UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 72

Docket No. SF-0831-11-0480-I-1

John W. McDevitt,
Appellant,
v.
Office of Personnel Management,
Agency.

June 8, 2012

John W. McDevitt, Westlake Village, California, pro se.

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

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that affirmed the final decision of the Office of Personnel Management (OPM) reducing his Civil Service Retirement System (CSRS) annuity to eliminate credit for his post-1956 military service. For the reasons set forth below, we GRANT the appellant's petition and REVERSE the initial decision. OPM's final decision is NOT SUSTAINED.

BACKGROUND

¶2 The appellant retired from the U.S. Postal Service under the CSRS on July 1, 2007, at age 58 after more than 34 years of federal civilian service. Initial

Appeal File (IAF), Tab 3, Subtab 2b at 19. He also served in the U.S. Army National Guard from 1969 to 1970 for a period of approximately 4 1/2 months. *Id.* at 18. He did not make a deposit for his post-1956 military service before he retired. *Id.* at 16. When he turned 62, OPM notified him that his annuity had been recomputed to exclude credit for his period of military service because he did not make a deposit for the service prior to his retirement. *Id.*, Subtab 2a. When recomputed, the gross monthly amount of the appellant's CSRS annuity was reduced from $2931 to $2903. *Id.*

¶3 On appeal to the Board, the appellant asserted that, when he was filling out his retirement papers, he had received an Estimated Earnings Instructions/Info Sheet and a copy of his DD-214 from the Department of Defense, which he presented to his retirement counselor. *Id.*, Tab 1 at 5, 10. The Instructions stated that "Reserve or National Guard time is **NOT** counted for the Buy Back program unless you are called to 'Active Duty.'" *Id.* at 10 (emphasis in original). According to the appellant, he questioned that provision, as his service was with the Army National Guard, but he was assured that, if the provision was not applicable, he would be notified. *Id.* at 5. He asserted that his paperwork was sent to Shared Services and then on to OPM; and that he contacted personnel at OPM and provided a copy of the Instructions, but was not advised of any errors in his retirement. *Id.* The appellant subsequently submitted a sworn declaration[*] in which he stated that: (1) His contacts with the Postal Service regarding his retirement began in early 2006; (2) he met with his counselor, Ms. Melton, who, upon reviewing his paperwork and the Instructions he had provided, asked him if he had ever been called to "active duty;" (3) he answered in the negative, explaining that his military time was considered "MOS training" on his DD-214 and as part of his enlistment; and (4) Ms. Melton instructed him that there was no deposit to be paid. *Id.*, Tab 6. Having learned from OPM's decision recomputing

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[*] The appellant declined a hearing. IAF, Tab 1 at 2.

his annuity that Ms. Melton's instructions were wrong, the appellant has asked to be able to pay the deposit now. *Id.*; Tab 1 at 4.

¶4 The administrative judge issued an initial decision affirming OPM's decision. *Id.*, Tab 7, Initial Decision (ID) at 1, 9. She found that the appellant received adequate notice of the requirement that he make a deposit for his post-1956 military service prior to his retirement to avoid a reduction in his CSRS annuity at age 62, ID at 4-5, and that he did not prove that his failure to pay the deposit was the result of administrative error, *id.* at 5-8. In this regard, the administrative judge acknowledged that the Estimated Earnings Instructions the appellant received contained incorrect information, but she found that he chose to rely on it, despite the fact that his DD-214 showed that he had active duty service. *Id.* at 8.

¶5 The appellant has filed a petition for review of the initial decision in which he challenges the administrative judge's statement that he did not present his DD-214 to Ms. Melton during his retirement counseling session. Petition for Review (PFR) File, Tab 1. OPM has responded in opposition to the appellant's petition. *Id.*, Tab 5.

ANALYSIS

¶6 An annuitant who retires after September 7, 1982, is entitled to receive credit for active duty military service performed after 1956 under both CSRS and the Social Security system if he deposits an amount equal to 7% of his total post-1956 military pay with the Civil Service Retirement and Disability Fund. *Hooten v. Office of Personnel Management*, 114 M.S.P.R. 205, ¶ 6 (2010); *see* 5 U.S.C. § 8334(j). If the annuitant fails to make such a deposit, OPM must recalculate the annuity payments when he first becomes eligible for Social Security benefits to exclude credit for the post-1956 service. 5 U.S.C. § 8332(j); *Hooten*, 114 M.S.P.R. 205, ¶ 6. Employees who retire on or after October 1, 1983, must make such deposit before their separation from service upon which

title to an annuity is based. *Hooten*, 114 M.S.P.R. 205, ¶ 6; 5 C.F.R. § 831.2104. The Board will order OPM to permit a post-separation deposit, however, if there was administrative error by the individual's employing agency or OPM and the failure to make the deposit prior to retirement was the product of the administrative error. *King v. Office of Personnel Management*, 97 M.S.P.R. 307, ¶¶ 4, 15 (2004), *aff'd sub nom. Grant v. Office of Personnel Management*, 126 F. App'x 945 (Fed. Cir. 2005); 5 C.F.R. § 831.2107(a)(1).

¶7 The Board may find administrative error and waive the deposit deadline when: (1) the employee can show that he relied on misinformation in electing not to make the deposit; (2) an application package contains obvious errors or internal inconsistencies in which OPM or the employing agency has an obligation to investigate and resolve the problem before processing the application; or (3) an employee elected to make the deposit and the paperwork is in order, but neither the employing agency nor OPM followed through to ensure the deposit was made. *King*, 97 M.S.P.R. 307, ¶ 12 n.2.

¶8 As to the first scenario, the U.S. Court of Appeals for the Federal Circuit has held that, "when an employee, at the time of election, asks for information regarding the amount of the military deposit or the consequences of failing to make a deposit, the government commits administrative error under 5 U.S.C. § 831.2107(a)(1) if its response either misrepresents the dollar amount in question, or is so indirect, inaccurate, or incomplete as to confuse the employee as to the amount of the deposit or the effect of any failure to make the deposit on the annuity recalculation." *McCreary v. Office of Personnel Management*, 459 F.3d 1344, 1349 (Fed. Cir. 2006). In so holding, the court affirmed the Board's longstanding policy that military veterans are entitled to expect that the government will provide them with accurate answers to questions concerning their deposit requirements to enable them to make informed decisions on matters that may significantly affect their annuities. *Id.*

¶9 In this appeal, the appellant asserts that he questioned Ms. Melton as to whether, based on the Estimated Earnings Instructions he had received, his service in the National Guard was subject to the "Buy Back" program. Contrary to the administrative judge's finding, ID at 7, the appellant did claim below that he also presented his DD-214 to Ms. Melton, IAF, Tab 1 at 5. And, he clearly asserted that she told him his service was not subject to the deposit and that no one at his agency ever corrected that misstatement. *Id.*, Tab 6 at 3. OPM has not disputed the appellant's factual assertions pertaining to his conversation with Ms. Melton. The appellant further asserts that he relied on the information he was provided in not paying a deposit for that military service, and that, if he had received correct information, he "could have avoided this appeal." *Id.*, Tab 1 at 5.

¶10 We find that the appellant's unrebutted allegations establish that the government committed administrative error by assuring him, when he asked, that his military service was not subject to the deposit. This is so even though the appellant received information about making a deposit in order to continue receiving credit for his military service if and when he became eligible to receive Social Security benefits, IAF, Tab 3, Subtab 2b at 16-17 (OPM Form 1515, Military Service Deposit election), and even though similar information was provided in his retirement application, SF-2801, *id.* at 4-10; *see Hendricks v. Office of Personnel Management*, 109 M.S.P.R. 179, ¶ 9 (2008); *Hooper v. Office of Personnel Management*, 108 M.S.P.R. 614, ¶ 10 (2008); *Taylor v. Office of Personnel Management*, 108 M.S.P.R. 12, ¶ 12 (2008).

¶11 Under these circumstances, we find that the information provided by the appellant's employing agency during the retirement process was inaccurate and incomplete under *McCreary* and therefore constituted administrative error. We further find that the error justifies a waiver of the deadline for making a deposit because the appellant has shown that his failure to do so was "due to" the administrative error. *See Thomas v. Office of Personnel Management*,

107 M.S.P.R. 334, ¶ 19 (2007). We find, accordingly, that the appellant is entitled to make a post-separation military deposit.

ORDER

¶12 We ORDER the OPM to set a time limit under 5 C.F.R. § 831.1207(a)(1) by which the appellant may make the military deposit to this former employing agency. OPM must complete this action no later than 20 days after the date of this decision.

¶13 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).

¶14 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).

¶15 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. 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.