

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

86 M.S.P.R. 186

DAVID J. FROMME,

Appellant,

DOCKET NUMBER

PH-0831-00-0008-I-1

v.

OFFICE OF PERSONNEL
MANAGEMENT,

Agency.

DATE: June 15, 2000

CSA 3 427 745

David J. Fromme, Leola, Pennsylvania, pro se.

Lesley Gordon, Washington, D.C., for the agency.

BEFORE

Beth S. Slavet, Acting 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 of the Office of Personnel Management (OPM) which recomputed his civil service retirement annuity to eliminate credit for his post-1956 military service. For the reasons discussed below, we GRANT the petition for review and REVERSE the initial decision. OPM's final decision is NOT SUSTAINED.

BACKGROUND

¶2 The appellant retired from the National Aeronautics & Space Administration on January 3, 1993, at age 55. Initial Appeal File (IAF), Tab 4, Subtab 5. On April 29, 1999, OPM informed the appellant that it was recalculating his annuity because he was eligible for social security benefits and, since he had not made a deposit for his post-1956 military service, it could not be used to calculate both his civil service annuity and his social security benefits. IAF, Tab 4, Subtab 4. The appellant requested that OPM reconsider its decision because his employing agency had not provided him with adequate information for him to choose whether to make the deposit for his post-1956 military service. IAF, Tab 4, Subtab 3. On September 22, 1999, OPM issued its final decision in which it recomputed the appellant's annuity to eliminate credit for his post-1956 military service. IAF, Tab 4, Subtab 2. The appellant timely appealed OPM's final decision to the Board. IAF, Tab 1.

¶3 After holding a brief telephonic hearing, the administrative judge affirmed OPM's final decision, finding that the appellant had not shown that his employing agency engaged in affirmative misconduct by failing to inform him of the consequences of failing to make the deposit. IAF, Tab 6. The appellant timely petitioned for review. Petition for Review File (PFRF), Tab 1. The agency did not respond.

ANALYSIS

¶4 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 (CSRS) and the social security system only if he deposits with the Civil Service and Disability Fund a sum equal to seven percent of his total post-1956 military pay. *Priano v. Office of Personnel Management*, 83 M.S.P.R. 35, ¶ 5 (1999). 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. *Id.* An employee who retires after October 1, 1983, must make this deposit before his separation from service. *Id.* 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*, 83 M.S.P.R. 35, ¶ 5.

¶5 Under the circumstances of this case, we find that the appellant is entitled to an opportunity to make the deposit. The appellant did receive some information about the effect of not making the deposit. In OPM Form 1515, the appellant signed a statement that he had read the information concerning his rights to make the deposit and that he had decided not to make the deposit. IAF, Tab 4, Subtab 5 at 1. Another form, RI 20-49, informed the appellant that all of his military service had been used to calculate his annuity; however, since he had not made the deposit and he was under the age of 62, at the age of 62, OPM would contact the Social Security Administration. If at that time, the appellant is eligible for social security benefits, then OPM would recompute his annuity to eliminate credit for his post-1956 military service. IAF, Tab 4, Subtab 5 at 3. Finally, his SF 2801-1, Certified Summary of Federal Service, contains a "Note" which states that if the applicant has post-1956 military service and chooses not to make a deposit, the applicant should read Section B of the Instructions for completing the application for retirement. IAF, Tab 4, Subtab 5 at 12. This note also states that the applicant cannot change his mind after he retires. *Id.* Section B of the instructions accurately describes the effect of a failure to make a deposit for post-1956 military service. *Id.*; *see Drury v. Office of Personnel Management*, 79 M.S.P.R. 493, ¶ 12 (1998).

¶6 The Board has held that a provision of the Federal Personnel Manual (FPM), FPM Letter 831-83 (Nov. 19, 1984), required agencies to obtain certifications from employees retiring after September 30, 1983, which states, "I have read the information about the effect of not making a deposit for my post-1956 military service and I do NOT want to make the deposit. I understand that I can't change

my decision after I retire." *Priano*, 83 M.S.P.R. 35, ¶ 7. The Board subsequently held that this certification was not necessary for employees who completed the January 1990 version of SF 2801 and who retired after the rescission of the FPM on December 31, 1993; thus, employees who retired after December 31, 1993, do not have to sign this certification. *Id.*, ¶ 8. Although, the appellant completed the January 1990 version of SF 2801, IAF, Tab 4, Subtab 5 at 4-6, a certification meeting the requirements of FPM Letter 831-83 was also required because he retired before December 31, 1993. *Priano*, 83 M.S.P.R. 35, ¶ 9. There is no document in the record which satisfies the certification requirement of FPM Letter 831-83.* Thus, OPM's failure to ensure that the required certification was completed by the appellant is administrative error. *Id.*

¶7 Additionally, we find that OPM committed administrative error in processing the appellant's retirement application because the appellant did not answer Question "f" of Schedule A of SF 2801. IAF, Tab 4, Subtab 5 at 5. This question asks:

¶8 If any of your military service occurred on or after January 1, 1957, have you paid a deposit to your agency for this service? (You must pay this deposit to your agency before separation. You cannot pay OPM after you retire.) See Section B of the instructions for the effect on your annuity if the deposit is not paid.

* As discussed above, the appellant did complete OPM Form 1515 (Attachment 10 to FPM Ltr. 831-77). IAF, Tab 4, Subtab 5 at 1. While this document states that the appellant has read the information concerning his rights to make a deposit, it does not state that the appellant has read the information concerning the effect of not making a deposit or that he understands that he cannot change his decision after he retires, as is required by FPM Letter 831-83. As for the "Note" contained in SF 2801-1, although it states that the applicant cannot change his decision after he retires, this note is found under a selection not chosen by the appellant. Thus, it is not clear that the appellant even read this note since he correctly chose the first selection that his above-listed service was complete. IAF, Tab 4, Subtab 5 at 12. Moreover, the appellant in *Priano* had completed SF 2801-1, but the Board found administrative error because there was no evidence that the appellant had signed a statement which met the requirements of FPM Letter 831-83. *Priano*, 83 M.S.P.R. 35, ¶¶ 6-7.

¶9 *Id.* There are three boxes to choose from to answer this question: yes, no, or not applicable.

¶10 In an appeal involving similar facts, the Board found administrative error by OPM in processing an application for retirement where the applicant checked the "not applicable" box despite listing his post-1956 military service just above this question. The Board found that this answer was clearly inaccurate and that it was incumbent on OPM to clarify the matter. *Drury v. Office of Personnel Management*, 79 M.S.P.R. 493, ¶ 19 (1998). In the present appeal, the appellant failed to check any box, and he had clearly listed directly above this question that he had post-1956 military service. Thus, as in *Drury*, it was incumbent upon OPM to clarify whether the appellant had been informed of the effect on his annuity if he failed to make the deposit.

¶11 The hearing testimony establishes that the appellant's employing agency did not supplement the information provided by OPM to ensure that the appellant would have an adequate understanding of the effect that not making the deposit would have on his retirement annuity. The administrative judge concluded from the evidence before him that the appellant's employing agency did not advise him as to the consequences of failing to make the deposit. IAF, Tab 6 at 4. Moreover, the appellant testified without dispute that the employing agency advised him not to make the deposit. Hearing Tape (Testimony of David Fromme). At the time of his retirement, the appellant did not have the necessary quarters of work to be eligible for social security benefits. *Id.* However, the agency did not explain to the appellant what would happen if he did become eligible for social security without making the deposit. *Id.* Even in the absence of OPM's error, the employing agency's administrative error would require that the appellant be given a new opportunity to make a deposit for his post-1956 military service. *See Pinkston v. Office of Personnel Management*, 57 M.S.P.R. 347, 350 (1993) (finding administrative error on the employing agency's part for giving erroneous advice).

¶12 In sum, the appellant is entitled, due to the administrative errors of both OPM and the appellant's employing agency, 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.

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 the agency about its progress. *See* 5 C.F.R. § 1201.181(b).

¶15 No later than 30 days after OPM tells the appellant that 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 that OPM has not fully carried out the Board's Order, and should include the dates and results of any communications with OPM. 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 requirements, 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.