

MERIT SYSTEMS PROTECTION BOARD

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LORETTA DICASELNUVO,
as widow of LARRY DICATELNUOVO

-against-

Appellant

PH 0831-10-0047-1-1

CSF 3 165 846

OFFICE OF PERSONAL MANAGEMENT,

Respondent

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**PETITION FOR REVIEW OF INITIAL
DECISION OF ADMINISTRATIVE JUDGE**

PRELIMINARY STATEMENT

Loretta DiCastelnuovo (“the appellant”) in the above captioned appeal hereby petitions for review of the administrative judge’s initial decision, dated February 9, 2010, affirming OPM’s denial of her claim for a survivor annuity. For reasons described more fully below, the administrative judge (1) should have found that the Office of Personnel Management (“OPM”) did not “establish through credible evidence that it was more likely than not that [it sent] the annual notice [required by Pub. L. No. 93-3171 that Mr. DiCastelnuovo could only elect to make the appellant his beneficiary within two-years of their remarriage].” *Schoemakers v. OPM*, 180 F.3d 1377, 1380 (Fed. Cir. 1999) (quoting *Brush v. OPM*, 982 F.2d 1554, 1559 (Fed. Cir. 1992)); or, alternatively, (2) if such a showing was made, should have reversed OPM’s denial in light of “the credible testimony or other evidence

tending to support the contention that the annuitant in question did not receive the annual notice.” *Brush*, 982 F.2d at 1561. Finally, even if the administrative judge’s findings were correct, it would be an error, under the very unusual facts of this case, to apply the Civil Service Retirement Spouse Equity Act so as to deny appellant a survivor’s annuity inasmuch as doing so (1) would be subversive of the statute’s purposes, and (2) by treating the appellant differently than a woman who was continuously married to the same man, creates an arbitrary distinction and amounts to a violation of property and contractual rights protected by the Due Process Clause of the Fifth Amendment

Point I

OPM DID NOT CARRY ITS BURDEN OF ESTABLISHING THROUGH CREDIBLE EVIDENCE THAT IT WAS MORE LIKELY THAN NOT THAT IT PROVIDED APPELLANT’S HUSBAND WITH PROPER NOTICE OF THE TWO-YEAR TIME LIMIT

Under the Civil Service Retirement Spouse Equity Act of 1984, as amended by Public Law No. 95-317, “[t]he Director of the Office of Personnel Management shall, on an annual basis, inform each annuitant of such annuitant’s rights of election under sections 8339(j) and 8339(k)(2) of title 5, United States Code” 5 U.S.C. § 8339 note (2000). The Federal Circuit in *Brush*, held that, in accordance with the intent of Congress in enacting this provision, “OPM carries the ultimate burden of persuasion on the issue whether it sent the required notice.” 982 F.2d at 1561. The court further explained that:

In accordance with the statutory mandate, OPM must show two things when attempting to prove that it has met its burden of providing retirees with the notice here in issue. First, OPM must attempt to prove that the notice was actually sent. Such evidence must be more than a bare allegation that notice was sent. Second, OPM must offer proof as to the contents of the annual notice. This must be so, because the statute clearly directs OPM to notify annuitants of all elections available under sections 8339(j) and (k)(2).

Id.

In this case, the only evidence submitted by OPM in support of its contention that it had complied with the statutory notice requirements was a single affidavit of one of its employees, Cyrus Benson. In her initial decision, however, the administrative judge did not address whether the affidavit proved that the notices were actually sent—the first element required for a showing of proper notice. *See id.* at 1561. The affidavit's mere presence in the claim file cannot serve as a substitute for such a finding. *See id.*

Nevertheless, this rule is unaltered by the fact that in some cases a finding of adequate notice based on such an affidavit was found not to necessarily require reversal, *see, e.g., Schoemakers*, 180 F.3d at 1381, as the Federal Circuit has never held such a finding, as a matter of law, insulates an MSPB decision from reversal. To the extent that the Federal Circuit, in exercising its very limited jurisdiction affirms MSPB decisions, it does not do so based on a finding the MSPB decision was correct, but merely that it was not (a) arbitrary, capricious, an abuse of discretion; (2) obtained without procedures required by law, rule, or regulation, having been followed; or (3) unsupported by substantial evidence. 5

U.S.C. § 7703(c). In stark contrast, MSPB administrative judges review OPM decisions *de novo*, without giving any deference to the agency. The administrative judge therefore must determine for himself or herself what, if any, weight to give to the affidavits such as that proffered in the instant case. In the instant case, because the administrative judge failed to provide a reasoned analysis of the probative value of the affidavit, her decision should not be sustained.

The administrative judge's lack of analysis is not excused by the fact that the formal rules of evidence do not apply in MSPB appeals. The question of the admissibility of the affidavit is, of course, an entirely different question than the weight it should be given. Moreover, the fact that the formal rules of evidence do not prevent the admissibility of the affidavit, does not convert OPM's "statutory mandate" into permissive guidelines. *See id.*

Had the administrative judge made a fair determination of the affidavit's probative value she would have taken into consideration the following points raised by appellant's counsel:

1. OPM failed to produce the affidavit's author, Cyrus Benson, as a witness, even though the only real issue on the appeal was the truth or accuracy of his allegations. The affidavit would have been entitled to greater weight if, *after* its author was tested by direct and cross-examination, the administrative judge found his allegations credible. As a matter of common sense, the fact that OPM failed to produce

Benson suggests that OPM believed that his allegations might prove vulnerable if so tested.

2. OPM did not provide any explanation for its failure to produce Benson. Inasmuch as he could have appeared telephonically and the hearing was of short duration, one would presume it unlikely that producing him would be onerous. Having failed to provide a good explanation, indeed, any explanation for this failure, one would have to presume that OPM simply did not have a plausible explanation. This also suggests that OPM believed that his allegations might prove vulnerable if he had appeared and been subjected to the tests of direct and cross-examination.
3. The affidavit, although proffered to “prove” that notice was provided, remarkably does not identify *who* provided the notice. What the affidavit makes clear is that the affiant who is attesting to the provision of notice did not provide the notice. Benson only attests that OPM outsourced service to a “general contract firm,” without even disclosing the firm’s name. Disclosing its name would, among other things, facilitate checking on its past performance, its reputation for competency and honesty, and any criminal or civil liability it might have incurred in the past.

4. The affidavit offers no reason for not disclosing the firm's name, notwithstanding Benson's insistence that the unnamed entity must have made service correctly.
5. Aside from assuring its reader that OPM outsources this work to firms "specializing in mass mailings" (Aff. ¶ 5(a)), the affidavit does not explain why Benson is so sure that this unnamed private "specializing" entity must be considered infallible. The notion that firms to which the government outsources its work *never* make errors and *never* fail to execute competently the tasks for which they are hired, is disproved by the numerous and well-publicized examples of such firms failing to carry out their duties correctly, even where, as in various war zones, the adequacy of their service is literally a matter of life and death.
6. Having implicitly insisted on the infallibility of the unnamed private contractor, Benson does not describe even in general terms what safeguards OPM employs to ensure that the unnamed entity provides notice correctly. The affidavit does not say whether, or in what way, OPM supervises the entity, or, to what extent, if at all, OPM monitors, inspects, or audits the entity's work.
7. Similarly, Benson does not describe what internal safeguards the unnamed entity uses to ensure that those of its employees, assigned to perform the work outsourced by OPM, perform their duties correctly.

8. More fundamentally, Benson does not set forth the basis of his knowledge of the facts he alleges. In the affidavit, he states in the present tense the he “administer[s]” the contract with the unnamed entity (*id.* ¶ 1) and that in that “capacity” he is “familiar with the history of notices related to civil service.” (*Id.* ¶ 2) But he does not state whether he administered the contract during the relevant months of December 1999 and December 2000, and, if not, the specific sources of his familiarity. If not himself a witness to “the history” to which he refers, Benson provides no clue as to whether, for example, he obtained his knowledge by hearing or reading the words account of the history from the individual who administered the contract during those months, or whether, he became “familiar with the history” by reading a manual, log book, memorandum, or other document. Inasmuch as OPM, like other governmental agencies, almost invariably create a written record of its actions and their procedures, Benson’s silence on this point is remarkable. Whatever the reason for this omission, it is yet another reason to give little, if any credence, to the “history” which Benson claims to recount.
9. The affidavit does not state the specific address that the notice was allegedly sent to. Benson’s generic reference to “annuitants and their correspondence addresses,” (Aff. ¶ 5(a)), is insufficient given that the

only purpose of the affidavit is to show that the notice was sent to sent to Mr. DiCastelnuovo.

10. The affidavit does not set forth the contents of the notice. As a consequence, OPM—relying solely on the Benson affidavit—failed not only to establish that an annual notice was sent, but failed to provide credible “proof as to the contents of the annual notice.” *Brush*, 942 F.2d at 1561. Moreover, even assuming *arguendo* that the affidavit (or some other document) sufficiently identifies a notice in the claims folder as a copy of the notice sent to Mr. DiCastelnuovo, it would provide inadequate notice because of the form of its contents, particularly its miniscule type. Both of these points are discussed in the next section.

Point II

EVEN ASSUMING THAT OPM ESTABLISHED THAT IT SENT MR. DICASTELNUOVO ANNUAL NOTICES, OPM FAILED TO ESTABLISH THE ADEQUACY OF THE CONTENT OF THE NOTICES

The administrative judge asserted, without supporting evidence, that a copy of a notice in the OPM claims file must be the same notice referred to in the affidavit. If this were true, it would have been expected that the affiant himself---the individual claiming knowledge to the facts, would have attached the notice to the affidavit and explicitly identified it as a true copy of the one referred to. Neither OPM, nor the administrative judge, offered any explanation as to why this was not done. Needless to say OPM must be found to have failed to establish the adequacy

of the content of the notice it supposedly sent to Mr. DiCastelnuov in light of Benson's failure to either quote the contents of the affidavits allegedly sent, to make a clear identification of an attached exhibit or other specifically identified document as having the same contents.

Nonetheless, assuming timely notices were sent to Mr..DiCastelnuovo, and assuming that the notice in the claims file is a copy of those sent, the administrative judge quoted from OPM's final denial notice, which, in turn quotes the alleged notice. Initial Decision at 9-10. Having assumed the notice to have been the same supposedly sent to Mr. DiCastelnuovo, the administrative judge did not explain why *she* believed it would have provided adequate notice to Mr. DiCastelnuovo. Instead, she stated that [t]hese form notices are generally sufficient to satisfy the notice requirement,@ and directed the reader to. *See Shoemakers*, 180 F.3d at 1380-81. Had she tried to make such a fair evaluation of the adequacy of the notice, she would have had, at a minimum, addressed the fact that it is printed in a extremely small type-face.

The type face is, in fact, smaller than that generally permitted by laws regulating the size of the print of such documents as consumer contracts and residential leases. See NY CPLR §4544; *Gulf Ins. Co. v. Kanen*, 788 N.Y.S.2d 132 (2nd Dept. 2004) (finding summary judgment for either party was inappropriate where defendants produced an expert affidavit that the type size utilized in a lease did not meet the requirements of CPLR 4544 and plaintiffs

produced an expert who opined that the type size was the minimum eight point font); Sweeney and Nessler “1993-1994 Survey of New York Law” Syracuse Law Review 1995. Given the important rights at stake, and the fact that the OPM notices are sent to individuals who have reached retirement age, the use of such notices must be considered inherently subversive of the goals of the Civil Service Retirement Equity Act. Moreover to the extent that pensions, including survivor annuities, are constitutionally protected contractual or property rights, the use of this miniscule type would have to be considered a violation of the Due Process Clause of the Fifth Amendment. In either case, OPM must be found to have failed to establish that it provided Mr. DiCastelnuovo with notice.

Point III

THERE WAS NO LOGICAL BASIS FOR THE ADMINISTRATIVE JUDGE TO REJECT THE APPELLANT’S TESTIMONY THAT THE REQUIRED NOTICES WERE NOT RECEIVED

The administrative judge emphasized that the appellant showed confusion as to the precise dates she moved to various addresses within Philadelphia. Moreover, the administrative judge seemed concerned by the possibility that Ms. DiCastelnuovo misidentified the address where her husband received mail in December of 1999 and 2000 as Baird Avenue, although nothing in the record suggests that Mr. DiCastelnuovo lived at that address during those months (Initial Decision at 10).

The address where the DiCastelnuovos lived during those two months is not in controversy in this case. The appellant is not arguing that OPM was mistaken with respect to what address it was supposed to send its notices. Nor, for its part, is OPM suggesting that either the appellant or her husband misled them as to where they lived. Indeed, there is every indication that wherever Mr. DiCastelnuovo lived during the years of his retirement, OPM never failed to send his annuity check to the correct address.

Nevertheless, the appellant's confusion about the addresses in 1999 and 2000, does not provide a reasonable basis for the administrative judge's inference that all of her testimony about that period must be discounted. Absent evidence that the appellant suffers from an advanced stage of a memory-impairing neurological disorder, there is no ground for making such an inferential leap, or for the administrative judge's assertion that there was an inherent improbability that the appellant could accurately recall what she received in the mail some ten years ago.

There is, if anything, an inherent *probability*, if not certainty, that the appellant is accurate in remembering her husband's chronic disability, and his consequent reliance upon her to retrieve their mail at all of the addresses at which they lived. What is entirely improbable is that Mr. DiCastelnuovo would have failed to meet the two-year deadline if he had had notice of that there was such a deadline. After all, it is undisputed that during both marriages to the appellant it was his clear desire that she be his beneficiary. This is attested to by the letters he sent to OPM,

repeatedly attempting to have her made his beneficiary, and by the fact, that during his first marriage to the appellant, he did in fact make her his beneficiary.

The administrative judge also makes much of the fact that when she asked the appellant if she recalled whether, as part of OPM's reconsideration decision dated September 30, 2009, she received the notices that OPM purportedly sent to all of its annuitant in December 1999 and 2000, she testified that she did not know because she had not read everything and cannot remember what each and every document was. (Initial Decision at 11). The administrative judge wrongly infers a sort of global unreliability from the appellant's inability to remember precisely what she read and remembered in every document that OPM attached to its rejection of her claim. The connection between the appellant's failure to read or remember every denial letter attachment, and the credibility of her testimony regarding her husband's receipt of the two year deadline notice is too attenuated to make logical sense . It is commonsensical that most people—attorneys included—do not retain complete recollection of the exact documents that are attached to notices they receive, particularly when, as in this case, the attachments themselves have no probative value. This is a fact of which the Board may, and should, take administrative notice. Furthermore, to the extent that the testimony of the appellant with respect to either the mail or the attachments indicates an absence of perfect recollection, there is less, rather than more, reason to suggest that her testimony is dishonest. Given the lapses of time, her testimony would be suspect if it was completely polished and evinced a prodigious capacity to remember details.

The administrative judge also saw as significant that when asked about whether after she remarried Mr. DiCastelnuovo he had ever had any conversation with her with regard to the requirement to submit paperwork by a certain deadline to elect her as the beneficiary of a survivor annuity, she responded that yes, he did, and he was sick a lot of the time. He was in and out of the hospital and time just lapsed but he did submit a letter to them and I don't know what happened to that. (Initial Decision at 9) In contrast to the administrative judge's complete rejection of the appellant's capacity to remember anything else with accuracy, the administrative judge inexplicably believes these recollections to be completely reliable. The problem, however, is not their accuracy, but, rather their irrelevance given that the appellant did not indicate if the conversation or attempt to name her as beneficiary took place before or after the expiration of the two year deadline.

Point IV

EVEN IF OPM PROVIDED THE PROPER NOTICE, DENIAL OF APPELLANT'S CLAIM WOULD SUBVERT THE PURPOSES OF THE CIVIL SERVICE RETIREMENT EQUITY ACT AND ARBITRARILY DISCRIMINATE AGAINST THE APPELLANT BECAUSE SHE WAS MARRIED TWICE, RATHER THAN ONCE, TO THE SAME MAN DURING RETIREMENT

The Civil Service Retirement Spouse Equity Act of 1984 ("the spouse equity act"), was enacted to protect the interests of the surviving spouses of civil servants, who are disproportionately widows with limited incomes. Nevertheless, if OPM prevails in the instant case, provisions of the spouse equity act will have the perverse effect of causing the appellant to be left with no survivor's pension. "Statement on Signing the Civil Service Retirement Spouse Equity Act of 1984,"

<http://www.reagan.utexas.edu/archives/speeches/1984/110984a.htm> (Nov. 9, 1984) (“[T]his measure contains significant changes that will improve equity for spouses under the Federal Government's employee retirement system.”) It is undisputed that Mr. DiCastelnuovo wanted appellant to be his beneficiary. He made her his beneficiary when they were first married, and he attempted to do the same when he married her for a second-time. The only difference is that this second marriage was termed by OPM a “remarriage” and Mr. DiCastelnuovo was found to have missed a two-year statutory deadline. Appellant would have a pension today if she and Mr. Castelnuovo had never divorced in the first place. Moreover, the appellant would have a survivor’s pension today if, after OPM’s refusal to accept Mr. DiCastelnuovo’s beneficiary designation after the two-year deadline, the couple had simply divorced a second time and gotten married again for the third time. Clearly, the term “remarriage” in the instant case is one of semantics and technicalities – and OPM’s reliance on these semantics and technicalities in the instant case will have the result of relegating the appellant to poverty in the final years of her life—the very result the statute was intended to prevent. In light of these circumstances even if it finds that the factual findings of the administrative judge are correct, the MSPB should avoid this result by not deeming the appellant’s second marriage to Mr. DiCastelnuovo a “remarriage,” a term which implies a change of spouses. Any other interpretation of the term would not only be inconsistent with the intent of the spouse equity act, as applied to her, would yield a result that is irrational and inconsistent with the requirement of the Due Process Clause of the Fifth Amendment because the

classification into which the appellant falls—those who are remarried to the same person after retirement—is not rationally related to a legitimate government interest.

CONCLUSION

For the foregoing reasons, the appellant respectfully requests that the Merit Systems Protection Board issue a decision reversing the decision of the Office of Personnel Management, and granting her claim for a survivor's annuity.

March 16, 2010

Respectfully submitted,

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Loretta Di Castelnuovo

Sincerely,

Gary Stone

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Loretta Di Castelnuov