



U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for December 30, 2016

Note: These summaries are descriptions prepared by individual MSPB employees. They do not represent official summaries approved by the Board itself, and they are not intended to provide legal counsel or to be cited as legal authority. Instead, they are provided only to inform and help the public locate Board precedents.

BOARD DECISIONS

Appellant: James Patrick Pierotti
Agency: Office of Personnel Management
Decision Number: [2016 MSPB 46](#)
Docket Number: AT-0831-16-0032-I-1
Issuance Date: December 27, 2016
Appeal Type: CSRS-Collection of Overpayment
Action Type: Retirement

OPM Overpayment

The appellant challenged OPM's reconsideration decision, which found that he had been overpaid in disability annuity benefits due to his receipt of Office of Workers' Compensation Program (OWCP) benefits. After holding a hearing, the administrative judge found that OPM proved the existence and amount of the overpayment. She also found that the appellant failed to show that he was entitled to waiver of the overpayment or that he was entitled to an adjustment of OPM's recovery schedule because he was not without fault and his monthly income exceeded his ordinary and necessary expenses.

Holding: The Board granted the appellant's petition for review and affirmed the initial decision as modified to reduce the appellant's repayment schedule.

1. The Board agreed with the administrative judge that the appellant failed to prove that he was without fault, and thus entitled to a waiver, because he accepted payments that he knew or should have known to be erroneous based on a February 16, 2006 letter from OPM. In the letter, OPM stated that it was suspending disability retirement payments to the appellant because he was receiving OWCP benefits. Although OPM shared some blame for the overpayment because it failed to stop paying the appellant after learning that he was receiving OWCP benefits, the governing regulations provide that the fact that OPM may have been at fault in initiating the overpayment will not necessarily relieve the recipient from liability.
2. The Board modified OPM's collection schedule to \$5 per month because it found that the appellant needed substantially all of his current income to meet his ordinary and necessary living expenses, and the collection of the overpayment on the schedule set by OPM would cause him financial hardship.
3. The Board requested an advisory opinion from OPM regarding what notice, if any, the Board could provide debtors to let them know that their debt to the U.S. Government may not terminate, and may continue to be collectible through various means, even after their deaths. In response, OPM recommended that the Board notify debtors of a potential collection action against the debtors' estate, and beneficiaries, if appropriate, should the outstanding debt not be satisfied at the time of death, with the language as follows:

The OPM has advised the Board that it may seek recovery of any debt remaining upon your death from your estate or other responsible party. A party responsible for any debt remaining upon your death may include an heir (spouse, child or other) who is deriving a benefit from your Federal benefits, an heir or other person acting as the representative of your estate if, for example, the representative fails to pay the United States before paying the claims of other creditors in accordance with 31 U.S.C. § 3713(b), or transferees or distribute[r]s of your estate.

COURT DECISIONS

PRECEDENTIAL:

Petitioner: Joseph R. Gallegos

Tribunal: U.S. Court of Appeals for the Federal Circuit

Case Number: [2016-2120](#)

Docket Number: DA-0752-01-0157-C-1

Issuance Date: December 27, 2016

Petition for Enforcement of Settlement Agreement -Timeliness

The petitioner was formerly employed by the Food and Drug Administration (agency) as a Consumer Safety Officer. On November 5, 2000, he was removed for failing to accept a job reassignment that required relocation. He filed a Board appeal challenging his removal. In March 2001, parties entered into a settlement agreement. Under the terms of the agreement, the petitioner agreed to withdraw his appeal with prejudice, and the agency agreed to expunge from his Official Personnel File (OPF) and Standard Form 50 (SF-50) any indication that he was removed from his position. The agency agreed to issue a revised SF-50 indicating a “voluntary resignation.” The agreement stated that the petitioner would be provided with a copy of the revised SF-50 for inspection and that he would notify the agency of any concerns within 15 days of receipt of the form.

On June 15, 2015, over 14 years after executing the settlement agreement, the petitioner filed a petition for enforcement of the settlement agreement with the Board. He argued that, in October 2014, he discovered a breach of the settlement agreement after he received a copy of his SF-50, which stated “Resignation ILIA,” meaning in lieu of involuntary action. According to the petitioner, he suspected the agreement had been breached in October 2014 because of the ILIA designation, but he had been using the SF-50 at issue since 2001.

The Board found that the petitioner failed to establish that his petition for enforcement was timely filed. The Board also found that the petitioner failed to establish good cause for his untimely filing because his failure to maintain a copy of the parties’ settlement agreement, as well as his apparent failure to compare the SF-50 with the settlement agreement at the time he received the documents was less than diligent.

Holding: The court affirmed.

1. A petition for enforcement of a settlement agreement must be filed “promptly.” 5 C.F.R. § 1201.182(a). The Court has interpreted “promptly” to mean within a “reasonable time.” Here, the petitioner had a copy of the SF-50 as of 2001 and was thus aware of the alleged breach approximately 14 years prior to filing his petition.
2. The Court found no error in the Board’s conclusion that the petitioner failed to establish good cause for his untimely filing because he did not exercise due diligence given that the agreement specifically provided that he would notify the agency of any concerns within 15 days of receipt of the revised SF-50.
3. The Court rejected the petitioner’s arguments that good cause existed for his untimely filing because the agency engaged in fraud.
 - a. The appellant’s argument that the agency inappropriately altered his SF-50 after he received a copy at the time of the settlement was unpersuasive because the minor typographic differences had no bearing on the “Resignation ILIA” designation on the SF-50.
 - b. Although the agreement provided for a “voluntary resignation” and the agency instead designated it a “Resignation ILIA,” the agreement placed the burden on the petitioner to review the SF-50 and notify the agency of any concerns within 15 days. The petitioner was represented by counsel and should have inquired about the ILIA acronym at the time of receiving his revised SF-50.

LEGISLATION

National Defense Authorization Act for Fiscal Year 2017, [S. 2943](#)

S. 2943 was signed into law by President Obama on December 23, 2016.

Section 512 amends 32 U.S.C. § 709 to provide Board appeal rights to dual status military technicians when the appeal concerns activities that occurred when the technician was not in military pay status or the issue does not involve fitness for duty in the reserve component. It also amends 5 U.S.C. § 7511 to delete National Guard technicians from the list of Federal employees who are not covered under 5 U.S.C. chapter 75. These provisions are effective upon enactment.

Section 1138 may be cited as the “Administrative Leave Act of 2016.” It limits the length of time that an agency may place an employee on paid administrative leave to 10 work days within a calendar year. Among other things, it also amends 5 U.S.C. chapter 63, subchapter II by adding a new section 6329b, which establishes two new categories of leave - investigative leave and notice leave. These categories of paid leave are distinct from administrative leave and are subject to certain restrictions on their use. Investigative leave is for employees undergoing investigations, and notice leave is for employees with pending notice periods under 5 U.S.C. § 7513(b)(1). Placement on investigative leave for a period of not less than 70 work days is considered a personnel action under 5 U.S.C. § 2302(b)(8) and (9). The Office of Personnel Management is charged with issuing regulations to implement these provisions within 270 days of enactment.

Section 1140 amends 5 U.S.C. chapter 33, subchapter I by adding a new section 3322. This section requires that, when an employee resigns under investigation and the investigation later results in an adverse finding, the agency must make a permanent notation of this fact in the employee’s Official Personnel File (OPF). An individual who has had such a note placed in his or her OPF may file a Board appeal challenging the notation. These provisions become effective upon enactment.

[MSPB](#) | [Case Reports](#) | [Recent Decisions](#) | [Follow us on Twitter](#) | [MSPB Listserv](#)