. Davis was not responsible for paying survivor annuity deposits, and therefore his gross annuity is equal to his unreduced annuity, and the appellant's share is 27.12 percent of the full amount. *Id*. The Board ordered OPM to recalculate the appellant's apportionment and reimburse her for the amount that her annuity had been erroneously reduced following OPM's decision. *Id*., ¶ 14.

¶14 In his compliance recommendation, the administrative judge found that OPM had not recalculated the appellant's apportionment and recommended that it do so and provide the appellant with an explanation of its computations. CF, Tab 12 at 3. OPM filed a response to the recommendation that included exhibits showing its calculation of the appellant's apportionment at 27.12 percent of Mr. Davis's unreduced annuity. CRF, Tab 3, Ex. 3. OPM's worksheet indicates that Mr. Davis's unreduced annuity, including his cost-of-living allowance (COLA), was $6,887 in December 2008 and that the appellant's share was 27.12 percent of that amount (6,887 multiplied by .2712), or $1,867.75. *Id*. Thus, we find that OPM has recomputed the appellant's apportionment in compliance with the Board's order.

OPM improperly offset a previously undisclosed debt and withheld federal income tax from the appellant's reimbursement

¶15 OPM has provided evidence that it has reimbursed the appellant for the difference between her recalculated apportionment and the incorrectly reduced amount that she received between November 1, 2004 and December 30, 2008. CRF, Tab 3, Ex. 3 (Letter from OPM to the appellant, dated Dec. 18, 2008). OPM determined that, during the relevant period, the appellant was paid $74,529.74, less deposits for her survivor annuity, and that she should have been paid $84,641.15, less the survivor annuity deposits. *Id*. The difference is $10,111.41. The appellant objects that she cannot determine whether OPM's calculation is correct because she has "not yet received a monthly delineation of Mr. Davis's self-only (unreduced) annuity from year 2000 to present...." CRF, Tab 6 at 1. In fact, OPM has disclosed the amount of Mr. Davis's unreduced annuity for each month between 2000 and the present. CRF, Tab 3, Ex. 2. OPM's evidence shows that Mr. Davis received an unreduced annuity of $5,396 on October 1, 2000. CRF, Tab 3, Ex. 1. OPM has provided the COLA computations for Mr. Davis's annuity for each year since 2000, as well as the appellant's 27.12 percent share of his annuity. *Id*., Ex. 2.

¶16 The appellant asserts that she is owed $15,763.80, rather than $10,111.41 as computed by OPM. CRF, Tab 8 at 2. In arriving at this figure, the appellant alleges that she received a reduced annuity long before OPM's July 9, 2005 letter stating that her apportionment would be recomputed and reduced. For example, the appellant claims that OPM underpaid her annuity by $5,555.48 in 2000 and 2001. *Id*., Ex. 4. To the extent that the appellant is arguing that OPM underpaid her annuity prior to 2004, she must first raise that claim with OPM and receive a final decision before bringing her claim to the Board. *See* 5 U.S.C. § 8347; 5 C.F.R. §§ 831.109, 831.110. We find that the appellant has shown no error in OPM's computation of the gross amount of the reimbursement that the appellant

is owed for the reduction in her apportionment between November 1, 2004 and December 30, 2008.

¶17 From the $10,111.41 that OPM determined the appellant is owed, OPM withheld deposits for her survivor benefits. OPM states that, between November 1, 2004 and December 30, 2008, it withheld a total of $29,124 in survivor deposits from the appellant's annuity, but that it should have withheld $29,904. CRF, Tab 3, Ex. 3. The difference between the amount withheld and the amount that should have been withheld is $780, which OPM indicates it has offset from the appellant's reimbursement. *Id*. The appellant responds that the $780 is part of the overpayments that the Board ordered OPM to waive. CRF, Tab 8 at 1. However, the overpayments that the appellant appealed occurred between October 1, 2000 and October 30, 2004. *Davis*, 109 M.S.P.R. 48, ¶ 4. We agree with the appellant, however, that the $780 is correctly characterized as an overpayment that OPM has offset from her Board-ordered reimbursement. Under OPM regulations, OPM is required to provide the appellant with written notice prior to collecting such a debt, along with the opportunity to request reconsideration, waiver, and/or a compromise. *See* 5 C.F.R. § 831.1304. Under these circumstances, OPM must first provide proper notice and apply its regulatory debt collection procedures prior to collecting this previously undisclosed debt from the appellant.

¶18 In addition, OPM also withheld $1,866 for federal income tax from her reimbursement. CRF, Tab 3, Ex. 4. The appellant asserts that she has never had federal income tax withheld from her former spouse annuity and therefore OPM should not have withheld it from her reimbursement. CRF, Tab 8 at 1. In support of this claim, the appellant has provided Internal Revenue Service (IRS) Forms CSA 1099R covering 2002 to 2008. *Id*., Ex. 2A. All of the forms indicate that no federal income tax was withheld during those years. According to IRS guidance, a CSRS annuitant may choose whether to have tax withheld. IRS Publication 721 at 3 (2008). "The choice for no withholding remains in effect

until [the annuitant] change[s] it." *Id*. Here, the evidence provided by the appellant shows that she opted not to have taxes withheld from her former spouse annuity. Accordingly, OPM must refund her the $1,866 withheld from her reimbursement, and the appellant will be responsible for any federal income tax that she owes.

The appellant's enforcement claim regarding her attorney fees must first be raised with the regional office

¶19 The appellant states that OPM failed to pay $151.60 that it owes in attorney fees. CRF, Tab 8 at 2. She appears to be referring to the fees awarded by the administrative judge on December 2, 2008. *See Davis v. Office of Personnel Management*, MSPB Docket No. DC-831M-07-0811-A-1 (Initial Decision, Dec. 2, 2008). If the appellant believes that OPM is not in compliance with that decision, she must, in the first instance, file a new petition for enforcement with the regional office that issued the decision. *See* 5 C.F.R. § 1201.182(a).

ORDER

¶20 Accordingly, we ORDER OPM to pay the appellant $2,646.00, i.e., to reimburse the appellant for the $780.00 offset and $1,866.00 federal income tax improperly withheld from her lump sum reimbursement. Satisfactory evidence of compliance with this Opinion and Order shall be submitted to the Office of the Clerk of the Board within 15 calendar days of the date of this Opinion and Order. If evidence of compliance is not received, the agency shall show cause why sanctions, pursuant to 5 U.S.C. § 1204(a)(2) and (e)(2)(A) and 5 C.F.R. § 1201.183, should not be imposed against the responsible agency official: **Kay Ely**, Associate Director, Human Resources Products and Services Division.

NOTICE TO THE APPELLANT

Following the agency's submission of evidence, you may respond no later than 10 calendar days after the date shown on the agency's certificate of service. All submissions should be made to:

Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW
Washington, DC 20419

If you do not respond, the Board will assume you are satisfied and will dismiss the petition for enforcement as moot.

FOR THE BOARD:

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