UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

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| GERTRUDE NYE DORRY,<br>Appellant,<br><br>v.<br><br>OFFICE OF PERSONNEL MANAGEMENT,<br>Agency. | ) | DOCKET NUMBER<br>DC08318610392<br><br>DATE: OCT 09 1987 |

Edith B. Sloan, Esquire, Washington, D.C., for the appellant.

John E. Landers, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

Chairman Levinson dissents.

OPINION AND ORDER

The appellant has petitioned for review of an initial decision, issued September 29, 1986, that sustained the Office of Personnel Management's (OPM's) reconsideration decision denying her application to redeposit retirement deductions refunded to her. The appellant sought to make the redeposit to establish eligibility for a retirement annuity. For the reasons below, we GRANT the petition under 5 U.S.C. § 7701(e) and REVERSE the initial decision.

## BACKGROUND

The appellant was employed by the U.S. Information Agency (USIA) at a Binational Center in Iran for approximately two years (1954-56) in a position which was not covered by the Civil Service Retirement System (CSRS). She then served for approximately four and a half years (1964-69) in a covered position with the Peace Corps. Upon separating from the latter position, she applied for and received a lump-sum payment of her retirement deductions because she did not have the five years of service necessary to be eligible for a retirement annuity under 5 U.S.C. § 8333(a).

In 1974, however, the U.S. District Court for the District of Columbia ruled in a class action suit that the service of personnel assigned to the Binational Centers was creditable for CSRS purposes. *See Taylor v. Hampton*, No. 1178-72 (D.D.C. May 2, 1974) (Tab 8-8). *See also* Tabs 8-6 and 8-10. The appellant, who lives in Iran, learned of this ruling during a visit to the United States in 1985 and applied to OPM to be allowed to redeposit the refunded retirement deductions from her Peace Corps position to establish annuity eligibility based on her total six and a half years of service.

In a reconsideration decision dated June 3, 1986, OPM denied the appellant's request. It found that under 5 U.S.C. § 8342(a), the appellant voided her right to receive a CSRS annuity when she accepted a refund of her retirement

contributions. It further found that the appellant could not receive an annuity by redepositing her refund because 5 U.S.C. § 8334(d) limits the opportunity to redeposit to current covered employees and the appellant is not now employed by the federal government.

On appeal to the Board's Washington Regional Office, the administrative judge sustained OPM's reconsideration decision. She found that the appellant's receipt of the lump-sum refund of retirement deductions for the period of the Peace Corps position voided her right to a civil service retirement annuity unless she was later reemployed in a covered position. The administrative judge stated that the appellant differs from any other separated employee who received a refund only in that when she applied for and received her refund, she did not know that because of the court's decision she would have the sufficient five years of service to receive an annuity at age 62.

In her petition for review, the appellant asserts that the administrative judge erred in interpreting 5 U.S.C. § 8333(b) and in failing to follow the court's decision.

## ANALYSIS

Because of the court's decision in *Taylor*, we find that the appellant should be allowed to redeposit funds to enable her to receive a retirement annuity. The appellant was specifically listed as a plaintiff in that class action suit and therefore is covered by the terms of the court's

decision. *See* Tabs 8-7 and 8-11. Under the decision, the appellant is entitled to retirement credit for the two years she worked at the Binational Center. Together with her Peace Corps service, the appellant thus had more than the five years required under 5 U.S.C. § 8333(a) to entitle her to an annuity. Moreover, under a stipulation entered in that case, the Civil Service Commission agreed to accept deposits from the plaintiffs regardless of whether they were retired. *See* Tab 8-9. Therefore, under the court's decision, the appellant's status as a former federal employee does not preclude her from redepositing her refund to receive a retirement annuity. In addition, because the appellant had the requisite five years of service for obtaining a civil service retirement annuity, granting her request to redeposit retirement funds does not violate any substantive statutory requirement. *Cf., e.g., Graef v. Office of Personnel Management*, 23 M.S.P.R. 676 (1984) (the government may not be estopped from enforcing the requirement that an employee have at least five years of civilian service before becoming eligible for a retirement annuity).

The appellant's decision to apply for a refund of her retirement contributions when she was terminated from her position with the Peace Corps in 1969 should not bar her from receiving a retirement annuity. The appellant applied for the refund because her employing agency informed her that she was not eligible for an annuity. Even though the agency's advice was correct when it was given, the court

decision has rendered the advice incorrect and thus the annuity should be allowed. The appellant's situation is analogous to an employee's detrimental reliance on unintentional misinformation provided by an agency and therefore must be remedied. *See Scharf v. Department of the Air Force*, 710 F.2d 1572, 1575 (Fed. Cir. 1983). Further, because the appellant would not have been entitled to receive an annuity when she was separated, even if she had not applied for a refund, the agency would have been required to grant her one under 5 U.S.C. § 8333(b). Thus, the appellant's situation is not that of an employee who made an erroneous decision; rather, her decision was not only correct, but was mandated by the law at the time she applied for the refund.

Finally, the appellant contends that she should receive a sum equal to the amount of annuities for the twelve years that she was not notified of the court's decision. The appellant has not identified any obligation on OPM's part to provide her with such notice and we find none.* Thus, there is no basis for entitlement to an annuity for those years. Rather, she should be allowed to redeposit the funds as of November 19, 1985--the date that OPM received her initial request.

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* OPM was not a party to the court case and the court's decision did not order OPM to take any action with respect to the participants in the class action other than upon request to accept redeposits and grant retirement credit.

## ORDER

OPM is ORDERED to allow the appellant to redeposit her refunded retirement contributions as of November 19, 1985, to establish entitlement to a civil service retirement annuity.

The agency is ORDERED to inform the appellant and her attorney of all actions being taken to comply with the Board's order and the date on which it believes it has fully complied. *See* 5 C.F.R. § 1201.181(b). The appellant and her attorney are ORDERED to provide all necessary information requested by the agency in furtherance of compliance and should, if not notified, inquire as to the agency's progress. *See id.*

If, after being informed by the agency that it has complied with the Board's order, the appellant's attorney believes there has not been full compliance, she may file a petition for enforcement with the Washington Regional Office within thirty days of the agency's notification of compliance. *See* 5 C.F.R. § 1201.182(a). The petition for enforcement shall contain specific reasons for the belief that there is noncompliance and shall include the date and results of any communications with the agency with respect to compliance. *See id.*

## NOTICE TO APPELLANT

You may petition the United States Court of Appeals for the Federal Circuit to review the Board's decision in your

appeal if the court has jurisdiction. 5 U.S.C. § 7703. The address of the court is 717 Madison Place, N.W., Washington, D.C. 20439. The court must receive the petition no later than thirty days after you or your representative receives this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

**SEPARATE OPINION OF CHAIRMAN DANIEL R. LEVINSON, DISSENTING**

I respectfully dissent from the majority's opinion. Although the appellant has shown that her circumstances are both unusual and unfortunate, she has not demonstrated that the Administrative Judge erred in finding that she was precluded from redepositing her voluntary retirement refund. Because the Administrative Judge correctly found that the appellant failed to establish eligibility for a retirement annuity, I would affirm the Initial Decision.

In her petition for review, the appellant contends that the refund of retirement contributions for approximately four and one-half years service with the Peace Corps was involuntary. The record, however, contains an SF-2802, Application for Refund of Retirement Deductions, completed and signed by the appellant. (Tab 6). This signed document contains a notice that any annuity rights that may have vested "will be forfeited by payment of this refund unless you are later reemployed subject to the Civil Service Retirement Act." The petitioner's signature indicates that she was informed that reemployment with the Federal government was a prerequisite to receiving a retirement annuity. Thus, although the appellant might not have applied for the refund if she knew she would later be deemed to have accrued two additional years of creditable service based on her U.S. Information Agency (USIA) position, it is

undisputed that she voluntarily applied for and accepted the refund.*

The majority accepts the appellant's argument that, pursuant to *Taylor v. Hampton*, No. 1178-72 (D.D.C. May 2, 1974), receipt of this refund does not bar her from revesting in the Civil Service Retirement System. *Taylor* does not support this conclusion. The effect of the stipulations and ruling in *Taylor* was to grant service credit for previous USIA employment retroactively by allowing them to deposit a sum equal to what they would have contributed had their positions originally been covered by the Civil Service Retirement Act. *Taylor* goes no further. By its plain wording, the stipulation there entered applies only to active or retired employees. *See* Tab 8-9. Here, the appellant is neither an employee nor an annuitant; the most accurate characterization of the appellant is that she is a former Federal employee. *See* 5 U.S.C. § 8331(a) and (10). However, the majority extends the district court's decision to permit the appellant to make an additional redeposit for a subsequent position wholly unrelated to the *Taylor* case.

The majority supports this unwarranted expansion by an application of the retirement legislation that I find inappropriate. Unlike the majority, I do not read 5 U.S.C.

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* *Cf. Sammt v. United States*, 780 F. 2d 31 (Fed. Cir. 1985) (in this military pay case, the court found that the plaintiff's retirement application was voluntary despite having been submitted because of a statute requiring that people passed over for promotion three times must be retired).

8333(b) as requiring the Office of Personnel Management (OPM) to refund the appellant's contribution. Section 8333(b) generally requires that before an annuity-eligible separation, an employee must have completed 1 year of creditable civilian service within the last 2 years. However, the individual is not deprived of any annuity rights which attached based on a previous separation. *Id.* The *Taylor* decision making previous USIA service creditable does not address the requirements set forth in section 8333(b) necessary for eligibility based on the most recent separation. Accordingly, that decision provides no basis for the majority's waiver of the statutory requirement.

On the other hand, 5 U.S.C. § 8342 is an entitlement for the employee who is not eligible for a civil service annuity to receive a lump-sum payment of his retirement contributions. Payment of a refund pursuant to 5 U.S.C. § 8342 voids all annuity rights unless the employee is reemployed in a covered position. Nothing in the statute required OPM to refund *sua sponte* the appellant's contribution. To the contrary, had the appellant not made application for payment of the lump-sum credit pursuant to 5 U.S.C. § 8342(a)(2), her contributions would still remain with the fund. And, if the appellant had made no election to withdraw these contributions, her account would contain existing service credit with which the *Taylor*-based USIA credit could combine.

This however, is not the case before the Board. Here the appellant acted voluntarily in withdrawing her retirement contributions. By her own volition, she extinguished her entitlement to an annuity, unless and until she were reemployed by the Federal government and fulfilled all necessary prerequisites to qualify for an annuity. These preconditions have not been met. Under 5 U.S.C. § 8334(d), the appellant may not now redeposit her refund because she is not now employed by the Federal government. *Abubot v. United States*, 1 Cl. Ct. 296 (1982); *Abubot v. Office of Personnel Management*, 6 M.S.P.B. 40 (1981). *Cf.* 5 U.S.C. § 8342(a).

The statutory requirements for annuity eligibility under 5 U.S.C. Chapter 83 are substantive legal requirements that allow for no administrative discretion on the part of OPM and equitable estoppel does not obtain. *Graef v. Office of Personnel Management*, 23 M.S.P.R. 676 (1984). The appellant has not met the statutory requirement of re-employment following her receipt of retirement contributions as she requested. Accordingly, I would deny the petition for review and affirm the Initial Decision.

Date: OCT 09 1987

Daniel R. Levinson,
Chairman

Washington, D.C.