

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

**2010 MSPB 202**

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Docket No. DE-0752-07-0201-X-1

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**Sara F. Crazy Thunder-Collier,  
Appellant,**

**v.**

**Department of the Interior,  
Agency.**

October 14, 2010

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Sara F. Crazy Thunder-Collier, Corrales, New Mexico, pro se.

Joshua L. Klinger, Esquire, Lakewood, Colorado, for the agency.

**BEFORE**

Susan Tsui Grundmann, Chairman  
Anne M. Wagner, Vice Chairman  
Mary M. Rose, Member

**OPINION AND ORDER**

¶1 This case is before the Board on the recommendation of the administrative judge, who granted the appellant's petition for enforcement of the Board's final order in her appeal and recommended that the Board take action necessary to enforce compliance. *Crazy Thunder-Collier v. Department of the Interior*, MSPB Docket No. DE-0752-07-0201-C-2 (January 15, 2010). For the reasons set forth below, the Board finds that the agency is now in compliance with the Board's final decision.

### BACKGROUND

¶2 The appellant filed a petition for enforcement of the Board’s final order in *Crazy Thunder-Collier v. Department of the Interior*, MSPB Docket No. DE-0752-07-0201-I-2 (Initial Decision issued on November 18, 2008, final on December 23, 2008), which reversed her involuntary retirement and ordered the agency to retroactively restore her to duty effective November 25, 2006, with back pay and benefits. In her petition, the appellant alleged that the agency failed to comply with the Board’s order because it had not restored her to her former position; failed to pay her appropriate locality pay; failed to pay her performance awards for 2006, 2007, and 2008; failed to reimburse her for taxes due when she did not complete payment of her Thrift Savings Plan (TSP) loan prior to separation; failed to pay her for losses that resulted from “rolling over” her TSP account to an individual retirement account (IRA) following her involuntary retirement; did not promptly process her pay for two pay periods; did not reimburse her for the amount of the court-ordered apportionment of her retirement annuity to her former spouse; did not process her within-grade increase for 2006; incorrectly withheld health and life insurance benefits from her back pay; and did not pay her the proper interest on her back pay. Initial Compliance File (ICF), Tab 13, 2-3.

### RECOMMENDATION

¶3 The administrative judge determined that the agency was in compliance with the Board’s order in several respects. She found that the agency restored the appellant to a position substantially equivalent to her former position, which had been eliminated; paid her appropriate locality pay; made the appropriate deductions for the retirement annuity payments she received and for health and life insurance premiums she owed; followed the appellant’s instructions as to the amount of TSP contributions to be deducted from her back pay; and provided her the within-grade increase in pay to which she was entitled. *Id.*, 4-10.

¶4 However, the administrative judge concluded that in other respects the agency had failed to comply with the Board's order. She determined that the agency was not in compliance in that it had not addressed the appellant's entitlement, if any, to performance awards during the back pay period; failed to address her claim that she was not properly paid for two pay periods; and failed to show that her leave balance was properly restored or to explain how the interest paid on her back pay was calculated. *Id.*, 6, 10. The administrative judge also found the agency failed to meet some of its obligations with respect to the appellant's TSP account. She found that it provided no evidence that the appellant's TSP account had been credited with the appropriate lost earnings on her contributions from back pay. *Id.*, 7-8. She also found that the agency was not in compliance because it failed to notify the appellant of her right to redeposit the funds she had withdrawn from her TSP account or of her right to reinstate the loan from her account, which was previously declared a taxable distribution. *Id.*, 8. She therefore granted the appellant's petition with respect to these matters and recommended that the Board order the agency to take the required actions.

### RESPONSES TO RECOMMENDATION

#### Agency's Response

¶5 In its response to the administrative judge's recommendation, the agency has submitted evidence showing that it has taken most of the recommended actions. The evidence shows payment to the appellant of performance awards for 2006, 2007 and 2008, the basis on which the awards were made and how the amounts were calculated. Compliance Referral File (CRF), Tab 3, Exhibits 1-4. The agency has also submitted evidence that it paid the appellant for the two pay periods at issue. *Id.*, Exhibit 7. Other evidence was submitted to show that the appellant was paid interest on her back pay and how the interest was calculated, *id.*, Exhibit 8, and that her leave balances had been properly restored, *id.*, Exhibits 9. The agency also presented evidence to show that appropriate

payments were made to the appellant's TSP account to reflect any earnings or losses that would have occurred. *Id.*, Exhibit 5.

¶6 However, the agency disagreed with the administrative judge's finding that it had a duty to provide the appellant with notice of her right to restore funds withdrawn from her TSP account and to reinstate her TSP loan. It submitted an employee's sworn statement that he spoke to a TSP employee who informed him that the TSP notifies all employees of their right to reinstate their loans and restore withdrawn funds within 90 days and would have notified the appellant. *Id.*, Exhibit 6. According to the statement, the TSP employee told the agency employee that the appellant would now need to file a waiver request with the Thrift Investment Board. *Id.*

#### Appellant's Response

¶7 In her reply, the appellant did not dispute most of the administrative judge's findings of compliance or the agency's evidence of compliance with respect to most of the administrative judge's findings of non-compliance. However, the appellant argued that the agency is still not fully in compliance with the Board's order in three respects.

¶8 First, she stated her agreement with the administrative judge that the agency had a duty to inform her of her right to redeposit in her TSP account the withdrawn funds that she had placed in an Individual Retirement Account (IRA) and of her right to reinstate her TSP loan, which had become a taxable distribution upon her separation. She also introduced evidence that a TSP employee informed her that there was no record that a TSP notice of a right to redeposit was sent to her. Thus, the appellant argued that the agency was not in compliance because it failed to provide her this notice. CRF, Tab 4.

¶9 Second, the appellant disagreed with the administrative judge's finding that the agency properly included in its deduction for retirement annuity payments received during the back pay period the amount of the annuity that was apportioned to her former spouse pursuant to a court order. CRF, Tab 4. In

connection with this alleged error, she also objected to the agency's failure to notify the Office of Personnel Management (OPM) that her involuntary retirement claim was under administrative review. *Id.*

¶10 Third, the appellant alleged that the agency erred by not depositing 10% of her back pay in her TSP account, and she submitted assertedly indisputable evidence that she was not provided an opportunity to retroactively continue the 10% contributions which she was making at the time of her separation. *Id.*

## ANALYSIS

### Retirement Annuity Deductions Issue

¶11 We agree with the administrative judge's finding of compliance with respect to the offset of retirement annuity payments. The agency correctly complied with the request of OPM that it offset from the appellant's back pay the retirement annuity payments that OPM paid to her and her former spouse during the back pay period. The Back Pay Act regulations required the agency to offset retirement annuity payments from the appellant's gross back pay award, with the only authorized deductions from the offset being life insurance and health benefits premiums that can be recovered from the insurance carrier. [5 C.F.R. § 550.805\(e\)\(2\)\(i\)](#). The appellant's claim for the portion of the offset reflecting annuity payments to her former spouse is a claim against her former spouse within the jurisdiction of the court whose apportionment order was the basis for those payments.<sup>1</sup>

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<sup>1</sup> However, we do not agree with the administrative judge's finding that the appellant could challenge OPM's calculation of the offset by seeking a decision from OPM under its regulations concerning collection of overpayment debts at 5 C.F.R. Part 845, Subpart B. ICF, Tab 13 at 9. In [5 C.F.R. § 845.202](#), these regulations exclude from their scope amounts that are collected from back pay awards pursuant to [5 C.F.R. § 550.805\(e\)\(2\)](#). The appellant's claim that the agency should have notified OPM that she had appealed her retirement as involuntary and her request for an OPM reconsideration decision concerning the offset from her back pay, CRF, Tab 4, Exhibit E, are also based on the mistaken belief that the overpayment collection regulations apply to her case.

### TSP Deductions Issue

¶12 We also agree with the administrative judge's conclusion that the agency made the appropriate TSP deductions from the appellant's back pay. The record includes copies of communications between the agency and the appellant concerning the percentage of her current pay and back pay that the appellant wished to contribute to her TSP account. Compliance File, MSPB Docket No. DE-0752-07-0201-C-1 (CF1), Tab 4, Exhibit 14. This evidence shows an agency Human Relations specialist's e-mails explaining to the appellant her options under the regulations with respect to TSP contribution rates and inquiring as to her choices. It includes no objection from the appellant to the specialist's summary of what she understood the appellant's choices to be, including contribution of 1% of her back pay to the TSP. *Id.* The communications that the appellant cites to show that she elected to contribute 10% of her back pay to the TSP do not support her contention, *see* CRF, Tab 4 at 2 & Exhibits B & D, and there is no other evidence that she made such an election.

### TSP Restoration Issue

¶13 However, we do not agree with the administrative judge's finding that the agency was not in compliance because it failed to inform the appellant of her rights upon reinstatement with respect to amounts withdrawn from her TSP account. It is correct that the appellant was entitled to restore the amount that she had withdrawn from the TSP at the time of her retirement and, in such a case, of the right also to reinstate the outstanding loan from her account, which was treated at the time of her withdrawal as a taxable distribution. These rights are conferred by the TSP regulation at [5C.F.R. § 1605.13](#)(d)-(e). However, section 1605.13 ("Back pay awards and other retroactive adjustments") does not state any agency duty to provide notice of this right, and the administrative judge cited no authority for such a requirement.

¶14 We find that the appellant voluntarily withdrew her funds from her TSP account to transfer them to an IRA and also thereby terminated her loan. Since

she was aware of having done so, it was incumbent on her to make inquiries if she wished to restore these funds to her TSP account upon reinstatement. The applicable TSP regulation informed her of her right to do so and the time limit for exercising it. Furthermore, the appellant has cited no authority for the Board to order the Thrift Investment Board to exercise its discretion to waive the time limit for restoring the funds. *Cf. Giove v. Office of Personnel Management*, [106 M.S.P.R. 53](#) ¶ 9 (2007) (the Board lacks authority to order that the appellant be allowed to redeposit the amount he withdrew from his TSP account during the period between denial of his disability retirement application and the Board's decision reversing the denial).

¶15 The appellant has also asked the Board to require the agency to compensate her for amounts that she lost while her funds remained in her IRA and the taxes that she incurred as a result of the taxable distribution of the remaining loan amount that resulted from her withdrawal of her TSP funds. However, assuming without deciding that the agency could be held responsible for the appellant's voluntary act of withdrawing her TSP contributions, the Board cannot make an award of damages for taxes and other consequences of an agency action without specific statutory authority to do so, which is lacking here. *See id.*

¶16 Accordingly, for the foregoing reasons, the Board finds that the agency is in compliance with the Board's final order and dismisses the appellant's petition for enforcement as moot.

#### ORDER

¶17 This is the final decision of the Merit Systems Protection Board in this compliance proceeding. Title 5 of the Code of Federal Regulations, section 1201.183(b) ([5 C.F.R. § 1201.183\(b\)](#)).

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](http://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:

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