



## U.S. MERIT SYSTEMS PROTECTION BOARD

### **Case Report for March 24, 2017**

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#### **COURT DECISIONS**

##### **PRECEDENTIAL:**

**Petitioner:** Robin Boyd

**Respondent:** Office of Personnel Management

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

**Case Number:** [2016-1078](#)

**MSPB Docket No. No.** PH-0845-15-0215-I-1

**Issuance Date:** March 20, 2017

The appellant filed for disability retirement annuity benefits under the Federal Employees Retirement System (FERS). While approving the application, OPM instructed the appellant to apply for Social Security disability benefits, inform OPM if she was awarded those benefits, and set them aside to pay for a required reduction in her FERS annuity. After she was awarded Social Security disability benefits, the appellant did inform OPM, but did not set those benefits aside. Because OPM failed to adjust her FERS annuity until months later, the appellant was overpaid. The appellant requested a waiver of the overpayment, but OPM denied the request. The appellant filed an appeal, but the administrative judge found that the appellant was not without fault and entitled to waiver because she had failed to set aside her Social Security payments. The Board affirmed.

**Holding:** The court vacated the Board's decision and held that the petitioner was without fault under the plain terms of OPM's guidelines. Specifically, OPM Policy Guidelines provide for a "prompt notice exception" that applies to individuals who inform OPM within 60 days of an apparent excess payment. The court found that this exception applied to the petitioner because she notified OPM within 60 days of her receipt of Social Security benefits.

The guidelines also require a determination as to whether the person "suspected or knew" that she had received an overpayment, in which case the person must set aside that payment. The court construed the set-aside requirement as inapplicable to individuals who do not know or suspect that the money does not belong to them. For such "unknowing individuals," financial hardship can serve as a basis for finding that recovery of the overpayment is against equity and good conscience. The court instructed the Board on remand to determine whether the petitioner knew or suspected that she had been overpaid, and if she did not, whether the recovery of the overpayment would be against equity and good conscience.

The court recognized that an individual's receipt of an OPM letter warning them to set aside Social Security disability awards may be enough evidence from which to infer knowledge, but determined that this was a factual issue for the Board to resolve in the first instance.

**NONPRECEDENTIAL:**

*Carson v. Merit Systems Protection Board*, No. [2015-3135, 2015-3211](#) (Mar. 17, 2017) (MSPB Docket Nos. AT-1221-14-0620-W-1, AT-1221-15-0092-W-1) (The court affirmed two Board dismissals of whistleblower claims against OSC. For the first appeal, the court agreed with the Board's dismissal for lack of jurisdiction because the petitioner's allegations that OSC failed to resolve a whistleblower complaint he had against his employer, the Department of Energy, did not describe a "personnel action." For the second appeal, which essentially raised the same claim as the first while it was still pending, the court agreed with the Board's dismissal for adjudicatory efficiency).

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