

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

2009 MSPB 132

Docket No. DA-0752-02-0095-C-3

**Cinderella A. Madison,
Appellant,**

v.

**Department of Defense,
Agency.**

July 15, 2009

Malinda A. Gaul, Esquire, San Antonio, Texas, for the appellant.

Richard M. Kitchen, Jr., Esquire, San Antonio, Texas, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant petitions for review of the initial decision, issued February 10, 2009, that denied her petition for enforcement. For the reasons discussed below, 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, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and DENY the appellant's petition for enforcement.

BACKGROUND

¶2 In an initial decision issued March 18, 2003, the administrative judge reversed the appellant's removal. DA-0752-02-0095-I-2 (I-2) Appeal File, Tab 21. The Board subsequently denied the appellant's petition for review and ordered the agency to cancel the appellant's removal and retroactively restore her to her position effective October 5, 2001, the date of her removal. I-2 Petition for Review File, Tab 4. The appellant retired from federal employment on June 30, 2004. DA-0752-02-0095-C-1 (C-1) Appeal File, Tab 1.

¶3 On October 27, 2006, the appellant filed a petition for enforcement asserting that the agency had not provided the proper back pay, interest, and other benefits, including the correct Thrift Savings Plan (TSP) contributions and catch-up contributions from October 5, 2001, until June 30, 2004 -- the time between her improper removal and her retirement. *Id.*, Tab 1. While this matter was pending, the appellant informed the administrative judge that she and the agency had successfully resolved all of the compliance issues. *Id.*, Tabs 11, 13, 15. The administrative judge, therefore, dismissed the petition for enforcement. *Id.*, Tab 16. The appellant, however, petitioned for review. C-1 Petition for Review File, Tab 1. The Board denied the appellant's petition, but also found that the appellant appeared to be raising new allegations of agency noncompliance and forwarded the allegations to the regional office for docketing as a new petition for enforcement. *Id.*, Tab 5.

¶4 During adjudication after forwarding, the appellant ultimately identified three matters of alleged noncompliance. DA-0752-02-0095-C-3 (C-3) Appeal File, Tab 8. The appellant first alleged that the agency was required to take certain actions regarding the 2005 Form 1099-INT concerning the interest on her back pay award. *Id.* at 4 of 12. The appellant also claimed that the agency was required to take various actions with respect to forms pertaining to her tax refunds for 2004 and 2005. *Id.* at 5-6 of 12. Finally, the appellant claimed that

the agency had failed to remove interest paid on an erroneous deposit to her TSP account. *Id.* at 6 of 12.

¶5 The administrative judge, however, denied the appellant’s petition for enforcement, finding that her allegations of noncompliance and her requested remedies for the alleged noncompliance were beyond the Board’s enforcement authority because they pertained to potential tax consequences arising from the agency’s compliance with the Board’s final order. C-3 Appeal File, Tab 10 at 5. The administrative judge further found the appellant’s concerns speculative, stating that they related to “hypothetical scenarios that have yet to arise.” *Id.* at 5-6.

¶6 In her petition for review, the appellant asserts that the administrative judge prevented her from providing relevant “input,” by denying her the opportunity to participate in a scheduled telephone conference or otherwise conducting a prehearing conference. Petition for Review File, Tab 1. The appellant also argues that the administrative judge failed to follow applicable law and ignored evidence. *Id.*

ANALYSIS

¶7 In claiming that the administrative judge denied her a fair opportunity to present her allegations of noncompliance, the appellant provides her version of the telephonic conferences. *Id.*, Statement of the Appellant, ¶¶ 3, 19-21. She first states that the administrative judge cancelled a July 21, 2008 conference because the agency had belatedly submitted materials, and that technical problems disrupted the July 23, 2008 telephone conference. *Id.*, ¶¶ 20-21. She asserts that various matters were, therefore, not completely resolved, and that the administrative judge did not hold another prehearing conference on July 28, 2008, as anticipated, thereby preventing her from fully presenting her claims of agency noncompliance. *Id.*, ¶¶ 21-23.

¶8 This claim, however, does not establish that the administrative judge unfairly denied the appellant an opportunity to present her case. We first note that matters discussed at the conferences do not constitute evidence. *See Spradlin v. Office of Personnel Management*, [84 M.S.P.R. 279](#), ¶ 8 (1999). We also find that, in any event, the appellant had numerous opportunities to submit evidence and argument supporting her case. DA-0752-02-0095-C-2 (C-2) Appeal File, Tabs 1, 9, 13, 14, 16; C-3 Appeal File, Tabs 6, 8. While the administrative judge may have contemplated holding a hearing, that decision is discretionary in a compliance appeal, and the Board has consistently held that there is no right to a hearing regarding a petition for enforcement. C-2 Appeal File, Tabs 7, 11; [5 C.F.R. § 1201.183\(a\)\(3\)](#); *see Owens v. Department of Transportation*, [99 M.S.P.R. 377](#), ¶ 9 (2005); *Galliart v. Department of the Treasury*, [84 M.S.P.R. 15](#), ¶ 9 (1999), *aff'd*, 232 F.3d 911 (Fed. Cir. 2000) (Table). The appellant has, therefore, not shown how the administrative judge's alleged procedural error prejudiced her substantive rights. *See Karapinka v. Department of Energy*, [6 M.S.P.R. 124](#), 127 (1981).

¶9 The appellant also reiterates her claims that the Defense Finance and Accounting Service (DFAS), which prepared various forms implementing the back pay and benefits on the agency's behalf, incorrectly completed certain tax forms related to the 2004 and 2005 tax years, thereby causing her certain potential tax liabilities. The appellant has, therefore, requested the Board to order the agency to enter what she believes is the correct information on the forms and to provide explanations of the actions resulting in the alleged erroneous information to the Internal Revenue Service. Petition for Review File, Tab 1. These claims, however, essentially seek assurances regarding potential tax consequences, and are, therefore, beyond the Board's enforcement authority. *See Giove v. Office of Personnel Management*, [106 M.S.P.R. 53](#), ¶ 9 n.2 (2007); *Kinney v. Department of Veterans Affairs*, [103 M.S.P.R. 602](#), ¶ 16 (2006);

Holtgrewe v. Federal Deposit Insurance Corporation, [65 M.S.P.R. 137](#), 140 (1994).

¶10 Finally, the appellant contends that the agency has not properly credited the interest in her TSP account. Petition for Review File, Tab 1. Specifically, she asserts that the agency made an erroneous duplicate deposit to her TSP account, and that the DFAS's delay in correcting that error caused an incorrect accrual of interest that will cause her tax consequences when she ultimately withdraws that money. *Id.*, Statement of the Appellant, ¶¶ 4-9. The appellant argues that [5 C.F.R. § 550.805](#)(h) requires an agency to correct errors affecting an employee's TSP account, and that the failure to correct the interest error on her account is within the Board's compliance authority. *Id.*

¶11 As the appellant correctly states, [5 C.F.R. § 550.805](#) governs back pay computations, and subsection (h) requires agencies to correct errors that affect an employee's TSP account consistent with regulations prescribed by the Federal Retirement Thrift Investment Board. These regulations required the agency to implement the appellant's TSP elections by deducting employee contributions from the back pay award and transferring those funds to the TSP. [5 C.F.R. § 1605.13](#)(c)(1); *see Shobert v. Department of the Air Force*, [90 M.S.P.R. 262](#), ¶ 10 (2001). Compliance allegations regarding whether the agency followed these regulations are within the Board's enforcement authority. *See Shobert*, [90 M.S.P.R. 262](#), ¶¶ 9-11. Here, the appellant asserts that the agency at first erred in this regard by making a duplicate payment to her TSP account, but admits that the agency later corrected that error by withdrawing the erroneous payment. C-2 Appeal File, Tabs 9, 16; C-3 Appeal File, Tab 3 at 5; Tab 7 at 6.

¶12 The agency, however, is also responsible for ensuring that the correct earnings on the required contributions are reflected in the appellant's TSP account. *See Shobert*, [90 M.S.P.R. 262](#), ¶ 11; *Camastro v. Department of Justice*, [86 M.S.P.R. 267](#), ¶ 15 (2000). The appellant claims that the agency has not complied in this regard because her account has accrued interest attributable to

the time the duplicate deposit was in her account. Because this claim concerns the correct earnings on the appellant's TSP account, it is within the Board's compliance authority and the administrative judge erred in not addressing it. C-3 Appeal File, Tab 10 at 5-6.

¶13 The regulations governing the removal of erroneous employee contributions to a TSP account, however, provide that, under the circumstances here, earnings on the erroneous payment remain in the employee's account. [5 C.F.R. § 1605.12\(d\)\(1\)](#). While the result might differ under certain circumstances for earnings on erroneous agency contributions, there are no agency contributions here because the appellant retired under the Civil Service Retirement System and, therefore, there are only employee contributions to her TSP account. C-1 Appeal File, Tab 1, Exhibit B at 1-4; C-3 Appeal File, Tab 7, Exhibit B; *see* [5 C.F.R. § 1605.12\(e\)\(3\)](#). Thus, the agency has complied with the Board's final order reversing the appellant's removal by leaving the interest attributable to the erroneous duplicate deposit in the appellant's TSP account. To the extent the appellant's complaint concerns the adverse tax consequences arising from the earnings from the duplicate deposit to her TSP account, it is beyond the Board's purview. *See Giove*, [106 M.S.P.R. 53](#), ¶ 9 n.2.

ORDER

¶14 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 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 the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's [Rules of Practice](#), and Forms [5](#), [6](#), and [11](#).

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.