

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

90 M.S.P.R. 436

ARTHUR A. DAVIS,
Appellant,

DOCKET NUMBER
DC-0831-00-0611-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,
Agency.

DATE: November 30, 2001

(CSA 3 603 762)

Arthur A. Davis, Beltsville, Maryland, pro se.

Kenneth R. Brown, Washington, D.C., for the agency.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant has filed a timely petition for review of the initial decision that affirmed the final decision by the Office of Personnel Management (OPM) recomputing his civil service retirement annuity to eliminate credit for his post-1956 military service. We find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and REVERSE the initial decision. OPM's final decision is NOT SUSTAINED.

BACKGROUND

¶2 The administrative judge explained the factual background of this case as follows: The appellant served in the military from May 1956 to May 1959. He began federal civilian service in 1960, and, after several breaks, retired because of disability in September 1975. He later served with the District of Columbia (D.C.) government from November 1986 until May 1987, with the federal government from May 1987 to October 1989 and from November 1989 until March 1993, and again with the D.C. government from March 1993 until November 30, 1994, when he retired. Initial Appeal File (IAF), Tab 3, subtab 4 at 16, Tab 6; Initial Decision (I.D.) at 1-2.

¶3 After affording the appellant his requested hearing, the administrative judge found that, on November 2, 1994, the appellant completed SF-2801 (revised January 1990) Application for Immediate Annuity and answered “no” to the question on Schedule A asking if he had paid a deposit to his agency for any military service occurring after January 1, 1957. She noted that the question informed the appellant that he must pay the deposit to his agency before separation and that he could not pay OPM after he retired and that it referred him to Section B of the instructions for the effect on his annuity if the deposit was not paid. I.D. at 2; IAF, Tab 3, subtab 3 at 2. She also found that OPM sent the appellant Form RI 20-49 (revised May 1990) notifying him that his annuity would be recomputed when he reached age 62 to eliminate credit for military service performed after December 31, 1956, because he had not paid the deposit. I.D. at 3; IAF, Tab 3, subtab 4 at 15.

¶4 The administrative judge found that, because the appellant completed the 1990 version of the retirement application, the agency met its duty to apprise him of the opportunity to make a pre-separation deposit for his post-1956 military service. She further found that OPM was not required to clarify the appellant’s “no” answer on the form. She acknowledged that the agency checked that documents or actions were “not applicable” to the following questions on SF-

2801 Schedule D, Agency Checklist of Immediate Retirement Procedures: 8i. “If post-1956 military service is involved and applicant has not made application to make a military service deposit, OPM Form 1515 [attached?]”; and 8j. “If post-1956 military service deposit is not made, was applicant counseled about the effects of not paying the deposit?” I.D. at 4-5; IAF, Tab 3, subtab 3 at 6. She found, however, that OPM did not commit administrative error by not clarifying the agency’s notations and that the agency did not materially misinform the appellant. In that regard, she cited the appellant’s testimony that he knew when he retired that he could pay his agency a deposit for his post-1956 military service. I.D. at 5.

¶5 The administrative judge rejected the appellant’s assertion that the law should not apply to him as a reemployed annuitant, finding that he received a new appointment in 1986 and that the law in effect when he retired in November 1994 properly applied to him. She also found no statute or regulation requiring advance notice of the deposit requirement, and, thus, found that the lack of such notice was not administrative error. I.D. at 5-6.

¶6 OPM has filed a timely response opposing the appellant’s petition for review. Petition For Review File, Tab 3.

ANALYSIS

¶7 As the administrative judge found, a civil service annuitant who retires after September 7, 1982, is entitled to credit for post-1956 active duty military service under both the Civil Service Retirement System and the social security system only if he deposits with the Civil Service Retirement and Disability Fund a sum equal to seven percent of his total post-1956 military pay. If an annuitant does not make such a deposit, OPM must recompute his annuity payment when he becomes eligible for social security benefits, excluding credit for the post-1956 military service. An employee who retires after October 1, 1983, must make this deposit before his separation from service. However, this deadline may be

waived if the employee failed to make the deposit because of administrative error. *See, e.g.*, 5 C.F.R. §§ 831.2104(a), 831.2107(a)(1); *Priano v. Office of Personnel Management*, 83 M.S.P.R. 35, ¶ 5 (1999). We have reopened this appeal because, contrary to the administrative judge, we find that the agency and OPM committed administrative error entitling the appellant to an opportunity to make the deposit.

¶8 Here, the appellant received some information concerning the effect of his failure to make the deposit before he retired. This included information on his SF 2801; his SF 2801-1, Certified Summary of Federal Service; and his RI 20-49 notice from OPM. IAF, Tab 3, subtab 3 at 2, 5, subtab 4 at 15. In addition, as the administrative judge found, Schedule A of the SF 2801 referred him to Section B of the Instructions for Application for Immediate Retirement, which explained the requirement to make a deposit for post-1956 military service. IAF, Tab 3, subtab 3 at 2, subtab 4 at 18-19.

¶9 However, in *Cox v. Office of Personnel Management*, 69 M.S.P.R. 320, 322-23 (1996), the Board held that agencies are required to submit OPM Form 1515 to OPM with a Civil Service Retirement System retirement application package when the retiring employee has post-1956 military service and has not applied to make a military service deposit. It further held that the agency retirement checklist requires agencies to counsel retirement applicants about the effect of not paying a deposit for post-1956 military service. *Id.*; *see also Mopps v. Office of Personnel Management*, 69 M.S.P.R. 314, 318 (1996). In this case, the record shows that the agency was aware of the appellant's previous military service. IAF, Tab 3, subtab 3 at 5. However, the record does not contain an OPM Form 1515, and, as previously noted, the agency erroneously indicated that it was "not applicable." *Id.*, subtab 3 at 6.

¶10 Moreover, in *Johnson v. Office of Personnel Management*, 84 M.S.P.R. 533 (1999), the Board noted that item 8i of the agency retirement checklist requiring the agency to indicate whether OPM Form 1515 was attached was blank in the

appellant's application. *Id.*, ¶ 9. It found that OPM committed administrative error entitling the appellant to an opportunity to make a deposit when it processed his retirement application without, *inter alia*, that form. *Id.*, ¶ 10. Furthermore, in *Sutcliff v. Office of Personnel Management*, 86 M.S.P.R. 101, ¶ 10 (2000), and *Coffey v. Office of Personnel Management*, 79 M.S.P.R. 429, ¶ 7 (1998), as in this case, the agencies had marked that OPM Form 1515 was "not applicable" and the records did not contain the form. The Board likewise found that OPM's processing of the retirement application without that document constituted administrative error. *Sutcliff*, 86 M.S.P.R. 101, ¶ 10; *Coffey*, 79 M.S.P.R. 429, ¶ 7.

¶11 Admittedly, in *Owens v. Office of Personnel Management*, 76 M.S.P.R. 543, 549 (1997), the Board found that the appellant's failure to make the deposit was not due to his agency's failure to provide him with OPM Form 1515. In that case, however, the Board found evidence that the appellant was aware of the consequences of not making a deposit, specifically citing his testimony that he was told by his agency that his failure to make the deposit would cause his annuity to be reduced when he reached age 62. *Id.* at 548-49. Here, although the appellant testified that he knew he had an opportunity to make the deposit, he did not testify that he was told that his annuity would be reduced if he did not. IAF, Tab 5, Hearing Tape, side 1A.

¶12 Accordingly, we find that the appellant is entitled to have OPM set a time limit under 5 C.F.R. § 831.2107(a)(1) for him to deposit the requisite amount of his base military pay into the Civil Service Retirement and Disability Fund. *See, e.g., Perley v. Office of Personnel Management*, 88 M.S.P.R. 183, ¶ 8 (2001).

ORDER

¶13 We ORDER OPM to set a time limit under 5 C.F.R. § 831.2107(a)(1) before which the appellant may make the military deposit to his former

employing agency. OPM must complete this action no later than 20 days after the date of this decision.

¶14 We also ORDER OPM to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and of 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).

¶15 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).

¶16 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. § 1201.202. 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 other related material at our web site, <http://www.mspb.gov>.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.