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

**2012 MSPB 9**

Docket No. DC-0842-10-0846-I-1

**Sheri Lynn Denney,**

**Appellant,**

**v.**

**Office of Personnel Management,**

**Agency.**

January 27, 2012

Sheri Lynn Denney, Troutman, North Carolina, pro se.

Karla W. Yeakle, Washington, D.C., for the agency.

**BEFORE**

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

## OPINION AND ORDER

¶1 The Office of Personnel Management (OPM) has filed a petition for review of the initial decision that reversed its final decision regarding the calculation of the appellant's Federal Employees' Retirement System (FERS) retirement annuity. For the reasons set forth below, we GRANT the petition for review, REVERSE the initial decision, and SUSTAIN OPM's final decision.

### BACKGROUND

¶2 The material facts in this case are not in dispute. The appellant served as a criminal investigator from July 25, 1983, until her retirement under FERS

effective December 31, 2008. Initial Appeal File (IAF), Tab 4, Subtab 6 at 6, 9-10, 12-17; Tab 7 at 1. The appellant's criminal investigator positions enabled her, upon satisfying the necessary legal requirements, to receive "availability pay"[1] under 5 U.S.C. § 5545a, until February 25, 2001, when she began working part-time for the remainder of her federal service. As a part-time employee, she could not satisfy the legal requirements for receiving availability pay during that period of her service.[2] 5 U.S.C. § 5545a(a)-(e), IAF, Tab 6, Subtab 3 at 9-10; Tab 7 at 1.

¶3 Following an OPM initial decision and the appellant's reconsideration request, IAF, Tab 5, Subtabs 3, 4, OPM explained that it calculated the appellant's FERS retirement annuity in accordance with the requirements under 5 U.S.C. §§ 8401, 8412, and 8415, using the appellant's last 3 years of service to derive the average pay portion of the annuity calculation. 5 U.S.C. §§ 8401(3), 8415(a), (f)(1)(A). IAF, Tab 4, Subtab 2. OPM did not include availability pay in the determination of the appellant's average pay because she did not receive availability pay for her part-time work during her last 3 years of service. *Id.* at 3-4.

¶4 The appellant reasserted in her Board appeal that, in determining her average pay, OPM should have included availability pay in the basic pay she should have been deemed to have earned during her last 3 years of part-time service. IAF, Tab 1 at 8-9; Tab 7 at 1, 6-8; Tab 9 at 2; Tab 11 at 3. The appellant also asserted that OPM's calculation of her average pay was contrary to Congress' intent in adding 5 U.S.C. § 8415(f) in 1986 because her average pay

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[1] Availability pay is a form of premium pay equal to "25 percent of the rate of basic pay for the position." 5 U.S.C. § 5545a(b),(h)(1).

[2] Although the appellant worked full-time from June 20, 2001, through August 25, 2001, during her part-time service, the appellant's service in 2001 was not used in determining her average pay in calculating her retirement annuity.

would be less than the average pay of a person who worked part-time until that person's last 3 years of service and then worked full-time and received availability pay during those last 3 years. IAF, Tab 7 at 8-10. OPM submitted evidence and argument that it lawfully relied on the basic pay certified in the appellant's individual retirement record (IRR) for her last 3 years of service and that the appellant's former agency had lawfully excluded availability pay from her basic pay for those 3 years because she had not received availability pay during that time. IAF, Tab 4, Subtabs 2, 6.

¶5 The administrative judge found that the appellant's former agency had not included availability pay in the basic pay shown on the appellant's IRR for her last 3 years of service. IAF, Tab 12, Initial Decision (ID) at 2-3. The administrative judge found that OPM's failure to include availability pay in the basic pay OPM should have deemed the appellant to have earned in determining the appellant's average pay was contrary to 5 U.S.C. § 8415(f) and Board and judicial precedent. ID at 3-4. Accordingly, the administrative judge found that OPM had incorrectly calculated the appellant's retirement annuity and ordered OPM to recalculate the annuity by adding availability pay to the appellant's certified basic pay. ID at 5.

¶6 OPM has filed a petition for review and the appellant has filed a response in opposition. Petition for Review (PFR) File, Tabs 1, 3.

## ANALYSIS

### OPM properly excluded availability pay from the appellant's basic pay in her last 3 years of service in determining the average pay for the appellant's retirement annuity calculation.

¶7 OPM reasserts on review that it lawfully relied on the basic pay certified in the appellant's IRR for her last 3 years of service and that the appellant's former agency had lawfully excluded availability pay from her basic pay for her last 3 years of service because she did not receive availability pay during those 3 years. PFR File, Tab 1 at 5-6. The appellant asserts that the administrative judge

correctly determined that 5 U.S.C. § 8415(f) required OPM to include availability pay in the full-time basic pay OPM was required to have deemed her to have earned in her last 3 years of part-time service. PFR File, Tab 3 at 3-5. For the reasons set forth below, we agree with OPM's determination.

¶8 As a FERS employee whose career included part-time service, the appellant's retirement annuity is calculated pursuant to 5 U.S.C. § 8415(f), which provides, in pertinent part, that:

> (f)(1) In computing an annuity under this subchapter for an employee whose service includes service performed on a part-time basis--
>
> > (A) the average pay of the employee, to the extent that it includes pay for service performed in any position on a part-time basis, shall be determined by using the annual rate of basic pay that would be payable for full-time service in the position; and
> >
> > (B) the benefit so computed shall then be multiplied by a fraction equal to the ratio which the employee's actual service, as determined by prorating the employee's total service to reflect the service that was performed on a part-time basis, bears to the total service that would be creditable for the employee if all of the service had been performed on a full-time basis.

Thus, the annuity calculation is a two step process; the first step is to determine the average pay of an employee as described under § 8415(f)(1)(A), and the second step is to calculate the annuity by prorating the annuity to reflect the employee's part-time service as described under § 8415(f)(1)(B). *See Nichol v. Office of Personnel Management*, 108 M.S.P.R. 286, ¶ 15 (2008); *see also Killeen v. Office of Personnel Management*, 558 F.3d 1318, 1324 (Fed. Cir. 2009).

¶9 For the following reasons, we find that availability pay is not automatically part of the "annual rate of basic pay that would be payable for full-time service in the position." 5 U.S.C. § 8415(f)(1)(A). The availability pay statute provides that the purpose of availability pay "is to provide premium pay to criminal investigators to ensure the availability of criminal investigators for unscheduled duty in excess of a 40 hour week based on the needs of the employing agency."

5 U.S.C. § 5545a(b). Thus, availability pay is a form of "premium pay" for services performed in excess of a basic work week. 5 U.S.C. § 5545a(a)(3)(A), (b); *see Martinez v. Department of the Treasury*, 71 M.S.P.R. 262, 264 (1996), *aff'd*, 126 F.3d 1480 (Fed. Cir. 1997). Further, in order to be eligible for availability pay, the statute requires an annual certification to the head of the agency by the employee and a supervising officer that the employee has and will satisfy the availability pay eligibility requirements set forth under 5 U.S.C. § 5545a(d). 5 U.S.C. § 5545a(e)(1). The appellant admits that she was not eligible to receive availability pay during her last 3 years of part-time service. IAF, Tab 7 at 7.

¶10 OPM's regulations and the precedent of both the Board and our reviewing court provide that certain types of income, including availability pay, shall only be included in basic pay in accordance with a statutory provision authorizing its inclusion.[3] *See Lisanti v. Office of Personnel Management*, 573 F.3d 1334, 1342 (Fed. Cir. 2009); *Martinez*, 71 M.S.P.R. at 264; 5 C.F.R. § 550.186(b). Congress limited the circumstances under which availability pay is to be included in "basic pay" for the purposes of the Civil Service Retirement System (CSRS) and FERS retirement statutes to when availability pay was actually "received by a criminal investigator under section 5545a of this title." 5 U.S.C. § 8401(4), § 8331(3)(E)(i). Thus, "basic pay" only includes availability pay that was actually "received" by a criminal investigator in a given year. *Id.* Additionally, we note that our reviewing court has previously addressed and rejected, albeit in a different context, the assertion that availability pay is automatically a part of a criminal investigator's annual rate of basic pay. The court stated as follows in rejecting that claim:

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[3] The Board must give effect to Congress' clearly expressed intent that availability pay is only to be included in "basic pay" when it has actually been "received" by the employee. *See Killeen*, 558 F.3d at 1325 (neither the court nor OPM may ignore words in a statute).

> The argument rests on a fallacious assumption: that law enforcement officers automatically are entitled to availability pay. The latter pay is not automatic, however, but requires compliance with the requirements of section 5545a, which include certification by both the law enforcement officer and his superior that the officer has met the statutory requirements.

*Caven v. Merit Systems Protection Board*, 392 F.3d 1378, 1381 (Fed. Cir. 2004).

Excluding availability pay from the appellant's average pay does not contravene Congressional intent in enacting 5 U.S.C. § 8415(f).

¶11 We disagree with the administrative judge's finding that OPM's failure to include availability pay as part of the appellant's average pay was contrary to Congressional intent in enacting 5 U.S.C. § 8415(f). ID at 3-5. Prior to 1986, an employee's average pay for retirement purposes was based on the pay the employee actually received during any 3 consecutive years the employee received their highest rates of basic pay. *See Killeen v. Office of Personnel Management*, 382 F.3d 1316, 1321-22 (Fed. Cir. 2004); *Nichol*, 108 M.S.P.R. 286, ¶ 11. That method of average pay calculation provided a windfall to employees who worked part-time until their last 3 years, then switched to full-time service and, thus, had their annuities calculated as if they had worked full-time for their entire career. It also worked to the disadvantage of those employees who worked full-time for most of their service, but then switched to part-time service during the last 3 or more years of service when their basic pay would presumably have been the highest if they had worked full-time.

¶12 In 1986, Congress addressed the unfairness when it added 5 USC § 8339(p) to the CSRS statute and 5 U.S.C. § 8415(f) to the FERS statute. *See Killeen*, 382 F.3d at 1322; *Nichol*, 108 M.S.P.R. 286, ¶¶ 11-12. By adding those respective paragraphs, all employees' salaries are now calculated as if they worked full-time for the 3 years used to determine the employee's average pay, but that average pay is then prorated to reflect the employee's years of part-time service, regardless of when their part-time service occurred. *See Killeen*, 382 F.3d at 1322; *Nichol*, 108 M.S.P.R. 286, ¶¶ 11-12. OPM complied with this procedure in

computing the appellant's annuity by actually using the full-time annual rate of basic pay for the appellant's position. IAF, Tab 4, Subtab 2 at 3-4; 5 U.S.C. § 8415(f)(1)(A).

¶13 Because OPM calculated the appellant's annuity under 5 U.S.C. § 8415(f)(1), her circumstances differ from the two Congressional concerns noted above. If Congress had been concerned about when a criminal investigator earned availability pay, it would not have required an annual eligibility certification to receive availability pay and it would not have limited the inclusion of availability pay in basic pay to that availability pay actually "received" by a criminal investigator. Although the appellant may consider the timing of her part-time service to have created an inequity in the determination of her average pay under 5 U.S.C. § 8415(f)(1)(A), neither OPM nor the Board may ignore that the statutory definition of "basic pay" only includes availability pay "received." OPM, the Board, and our reviewing court may not include availability pay that is not authorized by statute. *See Lisanti*, 573 F.3d at 1342.

OPM properly determined what pay should lawfully be included in the appellant's certified basic pay.

¶14 Finally, we disagree with the administrative judge's finding that OPM failed to conduct an independent legal review of what pay should lawfully be included in the appellant's "basic pay" in determining her average pay under 5 U.S.C. § 8415(f)(1)(A), as required by our reviewing court.[4] ID at 4-5; *see*

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[4] In *Lisanti*, the court modified prior Board decisions holding or implying that OPM and the Board are bound by the employing agency's IRR and that an appellant's remedy for a claim that the IRR is erroneous lies with seeking an amended IRR from the employing agency. *See Lee v. Office of Personnel Management*, 108 M.S.P.R. 321, ¶ 7 (2008); *Rainone v. Office of Personnel Management*, 104 M.S.P.R. 423, ¶ 7 (2007); *O'Connell v. Office of Personnel Management*, 103 M.S.P.R. 579 (2006). The court specifically rejected OPM's reliance on these decisions, finding that the IRR is not necessarily binding, and that, absent a clear Congressional intent to the contrary, both OPM and the Board are required to "entertain" a challenge to the employing agency's interpretation of the term "basic pay" on the IRR. *Lisanti*, 573 F.3d at 1239-40.

*Lisanti*, 573 F.3d at 1340. OPM did not simply use the basic pay certified in the IRR in determining the appellant's average pay, it used the "basic pay" defined by 5 U.S.C. § 8415(f)(1)(A), and, further, it provided a legal analysis for its exclusion of availability pay from the appellant's basic pay and, thus, her average pay. IAF, Tab 4, Subtab 2 at 1-4. OPM therefore complied with its obligations under *Lisanti*.

¶15 Accordingly, we REVERSE the initial decision and SUSTAIN OPM's reconsideration decision.

## ORDER

¶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 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:

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