

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

2013 MSPB 71

Docket No. DC-0845-11-0740-R-1

**Daniel-Lynn Whittacre,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

September 11, 2013

Daniel-Lynn Whittacre, Henderson, North Carolina, pro se.

Jessica Johnson, Esquire, James Williams, and Kristine Prentice,
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 Director of the Office of Personnel Management (OPM) has petitioned the Board to reconsider its April 13, 2012 Opinion and Order in *Whittacre v. Office of Personnel Management*, [118 M.S.P.R. 33](#) (2012). For the reasons set

forth below, we GRANT the Director's petition for reconsideration and REVERSE the Board's decision.¹

BACKGROUND

¶2 The appellant began his federal service as a Criminal Investigator with the Department of Health & Human Services (HHS) on January 9, 2005. Initial Appeal File (IAF), Tab 3, Subtab 2d at 1, 22. During his civilian service, he was called to active military duty, and HHS placed him in a leave without pay (LWOP) status for the period from June 12, 2007, through January 5, 2008. *Id.* at 22. The appellant returned to his civilian position on January 6, 2008, but was thereafter recalled to active military duty, and HHS again placed him in an LWOP status, effective February 3, 2008. *Id.* While on this second period of military LWOP, the appellant applied for disability retirement under the Federal Employees' Retirement System (FERS), and HHS separated him from service based on disability retirement effective August 30, 2008, with his last day in pay status being February 1, 2008. *Id.* at 22, 28. OPM commenced the appellant's FERS interim disability retirement annuity payments effective February 2, 2008. *Id.*, Subtab 2c. After making its final determination as to the amount of the annuity to which the appellant was entitled, OPM informed the appellant that he had received an overpayment of \$7,690.23 in interim annuity payments for the period of February 2, 2008, through May 30, 2009, and that it intended to offset his future annuity payments by \$213.61 per month for a period of 36 months in order to recoup the overpayment. *Id.*, Tab 3, Subtab 2c. On the appellant's request for reconsideration, OPM affirmed its finding of the overpayment. *Id.*, Subtabs 2a, 2b.

¹ 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 request for reconsideration in this case was filed before that date. Even if we considered this case under the previous version of the Board's regulations, the result would be the same.

¶3 On appeal to the Board, the appellant contended, inter alia, that he had not, in fact, received an overpayment of interim annuity payments. The appellant argued that OPM's calculation of the amount of annuity to which he was entitled was erroneous in that it did not include his periods of LWOP while serving on active military duty in arriving at his "average pay." *Id.*, Tab 7 at 1. In her initial decision, the administrative judge found that OPM had lawfully commenced the appellant's interim FERS disability retirement annuity payments on February 2, 2008, and properly calculated his "high-3" average salary in determining his annuity. *Id.*, Tab 8, Initial Decision (ID) at 3-4. The administrative judge further found that OPM had presented preponderant evidence in support of its determination that the appellant had received an overpayment of interim annuity payments for the period of February 2, 2008, to May 30, 2009, in the amount of \$7,690.23. ID at 4-7. As such, the administrative judge affirmed OPM's reconsideration decision. *Id.* at 1, 7.

¶4 On the appellant's petition for review of the administrative judge's initial decision, the Board found that OPM had erred in finding that the appellant was not entitled to service credit for the period of LWOP from June 12, 2007, to January 5, 2008, because he had failed to make a military service credit deposit for that service, and that, as a result, it had erroneously calculated the amount of his "average pay" by omitting from its computations his imputed salary during this period. *Whittacre*, [118 M.S.P.R. 33](#), ¶ 9. The Board further found, however, based upon the current record, that it was unable to determine whether the appellant actually received an overpayment and, if so, the amount of that overpayment. *Id.*, ¶ 10. Accordingly, the Board reversed OPM's reconsideration decision and remanded the appeal to OPM to issue a new reconsideration decision regarding the existence and amount of any overpayment, consistent with the Opinion and Order. *Id.*

¶5 The Director of OPM now petitions the Board to reconsider its decision.² OPM argues that the Board read one statutory provision in a vacuum and ignored others, rendering them a nullity, and that the Board’s decision conflicts with congressional intent and statutory interpretation and practice with regard to the requirement for crediting time spent on military LWOP. Reconsideration File (RF), Tab 4. The appellant responds that the Board properly required OPM to grant him credit towards retirement for the period of time he was on military LWOP, notwithstanding his failure to have paid a deposit.³ *Id.*, Tab 8.

ANALYSIS

¶6 As a preliminary matter, we note that the Director’s statutory authority to request reconsideration is limited to “any final order or decision of the Board.” [5 U.S.C. § 7703](#)(d); [5 C.F.R. § 1201.119](#)(a). As noted, the Board’s decision in this case remanded the appeal to OPM to make a new determination of the amount of the FERS disability retirement annuity to which the appellant is entitled and to

² OPM did not request a stay of the Board’s decision. *See* [5 C.F.R. § 1201.119](#)(d).

³ At the outset, the appellant argues that the OPM Director’s petition was not timely filed. RF, Tabs 2, 8. The Board’s regulations provide that the Director must file a petition for reconsideration within 35 days after the date of service of the Board’s final decision. [5 C.F.R. § 1201.119](#)(b). Because the date of the Board’s final decision was April 13, 2012, the Director was required to file the request by May 18, 2012. The OPM Director filed the petition by facsimile on May 18, 2012. RF, Tab 1. Therefore, contrary to the appellant’s claim, the OPM Director’s petition was timely filed. [5 C.F.R. § 1201.4](#)(1). The appellant also claims that the Director’s brief in support of the petition for reconsideration was untimely filed. RF, Tab 8. The Board’s regulations provide that the OPM Director must file the brief in support of the petition for reconsideration within 20 days after the Board makes the record available for review. [5 C.F.R. § 1201.119](#)(c). In response to the OPM Director’s request, RF, Tab 1, the Clerk of the Board afforded the Director 40 calendar days from the date of receipt of the administrative record in which to file the brief, RF, Tab 3. The Board may waive any of its regulations, [5 C.F.R. § 1201.12](#), and it did so in affording the OPM Director 40 days rather than 20 days. The Director was required by the Clerk’s notice to file the brief by July 2, 2012, and the brief was filed on that day. RF, Tab 4. Therefore, contrary to the appellant’s claim, the Director’s brief was also timely filed.

issue a new reconsideration decision. *Whittacre*, [118 M.S.P.R. 33](#), ¶¶ 1, 10. Because a question existed as to whether that decision was a final decision and whether the Director's petition for reconsideration was properly before the Board, the Board ordered OPM to respond to the finality issue. RF, Tab 6. While acknowledging the Board's decision remanding to it the factual issue of the existence and amount of the appellant's debt, OPM argued that the decision was dispositive on the legal issue of whether the appellant is entitled to service credit for the period of time he was on military LWOP. *Id.*, Tab 7. OPM further argued that the two issues are not severable and that therefore the Board's final determination on the legal issue effectively disposed of both issues and is therefore a "final" decision. *Id.*; see [5 C.F.R. § 1201.113\(c\)](#). The appellant agreed that the Board's decision is a final decision on this matter.⁴ RF, Tab 8 at 6-7. Upon review, we agree with the parties that, despite the remand to OPM for a new calculation as to the appellant's retirement annuity, the Board's finding that the appellant was entitled to service credit for the period from June 12, 2007, through January 5, 2008, even though he did not make a military service credit deposit for that service, was a final decision on that legal issue, and that therefore OPM's petition for reconsideration on that matter is properly before the Board.

⁴ We note that, on January 9, 2013, the appellant filed a petition for enforcement of the Board's April 13, 2012 decision, arguing that OPM had failed to take the actions ordered by the Board. *Whittacre v. Office of Personnel Management*, MSPB Docket No. DC-0845-11-0740-C-1. The administrative judge dismissed the petition for lack of jurisdiction, questioning whether the Board's decision was final but noting that, even if it were, OPM had recently issued a new reconsideration decision recalculating the appellant's overpayment. *Whittacre v. Office of Personnel Management*, MSPB Docket No. DC-0845-11-0740-C-1, Initial Decision at 1, 3-5 (Feb. 13, 2013). Neither party filed a petition for review of that initial decision, which became the Board's final decision on March 20, 2013. Because of our disposition of this case, we need not address the claims raised by the appellant in his response to OPM's petition for reconsideration regarding the extent to which OPM has complied with our decision of April 13, 2012.

¶7 The Director of OPM may file a petition for reconsideration of a final decision of the Board if the Director determines that: (1) the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management; and (2) the Board's decision will have a substantial impact on a civil service law, rule, or regulation, or policy directive. See [5 U.S.C. § 7703\(d\)](#); [5 C.F.R. § 1201.119\(a\)](#). The Board will consider *de novo* the arguments raised by OPM on petition for reconsideration. *Griffin v. Office of Personnel Management*, [83 M.S.P.R. 67](#), 72 (1999).

¶8 In its decision, the Board found that, in concluding that the appellant was required to make a deposit for his military service while on LWOP in order to receive credit for his service between June 12, 2007, and January 5, 2008, OPM relied on [5 U.S.C. § 8411\(c\)\(1\)\(B\)](#), which provides that an employee shall be allowed credit for each period of military service performed after December 31, 1956, and before the separation on which title to annuity is based, if a deposit is made with respect to such period. *Whittacre*, [118 M.S.P.R. 33](#), ¶ 8. The Board pointed out, however, that § 8411(d), which provides that credit shall be allowed for leaves of absence without pay granted an employee while performing military service, does not itself require payment of a deposit to obtain service credit. *Id.* The Board noted that OPM's regulations make no mention of a deposit requirement to obtain service credit for periods of service while in a military LWOP status, and that, while the regulations generally limit service credit for leaves of absence in excess of 6 months, they specifically provide that the 6-month limit does not apply while an individual is performing military service. *Id.*

¶9 OPM acknowledges in its petition for reconsideration that [5 U.S.C. §§ 8411\(c\)\(1\)\(B\)](#) and 8411(d) are "seemingly incongruent," but urges that, under established rules of statutory construction, both provisions should be given effect. RF, Tab 4 at 23-24; see *United States v. Borden Co.*, [308 U.S. 188](#), 198 (1939). Specifically, OPM argues that there is a general rule against interpreting a

statutory provision in derogation of another provision and courts have a “duty to construe statutes harmoniously” whenever possible. N. Singer, *Sutherland Statutes and Statutory Construction* § 53.1 (6th ed. 2000). Where statutes are incongruent, “[t]he correct rule of interpretation is, that if diverse statutes relate to the same thing, they ought all to be taken into consi[d]eration in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law.” *United States v. Freeman*, [44 U.S. 556](#), 564 (1845). OPM argues that the two provisions in question in this case can both be given effect when they are considered along with other statutory provisions that the Board failed to consider. RF, Tab 4 at 25.

¶10 Among the provisions that OPM asserts that the Board failed to consider are parts of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Pub. L. No 103-353, 108 Stat. 3149 (1994). Specifically, [38 U.S.C. §§ 4316](#)(b)(3) and (4) provide that a person deemed to be on furlough or leave of absence while serving in the uniformed services shall not be entitled to any benefits to which he would not otherwise be entitled if he had remained continuously employed, and that he may be required to pay the employee cost, if any, of any funded benefit continued to the extent other employees on furlough or leave of absence are so required. Section 4318 of Title 38, which addresses pension benefits, provides in subsection (a) that, upon reemployment, individuals who were on LWOP for military service are considered not to have incurred a break in service for purposes of accruing benefits and for determining nonforfeitability of pension benefits. Subsection (b)(2) provides, however, that a person so reemployed shall be entitled to accrued benefits that are contingent on the making of, or derived from, employee contributions only to the extent the person makes payment to the plan with respect to such contributions, but that no such payment may exceed the amount the person would have been permitted or required to contribute had he remained continuously employed throughout the period of leave of absence. And, as pertains to the matter at issue in this case,

another statute, [5 U.S.C. § 8422\(e\)\(1\)\(B\)](#), provides that, where military service interrupts creditable civilian service and reemployment occurs on or after August 1, 1990, the deposit payable may not exceed the amount that would have been deducted and withheld from basic pay during civilian service if the employee had not performed the period of military service.⁵

¶11 Reading all of these statutory provisions together, we agree with OPM that where, as here, military service interrupts civilian service, a deposit not exceeding the amount that would have been deducted and withheld from his basic pay had he remained in civilian service during the period in question is required.⁶ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, [467 U.S. 837](#), 843 (1984) (where Congress has not directly addressed the precise question at issue, a reviewing forum should not simply impose its own construction of a statute, particularly where the administration of a congressionally created program necessarily requires an administrative agency to formulate policy and make rules to fill implicit and explicit gaps). Further, we note the Board's statement in the *Whittacre* decision regarding the lack of a specific OPM regulation mentioning a deposit requirement to obtain credit for periods of service while in a military LWOP status. *Whittacre*, [118 M.S.P.R. 33](#), ¶ 8. A regulation does provide that any period of time for which service credit under chapter 84 of title 5, U.S. Code, is specifically allowed by a provision of law is creditable subject to any applicable deposit requirements. [5 C.F.R. § 842.303\(c\)](#). As we have found, [5 U.S.C. § 8411\(d\)](#) provides that creditable service shall be allowed for leaves of absence without pay granted an employee while performing military

⁵ A substantially similar provision applies to those covered by the Civil Service Retirement System. [5 U.S.C. § 8334\(j\)\(1\)\(B\)](#).

⁶ The amount of the deposit payable is less than the amount required of an employee seeking FERS retirement credit for post-1956 military service who must pay a deposit amount equal to 3% of his military basic pay into the Fund. [5 U.S.C. § 8422\(e\)\(1\)\(A\)](#).

service, § 8411(c)(1)(B) provides that military service performed after December 31, 1956, and before an employee's separation is creditable if a deposit is made, and § 8422(e)(1)(B) provides for the way in which the amount of deposit is calculated where military service interrupts creditable civilian service and where reemployment occurs on or after August 1, 1990. We therefore find that [5 C.F.R. § 842.303](#)(c) implements these statutes to require the payment of a deposit under these circumstances. The appellant's argument that the fact that the 6-month limit generally applicable to service credit for leaves of absence unrelated to military service does not apply to an individual who is performing military service, [5 C.F.R. § 842.304](#)(a)(4), does not cause us to reach a contrary conclusion.

ORDER

¶12 Accordingly, and upon reconsideration, the Board's Opinion and Order dated August 13, 2012 is REVERSED by this Opinion and Order. 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 review of this final decision by the United States Court of Appeals for the Federal Circuit. 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. See [5 U.S.C. § 7703](#)(b)(1)(A) (as rev. eff. Dec. 27, 2012). 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](#)) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. 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.