UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 235

Docket No. DE-0752-09-0415-I-1

Timothy C. Salazar,

Appellant,

v.

Department of the Army,

Agency.

December 7, 2010

Timothy C. Salazar, Vail, Arizona, pro se.

Eric L. Carter, Esquire, Fort Riley, Kansas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that dismissed his alleged involuntary retirement appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115, REVERSE the initial decision, and ORDER the agency to reinstate the appellant to his former position.

BACKGROUND

¶2 The appellant filed an appeal on July 3, 2009, alleging that his January 31, 2009 retirement was involuntary due to misinformation as to whether he had paid

the correct/full amount of his required post-1956 military deposit. Initial Appeal File (IAF), Tab 1. Specifically, at the time of the appellant's retirement he certified that he had post-1956 military service for which he paid the necessary deposit during his service with the Immigration & Naturalization Service (INS), but he did not include a copy of the OPM Form 1514 (proof of military deposit). IAF, Tab 10, subtab 4h at 4. The agency's Army Benefits Center Human Resource Specialist, Willie Ivory, declared in a sworn affidavit that she spoke with the appellant on November 20, 2008, that he indicated he had submitted a copy of the form to the Army in the late 1990s, and that Ivory advised him that his prior submission of a copy of the OPM Form 1514 was sufficient to complete his application. However, she did not discuss with him whether the amount of the deposit was correct. IAF, Tab 10, subtabs 4a, 4l. It is undisputed that the accuracy of his post-1956 deposit was not discussed with the appellant during his final retirement counseling session. IAF, Tabs 14, and 10, subtab 4b. The appellant's retirement was effective on January 31, 2009. IAF, Tab 10, subtab 4f. On March 23, 2009, the Office of Personnel Management (OPM) notified the appellant that his military deposit had been erroneously calculated using the 3 percent amount applicable under the Federal Employees' Retirement System (FERS) rather than the correct 7 percent amount applicable under the Civil Service Retirement System (CSRS). IAF, Tab 10, subtabs 4d and 4e. Therefore, OPM considered the appellant to have only partially paid his military deposit and that the remaining balance must be paid in full immediately by the appellant. *Id.*, subtab 4d. OPM directed the Army to calculate the remaining amount due and to notify the appellant. IAF, Tab 10, subtabs 4d, 4e. The appellant appealed OPM's determination, but subsequently he voluntarily withdrew his appeal. *See Salazar v. Office of Personnel Management*, MSPB Docket No. DE-0842-09-0366-I-1 (Initial Decision, June 29, 2009).

¶3 In this appeal, the appellant asserted that he would not have retired had he known that the INS had incorrectly calculated his post-1956 military deposit

under FERS and the consequences of that error. IAF, Tab 1 at 5. He further argued that the Army provided him with misinformation because it did not notify him of the consequences of the 1997 deposit error. *Id*. The Army argued that it was not responsible for finding and correcting the INS's mistake when it calculated and collected the appellant's military deposit. IAF, Tab 10, subtab 1 at 6-7. After holding a telephonic hearing, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to show that his January 2009 retirement was involuntary. Initial Decision (ID) at 7. In so finding, the administrative judge concluded that: (1) It was undisputed that the Army did not provide the appellant with misinformation because both the appellant and the Army assumed that his post-1956 deposit was correct; (2) the Army officials were not negligent in failing to spot and correct the INS's error; and (3) the Army officials had no reason to know that the appellant erroneously believed that they had independently verified the correctness of the deposit. ID at 6-7. The initial decision indicated that it would become final on December 28, 2009, unless a petition for review was filed by that date. ID at 8. The appellant filed his petition for review on February 24, 2010. Petition for Review (PFR) File, Tab 1.[1]

¶4 On petition for review, the appellant reiterates his contention that his retirement was involuntary due to misinformation. PFR File, Tab 6.

ANALYSIS

Timeliness Issue

¶5 A petition for review must generally be filed within 35 days after the date of the issuance of the initial decision, or if the appellant shows that the initial

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[1] The appellant's original submission addressed only the timeliness of his pleading, which is discussed below. PFR File, Tab 1. He submitted his substantive objections to the initial decision after being directed to do so in a Show-Cause Order issued by the Clerk of the Board. PFR File, Tabs 5-6.

decision was received more than 5 days after the initial decision was issued, within 30 days after the appellant received the initial decision. 5 C.F.R. § 1201.114(d). The Board will waive this time limit only upon a showing of good cause for the delay in filing. 5 C.F.R. §§ 1201.12, 1201.114(f). To establish good cause for the untimely filing of an appeal, a party must show that he exercised due diligence or ordinary prudence under the particular circumstances of the case. *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). To determine whether an appellant has shown good cause, the Board will consider the length of the delay, the reasonableness of his excuse and his showing of due diligence, whether he is proceeding pro se, and whether he has presented evidence of the existence of circumstances beyond his control that affected his ability to comply with the time limits or of unavoidable casualty or misfortune which similarly shows a causal relationship to his inability to timely file his petition. *Moorman v. Department of the Army*, 68 M.S.P.R. 60, 62-63 (1995), *aff'd*, 79 F.3d 1167 (Fed. Cir. 1996) (Table).

¶6 The appellant filed his petition for review almost 2 months after the December 28, 2009 filing deadline set forth in the initial decision. ID at 8; PFR File, Tab 1. The appellant's petition for review addresses the timeliness issue by stating that he initiated his petition electronically on December 17, 2009, which would have made it timely, and he thought that he had submitted his petition for review at that time. However, the appellant asserts that he later learned that his pleading had not been processed. *Id*.

¶7 The date of a filing by e-filing is "the date of electronic submission." 5 C.F.R. § 1201.4(1). We find that the appellant did not file his petition for review by the December 28, 2009 deadline because he did not actually complete all of the steps necessary for an electronic submission when he visited the Board's e-filing site on December 17, 2009. *See Rodgers v. U.S. Postal Service*, 105 M.S.P.R. 297, ¶ 5 (2007). Nevertheless, we find that the appellant's statement and the Board's e-Appeal Event Log show that on December 17, 2009, 11 days

before his appeal was due, the appellant created a petition for review on the e-filing section of the Board's website. *See Boykin v. U.S. Postal Service*, 104 M.S.P.R. 460, ¶ 6 (2007) (finding that the Board's records showed that an e-Appeal was created on May 1, 2006, supporting the appellant's representative's statement that he attempted to e-file on the May 1, 2006 filing deadline). The appellant did not file this pleading on December 17, 2009, however, because he did not complete the electronic submission. The appellant ultimately filed his petition for review on February 24, 2010, after he contacted the Board and became aware that he had not yet filed his petition for review. PFR File, Tab 1.

¶8 Noting that it is possible to exit the Board's e-filing website without receiving a clear warning that an appellant has not yet filed his pleading, the Board has found good cause for an untimely filing under circumstances where the individual could reasonably have believed that he filed his pleading in a timely fashion. *See Lamb v. Office of Personnel Management*, 110 M.S.P.R. 415, ¶ 9 (2009); *Rodgers*, 105 M.S.P.R. 297, ¶¶ 7-9. Furthermore, the appellant acted with due diligence by contacting the Board when he did not receive a response to his appeal and by refiling the appeal on February 24, 2010, when he became aware there was a problem. *Lamb*, 110 M.S.P.R. 415, ¶ 9; *Livingston v. Office of Personnel Management*, 105 M.S.P.R. 314, ¶ 9 (2007). Thus, we find, under the particular circumstances of this case, that the appellant has shown good cause for filing his petition for review beyond the deadline because he attempted to make a timely electronic filing, because he was able to exit the Board's website without receiving a clear warning that he had not yet filed his pleading, and he acted with due diligence in submitting the relevant documents when he became aware of the problem.

Involuntary Retirement Issue

¶9 The administrative judge correctly found that an employee's retirement is presumed to be a voluntary action and, as such, is not within the Board's jurisdiction. *Aldridge v. Department of Agriculture*, 111 M.S.P.R. 670, ¶ 7

(2009); ID at 1-2. An involuntary retirement or resignation, however, is tantamount to a removal, and, accordingly, is appealable to the Board. *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1328 (Fed. Cir. 2006) (en banc); *Aldridge*, 111 M.S.P.R. 670, ¶ 7. The presumption that a retirement is voluntary can be rebutted by evidence showing that the retirement was the result of agency misrepresentation, coercion, or duress. *Scharf v. Department of the Air Force*, 710 F.2d 1572, 1574-75 (Fed. Cir. 1983). Where, as here, there is a claim that an involuntary action resulted from misinformation, an appellant must show: (1) that the agency made misleading statements; and (2) that the appellant reasonably relied on the misinformation to his detriment. *Id.*; *Aldridge*, 111 M.S.P.R. 670, ¶ 8. The appellant need not show that the agency was intentionally misleading. *Covington v. Department of Health & Human Services*, 750 F.2d 937, 942 (Fed. Cir. 1984); *Aldridge*, 111 M.S.P.R. 670, ¶ 8. An agency is required to provide accurate information to permit an employee to make an informed, and thus voluntary, decision regarding resignation or retirement. *Aldridge*, 111 M.S.P.R. 670, ¶ 8. A decision based on misinformation is not binding as a matter of fundamental fairness and due process. *Covington*, 750 F.2d at 943.

¶10 Here, the appellant reasserts on review that the agency provided him with incorrect information regarding his annuity that caused him to involuntarily retire. Specifically, the appellant contends that the Army had a responsibility to verify the accuracy of the post-1956 deposit for his military service made in 1997, because it was supposed to conduct a comprehensive review of his retirement eligibility and provide him an accurate estimate on which he was to base his retirement decision. PFR File, Tab 6 at 4.

¶11 In this case, the administrative judge credited "as straightforward" the appellant's testimony that he would have delayed his retirement had the Army, the agency which processed his retirement, properly detected and corrected the error made by the INS in collecting the post-1956 deposit under FERS rules. ID

at 6.[2] Further, the record includes an affidavit, sworn under oath, from Carla M. Gilbert, Human Resources Specialist, in which she states that she spoke with the appellant on January 9, 2009, and provided him with a "final counseling." IAF, Tab 10, subtab 4b. Ms. Gilbert's affidavit states that the final counseling included an estimate for the appellant's monthly annuity and that, while she and the appellant did not specifically discuss his post-1956 military deposit, the counselor based her estimates on the proof of payment in full of a military deposit the appellant included in his retirement packet. IAF, Tab 10, subtab 4b. This proof of payment information, however, was wrong. The appellant had not paid his post-1956 military deposit in full at the CSRS rate. As a result, because the Army did not verify the accuracy of the appellant's military deposit, the Army's estimate of the appellant's monthly annuity was, therefore, also incorrect. Thus, the Army provided the appellant with misinformation, albeit unintentionally. The Board has repeatedly held that whether the agency provided the misinformation intentionally, unintentionally, negligently, inadvertently, or even innocently is immaterial to whether it was, in fact, misinformation, and that a decision based on misinformation is not binding as a matter of fundamental fairness and due process. *See Aldridge*, 111 M.S.P.R. 670, ¶ 8; *Baldwin v. Department of Veterans Affairs*, 109 M.S.P.R. 392, ¶ 26 (2008); *Petric v. Office of Personnel Management*, 108 M.S.P.R. 342, ¶ 9 (2008).

¶12 Because the appellant has shown that the Army provided him with misinformation and that he reasonably relied on it in deciding to retire, he has proven that his retirement was involuntary. *See Baldwin v. Department of Veterans Affairs*, 111 M.S.P.R. 586, ¶ 46 (2009). Accordingly, because the appellant has proven that his retirement was involuntary and thus tantamount to a

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[2] An accurate deposit for the appellant's post-1956 military service gives him retirement credit for an additional 7 years of service. IAF, Tab 10, Subtab 4k. The failure to pay the deposit thus has serious consequences.

removal, there is Board jurisdiction and he prevails on the merits. *See Shoaf v. Department of Agriculture*, 260 F.3d 1336, 1341 (Fed. Cir. 2001); *Schultz v. United States Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987); *Aldridge*, 111 M.S.P.R. 670, ¶ 20. The appellant is therefore entitled to reinstatement.

ORDER

¶13 We ORDER the agency to cancel the appellant's retirement and to reinstate him to the GS-13 grade level, Supervisory Security Specialist position at the United States Army Intelligence Center, Fort Huachuca, Arizona, effective January 31, 2009. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶14 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board's Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶15 We further ORDER the agency 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. The appellant, if not notified, should ask the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶16 No later than 30 days after the agency tells the appellant that 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 in this appeal if the appellant believes that the agency did not fully carry out the Board's Order. The petition

should contain specific reasons why the appellant believes that the agency has not fully carried out the Board's Order, and should include the dates and results of any communications with the agency. 5 C.F.R. § 1201.182(a).

¶17 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶18 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 requirements, 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. 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:

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

	DFAS CHECKLIST **INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD**

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
   a. Outside earnings with copies of W2's or statement from employer.
   b. Statement that employee was ready, willing and able to work during the period.
   c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts**.**

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.

2. The following information must be included on AD-343 for Restoration:

a. Employee name and social security number.
b. Detailed explanation of request.
c. Valid agency accounting.
d. Authorized signature (Table 63)
e. If interest is to be included.
f. Check mailing address.
g. Indicate if case is prior to conversion. Computations must be attached.
h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)

2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.

3. Outside earnings documentation statement from agency.

4. If employee received retirement annuity or unemployment, provide amount and address to return monies.

5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)

6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.

7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

a. Must provide same data as in 2, a-g above.
b. Prior to conversion computation must be provided.
c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.