

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

2012 MSPB 132

Docket No. PH-0845-12-0153-I-1

**Karen E. Boone,
Appellant,**

v.

**Office of Personnel Management,
Agency.**

December 21, 2012

Karen E. Boone, Lyndeborough, New Hampshire, pro se.

Roberta Austin Thomas, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that affirmed an Office of Personnel Management (OPM) reconsideration decision, finding that the appellant received an overpayment in Federal Employees' Retirement System (FERS) benefits and that the appellant failed to show her entitlement to waiver of recovery of the overpayment. The initial decision also modified the appellant's repayment schedule. For the reasons set forth below, we

AFFIRM the initial decision as MODIFIED by this Opinion and Order, finding that further adjustment of the recovery schedule is appropriate.¹

BACKGROUND

¶2 The appellant filed an appeal of OPM's reconsideration decision, which found that she was overpaid \$3,529.48 in annuity benefits under FERS and that she was not entitled to a waiver of recovery of the overpayment, despite her lack of fault in causing or contributing to the overpayment, because recovery would not be against equity and good conscience. Initial Appeal File (IAF), Tab 1; Tab 4, Subtab 2a. On appeal, the appellant asked the Board to waive recovery of the overpayment because of financial hardship. IAF, Tab 1 at 4.

¶3 After holding a hearing, the administrative judge issued an initial decision finding that the appellant did not dispute the existence or amount of the overpayment. IAF, Tab 8, Initial Decision (ID) at 2; IAF, Tab 6, Attachment 6-3. The administrative judge also found that the appellant's request to "waive collection of the overpayment must be denied." ID at 4. Finally, the administrative judge modified OPM's collection schedule by reducing the installment payments from \$98.04 per month for 36 months and a final payment of \$0.04, to \$50 per month for 70 months and a final payment of \$29.48, upon finding that the installment payments originally proposed by OPM would cause the appellant financial hardship because her monthly expenses exceeded her monthly income. ID at 6.

¶4 The appellant filed a petition for review of the initial decision arguing that she is entitled to waiver of the overpayment. Petition for Review (PFR) File, Tab 1 at 4-5. OPM did not file a response to the appellant's petition for review.

¹ Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition for review under the previous version of the Board's regulations, the outcome would be the same.

ANALYSIS

The appellant has not shown that she is entitled to waiver of collection of the overpayment.

¶5 The appellant bears the burden of establishing her entitlement to a waiver of recovery of the overpayment by substantial evidence. *See Knox v. Office of Personnel Management*, [107 M.S.P.R. 353](#), ¶ 5 (2007). Generally, the recovery of a FERS overpayment should be waived if the recipient is without fault and recovery would be against equity and good conscience. *Id.*; *see* [5 U.S.C. § 8470\(b\)](#); [5 C.F.R. § 845.301](#). Recovery is against equity and good conscience when it would cause financial hardship, the annuitant can show that she relinquished a valuable right or changed positions for the worse, or recovery would be unconscionable under the circumstances. *Knox*, [107 M.S.P.R. 353](#), ¶ 8; [5 C.F.R. § 845.303](#).

¶6 OPM policy also provides that individuals who know or suspect that they are receiving overpayments are expected to set aside the amount overpaid pending recoupment, and that in the absence of exceptional circumstances -- which do not include financial hardship -- recovery in these cases is not against equity and good conscience. *Knox*, [107 M.S.P.R. 353](#), ¶ 8; IAF, Tab 4, Subtab 2e, Policy Guidelines on the Disposition of Overpayments under the Civil Service Retirement System and the Federal Employees' Retirement System (Policy Guidelines) § I.C.4. In the instant case, the administrative judge found that the appellant did not contend that she was unaware of the set aside rule. ID at 4. On review, the appellant concedes that she knew she was probably receiving an overpayment, but not the extent of it. PFR File, Tab 1 at 5. Thus, the appellant was required to set the overpayment aside in the absence of exceptional circumstances. Exceptional circumstances involve extremely egregious errors or delays by OPM, such as the failure to issue a written decision within 4 years of a request for a waiver. *Dorrello v. Office of Personnel Management*, [91 M.S.P.R. 535](#), ¶ 7 (2002); Policy Guidelines § I.C.4.

¶7 The appellant argues on review that she demonstrated exceptional circumstances based on her health-related indebtedness and her financial problems. PFR File, Tab 1 at 4-5. Among other things, the appellant asserts that she used her credit cards for living expenses and medical bills, resulting in a \$52,000 debt, and that she explained her financial situation in the Financial Resources Questionnaires (FRQ) she submitted to OPM on March 7, 2011, and February 14, 2012.² *Id.* at 4.

¶8 While we are sympathetic to the appellant's circumstances, we find that the hardships she describes are primarily financial and, as such, do not constitute exceptional circumstances that would warrant an exception to the set aside rule. *Knox*, [107 M.S.P.R. 353](#), ¶ 8; Policy Guidelines § I.C.4. Accordingly, we agree with the administrative judge's finding that the appellant failed to demonstrate the exceptional circumstances necessary to waive collection of the overpayment under the circumstances of this appeal. *Id.* at 4.

¶9 On review, the appellant also argues that recovery of the overpayment would be unconscionable because of her various medical conditions. PFR File, Tab 1 at 4-5. The unconscionability criterion is a high standard justifying waiver only under exceptional circumstances. *Spinella v. Office of Personnel Management*, [109 M.S.P.R. 185](#), ¶ 7 (2008); *Aguon v. Office of Personnel Management*, [42 M.S.P.R. 540](#), 549 (1989). However, because the concept of unconscionability is generally defined in terms of broad, equitable considerations, the Board will consider all relevant factors using a "totality-of-the-circumstances" approach in order to determine whether recovery of an annuity overpayment is

² The appellant correctly asserts that OPM's January 9, 2012 reconsideration letter, which found that recovery of the overpayment would not be against equity and good conscience, erroneously stated that the appellant did not submit an FRQ. PFR File, Tab 1 at 5; IAF, Tab 4, Subtab 4a at 3. The record shows that the appellant submitted a March 7, 2011 FRQ to OPM by certified mail, in addition to the February 14, 2012 FRQ, both of which are part of the record on appeal. IAF, Tab 6, Subtabs 2-1 to 6-6.

unconscionable in a given case. *Aguon*, 42 M.S.P.R. at 550;³ see *Spinella*, [109 M.S.P.R. 185](#), ¶ 7. Thus, in determining whether recovery of a debt would be unconscionable under the circumstances, the Board may consider the appellant's medical condition as support for an allegation that collection of the overpayment would have a negative impact on the appellant because of her medical conditions, or that those medical conditions require expenditure of a portion of the installment amount. *Thornhill v. Office of Personnel Management*, [69 M.S.P.R. 600](#), 602 (1996); see *Dixon v. Office of Personnel Management*, [63 M.S.P.R. 607](#), 610-11 (1994).

¶10 In this case, the appellant provided limited medical evidence below and no such evidence on review. See IAF, Tab 6; PFR File, Tab 1. Furthermore, in her petition for review, the appellant asserts that despite her health problems she is still able to run her jewelry business, her administrative business, and her pet sitting business. PFR File, Tab 1 at 5. Thus, we find that the appellant's assertions regarding her health and the limited evidence she provides fail to meet the high standard to establish unconscionability.⁴

³ We recognize that *Aguon* involved benefits under the Civil Service Retirement System and not FERS, but we have applied the principles articulated therein to FERS cases as well. E.g., *Spinella*, [109 M.S.P.R. 185](#), ¶¶ 1, 7.

⁴ The appellant argues that she counted on her original annuity amount to start her jewelry business and she is unsure that she would have started that business if she had known that her annuity was going to be reduced by over \$500. PFR File, Tab 1 at 5. To the extent that the appellant is claiming that recovery would be against equity and good conscience because she relinquished a valuable right or changed positions for the worse in reliance on OPM's original estimated annuity amount, the Board will not consider this argument because the appellant did not raise it on appeal below and she did not show that her argument is based on new and material evidence not previously available despite her due diligence. *Banks v. Department of the Air Force*, [4 M.S.P.R. 268](#), 271 (1980).

The appellant's repayment schedule should be adjusted further because she has shown by substantial evidence that the current repayment schedule would cause her financial hardship.

¶11 Although the appellant has not met her burden of proving that she is entitled to a waiver of recovery of the overpayment, she has met her burden of showing by substantial evidence that further adjustment of the repayment schedule is warranted. *See Dorrello*, [91 M.S.P.R. 535](#), ¶ 7 (even if waiver of recovery is inappropriate, the repayment schedule may be adjusted based on financial hardship); [5 C.F.R. § 845.307\(b\)](#). In her February 14, 2012 FRQ, the appellant claims that her monthly expenses exceed her monthly income by \$81 a month. IAF, Tab 6 at 2-1. In her initial decision, the administrative judge concluded that the appellant's monthly expenses exceed her monthly income by \$31.⁵ ID at 5-6. OPM does not challenge this finding.

¶12 When an appellant's monthly expenses exceed her monthly income, the Board has reduced OPM's repayment schedule to \$5 a month. *Knox*, [107 M.S.P.R. 353](#), ¶¶ 12-13; *Dorrello*, [91 M.S.P.R. 535](#), ¶¶ 9-10; *Matthews v. Office of Personnel Management*, [85 M.S.P.R. 531](#), ¶ 11 (2000). Accordingly, because in this case the appellant's monthly expenses exceed her monthly income, we modify the collection schedule to \$5 a month.

ORDER

¶13 We ORDER the OPM to reduce the appellant's repayment schedule to a rate of \$5 per month. OPM must complete this action no later than 20 days after the date of this decision.

⁵ We note that at one point in the initial decision the administrative judge stated that the appellant's monthly expenses were \$2,983 plus \$50 for emergencies, for a total of \$3,033. ID at 6. Elsewhere in the initial decision, the administrative judge stated that the appellant's monthly expenses were \$3,083 plus \$50 for emergencies for a total of \$3,033. *Id.* The second statement appears to be a typographical error; the administrative judge intended to reiterate that the appellant's monthly expenses were \$2,983 plus \$50 for emergencies for a total of \$3,033.

¶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 to describe 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 OPM about its progress. See [5 C.F.R. § 1201.181](#)(b).

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