

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

EDGARD P. DAVIDBROWN,
Appellant,

DOCKET NUMBER
SF-0831-12-0099-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: January 18, 2013

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Edgard P. Davidbrown, Vallejo, California, pro se.

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

BEFORE

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

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge affirming the decision of the Office of Personnel Management (OPM) to recompute the

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

appellant's Civil Service Retirement System (CSRS) annuity. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, and based on the following points and authorities, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision issued by the administrative judge, which is now the Board's final decision. [5 C.F.R. § 1201.113\(b\)](#).²

A civil service annuitant who retires after September 7, 1982, is entitled to receive credit for active duty military service performed after 1956 under both the CSRS and the Social Security System, but only if the annuitant deposits with the Civil Service Retirement Fund an amount equal to seven percent of the person's total post-1956 military pay. *McCrary v. Office of Personnel Management*, [459 F.3d 1344](#), 1347 (Fed. Cir. 2006); *see* [5 U.S.C. § 8334\(j\)](#). Moreover, the amount of the deposit accrues interest until deposited. *See* [5 U.S.C. § 8334\(e\),\(j\)](#). If, before retirement, the individual does not make the required deposit with interest, OPM must recompute the individual's retirement annuity when the

² Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

individual becomes eligible for Social Security benefits, so as to exclude any post-1956 military service from the computation of the civil service retirement annuity benefit. *McCrary*, 459 F.3d at 1347. The Board will order OPM to allow an individual to make a post-separation deposit to his retirement account to receive retirement credit for post-1956 military service pursuant to [5 U.S.C. §§ 8332\(j\)](#) and 8334(j) only if the individual shows that OPM or his employing agency made an administrative error that caused his failure to timely make the deposit. *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); *see* [5 C.F.R. §§ 831.2104\(a\)](#), 831.2107(a)(1).

The appellant appealed OPM's final decision to recompute his monthly annuity in order to eliminate credit for his post-1956 military service. Initial Appeal File (IAF), Tab 1; *see* IAF, Tab 5, Subtab 2. The administrative judge informed the appellant of his burden of proof and the parties responded. IAF, Tabs 5-6, 8. After holding a telephonic hearing, the administrative judge affirmed OPM's final decision, finding that OPM properly recomputed the appellant's CSRS annuity. IAF, Tab 14, Initial Decision (ID). The administrative judge found it undisputed that the appellant retired after October 1, 1983, that he was therefore required to make a deposit to cover his post-1956 military service, and that, after receiving written notice of the consequences, he elected not to make the required deposit. ID at 4. The administrative judge further found that the approximately \$12,000.00 deposit and interest quoted by the appellant's employing agency does not so misrepresent the actual \$10,297.00 deposit and interest that the appellant would have been required to pay at the time he retired as to amount to administrative error. ID at 6. We agree with the administrative judge that the appellant failed to establish that the agency committed administrative error or that the agency's information caused his failure to pay the deposit. In his petition for review, the appellant asserts that the agency did misrepresent the amount, claiming that \$12,000.00 is more difficult to pay

than \$10,000.00, and claims that he missed the chance to make the deposit because time was constrained and the inflated amount the agency quoted “made it difficult and disappointing to meet their demand.” Petition for Review File, Tab 1 at 2-3. Nevertheless, whatever the degree of the agency’s error in estimating the amount of the deposit the appellant was required to make and the interest he was required to pay, the appellant failed to establish that the agency’s error caused his failure to timely make the deposit. ID at 6; *see King*, [97 M.S.P.R. 307](#), ¶¶ 4, 15 (“OPM’s regulation permits a post-separation deposit only when the failure to make the deposit was ‘due to’ an administrative error.”); [5 C.F.R. § 831.2104\(a\)](#).

**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 the date of this order. 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. *See* 5 U.S.C. § 7703(b)(1)(B), as revised effective December 27, 2012, Pub. L. No. 112-199, § 108, [126 Stat. 1465](#),

1469. Additional information about the United States Court of Appeals for the Federal Circuit 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.