

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

**2009 MSPB 211**

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Docket No. NY-844E-08-0351-X-1

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**Teresa A. McClain,  
Appellant,**

**v.**

**Office of Personnel Management,  
Agency.**

OPM Claim No. CSA 8 335 363

October 27, 2009

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Robert Sowers, Bellmore, New York, for the appellant.

Charlretta T. McNeill, Washington, D.C., for the agency.

**BEFORE**

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

**OPINION AND ORDER**

¶1 This case is before the Board pursuant to a recommendation of the administrative judge finding the agency in noncompliance with the final Board order on the merits of this appeal. For reasons set forth below, we find that the agency is now in compliance and DISMISS this matter as MOOT.

**BACKGROUND**

¶2 In a December 30, 2008 initial decision, an administrative judge of the Merit Systems Protection Board's New York Field Office reversed an Office of

Personnel Management (OPM) reconsideration decision and found that the appellant had established her entitlement to disability retirement benefits under the Federal Employees' Retirement System. MSPB Docket No. NY-844E-08-0351-I-1, Initial Appeal File, Tab 12. The administrative judge ordered OPM to grant the appellant's disability retirement application within 20 days. *Id.* at 7. The initial decision became the final decision of the Board when neither party filed a petition for review.

¶3 On April 9, 2009, the appellant filed a petition for enforcement complaining that OPM had not complied with the December 30, 2008 initial decision. MSPB Docket No. NY-844E-08-0351-C-1, Compliance File, Tab 1. In an acknowledgment order, the administrative judge ordered OPM to respond to the petition for enforcement, but OPM failed to do so. *Id.*, Tab 2. In an August 4, 2009 compliance recommendation, the administrative judge granted the petition for enforcement and stated that, to be in compliance, OPM needed to submit evidence that it had granted the appellant's disability retirement application. *Id.* Tab 3 at 3. In his recommendation, the administrative judge also informed the appellant that she could respond to the agency's evidence of compliance and that if she did "not respond to the agency's evidence of compliance within 20 days, the Board may assume that [she was] satisfied and dismiss the petition for enforcement." *Id.* at 4.

¶4 Because the administrative judge found the agency in noncompliance, the matter was referred to the Board's Office of General Counsel. *See* MSPB Docket No. PH-0752-07-0054-X-1, Compliance Referral File (CRF), Tab 1. In an August 7, 2009 acknowledgment order, the Clerk of the Board again informed the appellant that, if she did not respond to the agency's evidence of compliance, the "Board may assume you are satisfied and dismiss your petition for enforcement." *Id.* Tab 2 at 2-3.

¶5 In an August 20, 2009 submission, OPM asserted that it had fully complied with the December 30, 2008 initial decision granting the appellant disability

retirement benefits. CRF, Tab 4 at 2. OPM explained that it: 1) approved the appellant's disability retirement application effective April 13, 2009; 2) authorized a special payment to the appellant of \$1,539.76 on April 16, 2009; 3) finalized the appellant's annuity with a back payment of \$21,203 on July 22, 2009; and 4) commenced a monthly annuity of \$631.84 on August 1, 2009. *Id.* In support of its assertions of compliance, OPM submitted a copy of an April 13, 2009 letter approving the appellant's retirement application and two computer print outs reflecting the payments to the appellant. *Id.*, Exhibits 1 and 2.

### ANALYSIS

¶6 An agency bears the burden of proving its compliance with a Board order, and assertions of compliance must be supported by relevant, material, and credible evidence in the form of documentation or affidavits. *See New v. Department of Veterans Affairs*, [106 M.S.P.R. 217](#), ¶ 6 (2007), *aff'd*, 293 F. App'x 779 (Fed. Cir. 2008); *Donovan v. U.S. Postal Service*, [101 M.S.P.R. 628](#), ¶¶ 6-7, *review dismissed*, 213 F. App'x 978 (Fed. Cir. 2006). The appellant may rebut the agency's evidence of compliance by making specific, nonconclusory, and supported assertions of continued noncompliance. *See New*, [106 M.S.P.R. 217](#), ¶ 6; *Donovan*, [101 M.S.P.R. 628](#), ¶ 7.

¶7 In the instant case, the agency has provided relevant, material, and credible documentary evidence to support its assertion of compliance. CRF, Tab 4. Furthermore, the appellant has not replied to the agency's evidence despite being told repeatedly that a failure to do so could result in a dismissal of her petition for enforcement. Based on the agency's evidence of compliance, and the appellant's failure to respond to the agency's evidence, we find the agency is in compliance. *See Holler v. Department of the Navy*, [94 M.S.P.R. 323](#) ¶ 8 (2003) (finding that an agency's evidence of compliance was bolstered by the appellant's lack of objection to the evidence); *Cox v. U.S. Postal Service*, [87 M.S.P.R. 575](#), ¶

3 (2001) (finding compliance based on an agency's evidence and the appellant's failure to object).

### ORDER

¶8 The petition for enforcement is dismissed as MOOT. This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.183(b)(c) ([5 C.F.R. § 1201.183\(b\)\(3\)](#)).

### 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.ca9.uscourts.gov](http://www.ca9.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:

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