

OPM Retirement Processing

John Hatton
Deputy Legislative Director
National Active and Retired Federal Employees Association (NARFE)

Introduction

- (1) Overview of (Paper-Based) Process
- (2) Recent History
 - Failed Attempts to Modernize
 - Backlog
 - Congressional Oversight
 - Strategic Plan
 - Improvement
- (3) What Now?
 - Backlog reappearing?
 - IT modernization?
 - Other improvements?

Overview of the Process



Overview of the Process

- (1) Paper file mailed to OPM cave in Boyers, PA
- (2) Old records on file retrieved
- (3) Data from paper files entered into computer program used to calculate the final retirement annuity

Recent History

- Failed Modernization Efforts
 - OPM Cancelled a 10 year, \$290 million contract in 2008
- Backlog
 - 61,108 cases pending in January 2012
 - Average time to process: 156 days (over 5 months)
 - Extremely long hold times on phone

Recent History

- Congressional Hearings
 - Senate hearing in February 2012
 - House hearings in May 2013, December 2014
- Strategic Plan
 - Hire more claims processors and customer service reps + use overtime
 - Improve processes, agency processing

Improvements?

- Reduced Backlog (December 2014)
 - 11,699 case inventory
 - 83.7 percent processed in 60 days or less
 - Average wait time: 10 minutes
- Regression? (April 2015)
 - 15,374 case inventory
 - 68.0 percent in 60 days or less

What next?

- IT Modernization Plan
 - Incremental
 - Any progress?
- Agency Improvement?
 - Accountability?
- Funding?
- Other issues
 - Customer Service
 - Other tasks

Questions?



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

4/28/2015

Retirement Services

Legal Services of Northern California
444 North 3rd Street, Suite 312
Sacramento, CA 95811

REF: [REDACTED]
CSA [REDACTED]
SSN: XXX-XX-[REDACTED]

Dear Sirs:

This is in response to your April 13, 2015, letter on behalf of Mr. [REDACTED]

We are enclosing all correspondences between Mr. [REDACTED] and our office since his retirement.

Please note that we have not received a reply from the National Guard Adjutant's Office nor have we received a reply from Mr. [REDACTED] to our 01/27/2012 and 06/22/2012 letters. In addition Mr. [REDACTED] never forwarded the additional evidence he mentioned in the last paragraph of his attached letter dated 01/03/2010.

Sincerely,

T. Battle

Tanya Battle
Legal Administrative Specialist
Claims 1, Post-Retirement Branch

Enclosures



United States
**Office of
Personnel Management** Washington, DC 20415-0001

January 27, 2012

CSA [REDACTED]

[REDACTED]
Dear Mr. [REDACTED]

This is in response to your January 3, 2012, letter.

The Legal Reconsideration Branch has forwarded your case back to the Claims 1 Group, Post-Retirement for additional development.

We have sent a request to the National Guard Adjutant General's office to determine if the service you performed from 1958-1966 was under Title 10. Once we receive a reply (this could take from 3-6 months), we will contact you with our findings and provide you with Reconsideration Rights if the decision is not favorable.

In addition, the Legal Reconsideration Branch has asked that we grant you additional time to forward the additional evidence you mentioned in the last paragraph of your January 3, 2012, letter. Once you receive this evidence please forward it to our office in the enclosed envelope. Also, if you receive any additional certified documentation certifying the service you performed from 1958-1966 as performed under Title 10, please forward it also.

Sincerely,

Tanya Battle
Legal Administrative Specialist
Claims 1, Post-Retirement Branch

Envelope

Verification of Military Retired Pay Status

(Required Under Provisions of Civil Service and Federal Employees Retirement Systems)

Mark the appropriate address on the reverse of this sheet.

Name of individual (last, first, middle) [REDACTED]		Social Security Number [REDACTED]	Date of request 6-13-2012	File reference
Last Period of Service				
Date of birth [REDACTED]	Claim number [REDACTED]	Branch Nat'l Gd	Serial Number [REDACTED]	From (mo/dy/yr) 1958
<input checked="" type="checkbox"/> The individual named above has applied for retirement annuity commencing <u>08/01/2009</u>		<input type="checkbox"/> See the remarks at the bottom of this form.		To (mo/dy/yr) 1966
<input checked="" type="checkbox"/> The individual named above has elected to provide a survivor benefit.		Signature Tanya Battle Retirement Services Program		
<input type="checkbox"/> The individual named above died on <u>08/01/2009</u> The survivors have applied for survivor annuity.				

Certification

Instructions: Please verify the retired pay status of the individual named above by checking the appropriate item(s) below. If you check item 1, be sure to complete the appropriate box(es) in A, B, and C. (If an overpayment exists, it can be withheld from the individual's retirement annuity and reimbursed to your office.)

1. <input type="checkbox"/> Individual has been awarded retired pay effective: <div style="border: 1px solid black; padding: 2px; width: 150px; margin: 5px 0;">Date (mo/dy/yr)</div>		C. Has the individual received retired pay beyond the effective date of the waiver? <input type="checkbox"/> No <input type="checkbox"/> Yes Amount, if any, to be withheld \$ _____ Name, address and ZIP code of office to be reimbursed _____ _____ _____ _____ _____	
A. Nature of the award <input type="checkbox"/> Reserve Retainer Pay <input type="checkbox"/> Age and/or Service Retirement <input type="checkbox"/> Chapter 1223, Title 10, U.S. Code, Sec. 12731 through 12739 (formerly Chapter 67, Title 10) <input type="checkbox"/> Disability incurred in enemy combat or caused by an instrumentality of war in line of duty during a period of war as defined in Chapter 11, Title 38, U.S. Code. <input type="checkbox"/> Disability other than as described above <input type="checkbox"/> Disability - reason unknown. Contact office shown below:		2. <input type="checkbox"/> The individual had been awarded reserve retainer or military retired pay on the date of death. <input type="checkbox"/> No waiver in effect. <input type="checkbox"/> Had total VA waiver in effect.	
B. Has the individual waived all retired pay - (1) for a Civil Service or Federal Employees annuity? <input type="checkbox"/> No <input type="checkbox"/> Yes, as of close of business <u>08/01/2009</u> (2) for VA compensation? <input type="checkbox"/> No <input type="checkbox"/> Yes, as of close of business <u>08/01/2009</u>		3. <input type="checkbox"/> The individual had not been awarded reserve retainer or military retired pay on the date of death. 4. <input type="checkbox"/> We have no record of this individual.	
If you answered "yes" above, are you paying a court-ordered allotment to this person's former spouse? <input type="checkbox"/> No <input type="checkbox"/> Yes. On a separate page, please give us the former spouse's full name, correspondence address, payment address, social security		Certified by (signature) _____ Title _____ Organization _____ Date (mo/dy/yr) _____	

Return the completed original of this form to:
 U.S. Office of Personnel Management
 Retirement Programs
 Attn: T. Battle Room 4469
 1900 E Street, NW
 Washington, DC 20415-0001

Remarks Mr. [REDACTED] performed 15-day training periods from 1958-1966. Was this service performed under Title 10?

Reconsideration and Appeal Group Findings

THIS CASE REQUIRES IMMEDIATE ATTENTION

From: Pat Beach, Manager Disability, Reconsideration and Appeals Group	DATE: November 30, 2011	REMAND MSPB APPEAL	<input checked="" type="checkbox"/>
To: <input type="checkbox"/> Boyers Staff Office Claims 2 Group Analyst	<input checked="" type="checkbox"/> Carol Cook, Acting Chief Claims 1 Group	<input type="checkbox"/> , Chief Receivables Management Branch	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/> Jennifer A. Norman, Chief RESG	

INSTRUCTIONS

1. Process **MSPB Appeals** within **15** days and **Remands** within **30** days of the date above.
2. **DO NOT** change the type status code. Use the Hold and Receipt functions on DCCS to track **DEVELOPMENT** actions.
3. **DO NOT SEND THE CASE TO ROC TO AWAIT REQUESTED EVIDENCE.**
4. A completed copy of this form must also be filed inside the claim file.
5. After action is completed, return records file to: ☒ ROC Boyers ☐ DRAG ☐ Other

Case Name: [REDACTED]

CSA [REDACTED]

1. Description of Findings

[REDACTED] requested reconsideration of the initial decision dated December 9, 2009. This decision informed him that military service for the years 58, 59, 60, 61, 62, 63, 64, 65, and 66 was not usable. Furthermore, the service was considered under Title 32 and not creditable. After consulting with the Legal Reconsideration Branch Chief Mark Vok, a determination was made that there is evidence proving eligibility to include active duty National Guard service under Title 10 based on the additional evidence provided by Mr. [REDACTED]. Also, that the case needs to be remanded to Claims. See the yellow post-it note from the Legal Reconsideration Branch Chief. In view of the above, the initial decision is rescinded.

Authority.

1. Review the additional evidence provided by Mr. [REDACTED] to support his claim that he performed active duty military service under Title 10. Request that he provide the additional evidence mentioned in the last paragraph of his letter dated January 3, 2010.
2. Develop for his National Guard service for years 1958 through 1966 to determine if the service was performed under Title 10.
3. After completing the actions mentioned above, provide Mr. [REDACTED] with a detailed, new initial decision.

Benefits Specialist contact: A. Vanderhorst

2. For Completion by Action Office

Office:	Signature:	Date Completed:
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UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

MAY 09 2012

Retirement Services

The Honorable Daniel K. Akaka
United States Senator
Attn: Daphne Tong
Post Office Box 50144
Honolulu, HI 96850

Dear Senator Akaka:

This letter is in further response to your letter on behalf of Mr. [REDACTED] concerning his inquiry about the use of military service used in his annuity computation under the Civil Service Retirement System (CSRS).

The Office of Personnel Management (OPM) began Mr. [REDACTED] CSRS retirement annuity on August 1, 2009. We included in his CSRS annuity computation 11 months of military service. However, Mr. [REDACTED] civilian and military service total was in excess of the amount allowed by law for him to receive the maximum retirement annuity (80 percent). This 80 percent is reached when an employee has performed 41 years and 11 months of Federal service. OPM is required by law to refund excess retirement contributions after the maximum limit was reached in the annuity computation. Thus, Mr. [REDACTED] was notified on September 3, 2009 about the refunding of his excess retirement contributions. He was also provided information to rollover his excess retirement contributions and interest.

We notified Mr. [REDACTED] on December 9, 2009, that some of his military service was not creditable for use in his retirement annuity. This had a result that the total of his excess CSRS retirement contributions changed. Mr. [REDACTED] was informed that he had the right to request reconsideration which he did. We sincerely regret the delay that occurred with this review. After our review we rescinded the initial decision on November 30, 2011 and also notified Mr. [REDACTED] that his claim was returned to Claims 1 Group for development of additional evidence to determine the status of his National Guard military service and if it was performed under Title 10 (copy enclosed). Our Claims 1 Group will provide Mr. [REDACTED] with a new initial decision when this development has been completed. If the new initial decision is adverse, Mr. [REDACTED] will be provided with the right to request reconsideration. I appreciate the opportunity to respond to your inquiry and hope this information will be helpful to Mr. [REDACTED].

Sincerely,

Larry Hines

Larry Hines
Management and Program Analyst
Special Inquiries Branch

FILE

Enclosure



Retirement Services

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

November 30, 2011

CSA [REDACTED]

[REDACTED]

Dear [REDACTED]

You requested reconsideration of our December 9, 2009, initial decision that found your military service for years 1958 through 1966 was not usable. We have reviewed your request for reconsideration in accordance with the applicable sections of Title 5, Code of Federal Regulations. We have rescinded the initial decision.

After reviewing your written submissions and the case file, we find that the initial decision was issued prematurely. Therefore, the case file is being forwarded to the Claims I office for that office to develop for additional evidence to determine if your National Guard military service during calendar years 1958-1966 was performed under Title 10. The Claims I office will provide you with a new initial decision. If the new initial decision is adverse, you will be provided with reconsideration rights.

Sincerely,

Antionette Vanderhorst
Legal Administrative Specialist
Disability, Reconsideration and Appeals



Retirement and
Benefits

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

APR 18 2011

The Honorable Daniel K. Akaka
United States Senator
Attn: Daphne Tong
Post Office Box 50144
Honolulu, HI 96850

Dear Senator Akaka:

Thank you for your letter on behalf of Mr. [REDACTED] concerning his inquiry about the use of military service used in his annuity computation under the Civil Service Retirement System (CSRS).

The Office of Personnel Management (OPM) began Mr. [REDACTED] CSRS retirement annuity on August 1, 2009. We included in his CSRS annuity computation 11 months of military service. However, Mr. [REDACTED] civilian and military service total was in excess of the amount allowed by law for him to receive the maximum retirement annuity (80 percent). This 80 percent is reached when an employee has performed 41 years and 11 months of Federal service. OPM is required by law to refund excess retirement contributions after the annuity computation when the maximum limit was reached. Thus, Mr. [REDACTED] was notified on September 3, 2009 about the refunding of his excess retirement contributions. He was also provided information to rollover his excess retirement contributions and interest.

We notified Mr. [REDACTED] on December 9, 2009, that some of his military service was not creditable for use in his retirement annuity. This resulted that the total of his excess CSRS retirement contributions changed. Mr. [REDACTED] was informed that he had the right to request which he did. We sincerely regret the delay, but his case is under review. After OPM's review is completed we will notify Mr. [REDACTED] of our final decision. OPM will then inform your office of the results. In the meantime, you can contact me at the telephone number below with any questions you might have regarding his claim.

I appreciate the opportunity to respond to your inquiry and your patience in this matter. If I can be of any additional assistance, please let me know.

Sincerely,

Larry Hines
Management and Program Analyst
Special Inquiries Branch
202-418-4302

FACSIMILE TRANSMITTAL

TO: Charlene Luskey, Chief, Congressional Liaison Office, Office of Personnel Management

FR: U.S. Senator, Daniel K. Akaka

DT: February 23, 2011

FAX #: (202) 225-4974

NUMBER OF PAGES INCLUDING THIS COVER SHEET: 13

MESSAGE:

Re: Inquiry on behalf of Mr. [REDACTED] faxing correspondence due to the time-sensitivity of the issue.

If problems occur or you do not receive all the pages sent, please call (808) 522-8970 and ask for Daphne Tong. Our facsimile number is (808) 545-4683. Thank you.

UNLESS OTHERWISE OR OBVIOUS FROM THE NATURE OF THE TRANSMITTAL, THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE.

RETIREELIT

RECON GQ

- MEMBER WAITING ON FINAL DECISION OF RECON
FOLLOWS 13 MOS

DANIEL K. AKAKA
HAWAII

WASHINGTON OFFICE:
141 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
TELEPHONE: (202) 224-5361

HONOLULU OFFICE:
3108 PRINCE JONAH KUHIO
KALANIANA'OLAH FEDERAL BUILDING
P.O. Box 50144
HONOLULU, HI 96850
TELEPHONE: (808) 522-8970

United States Senate

WASHINGTON, DC 20510-1103

COMMITTEES:
ARMED SERVICES
BANKING, HOUSING AND
URBAN AFFAIRS
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
INDIAN AFFAIRS
VETERANS' AFFAIRS

February 22, 2011

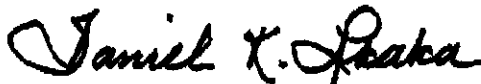
Ms. Charlene Luskey
Chief, Congressional Liaison Office
Office of Personnel Management
B-332 Rayburn House Office Building
Washington, DC 20515

Dear Ms. Luskey:

Enclosed is a copy of a correspondence I received from Mr. [REDACTED]. I would very much appreciate your advice on the issues raised in his letter. Your reply will help me to respond to his request for assistance.

Please forward your response to my Honolulu office, P.O. Box 50144, Honolulu, HI 96850. Thank you for your attention to this matter.

Aloha pumehana,



DANIEL K. AKAKA
U.S. Senator

Enclosure

SENATOR DANIEL K. AKAKA
U.S. SENATE
WASHINGTON, D.C.

February 5, 2011

FEB 16 AM 11:27

Senator Daniel Akaka
Senate Office Bldg.
Washington, D.C. 20510

11 FEB 18 PM 2:10

Dear Senator Akaka:

Thank you for your support of veterans, and, in particular, your efforts to allow willing, disabled service members to remain on duty in positions where they may make a contribution to our nation's defense.

I am a retired Air Force Reserve veteran with over 22 years of service that included Air Force active duty and Air National Guard and Air Force Reserve service. I am also retired from the U.S. Civil Service with over 40 years employment with the Department of the Interior and the Department of Agriculture.

In 1971, and in response to a Comptroller General decision, my Federal Agency revised my service computation date to include my Air Force active duty time which was performed under the Title 10 United States Code and prior to my appointment in Federal service. This active duty time was verified by military pay records and subsequently by correspondence between my personnel office and National Guard adjutant general offices, and upon retirement was certified by the Department of the Interior and reported to the Office of Personnel Management (OPM) with my retirement file (see attachment 1 - Letter dated July 30, 2009). Initially, OPM recognized the active duty time and credited my time as service performed in excess of the service necessary to produce the maximum basic annuity (see attachment Nos. 2 and 3 - Letters dated 09/03/2009 and October 7, 2009). Subsequently, however, OPM decided that my Title 10 Federal service was not creditable (See attachment No. 4 - Letter dated 12/09/2009).

The 12/09/2009 letter advised me that I could request reconsideration of this decision by filing a form RI 38-47 within 30 days of the date of the letter, which I did (see attachment No.5 - Letter dated January 03, 2010). The 12/09/2009 letter also stated that OPM would issue a final decision and that I could not appeal to the Merit Systems Protection Board until OPM issued a final decision. It has now been over 13 months since I requested reconsideration of OPM's initial decision and I have not received a response to my request. Please let me know if you may be of assistance in bringing this matter to an equitable closure.

In summary, I find it ironical that for all our efforts as reserve officers to evolve the state of art partnership that exists today between reserve and active duty counterparts, i.e., the Department of Defense "total force policy", an uninformed decision such as this one could be made by an entity of our Government!

Sincerely,

[REDACTED]
[REDACTED]
Captain, USAFR RET
[REDACTED]
CSA [REDACTED]

enclosed:

- Attachment 1 - Letter from the Department of Interior dated 07/30/2009
- Attachment 2 - Letter from the Office of Personnel Management dated 09/03/2009
- Attachment 3 - Letter from the Office of Personnel Management dated 10/07/2009
- Attachment 4 - Letter from the Office of Personnel Management dated 12/09/2009
- Attachment 5 - Letter from me to the Office of Personnel Management dated 01/03/2010



United States Department of the Interior

OFFICE OF THE SECRETARY

National Business Center
Payroll Operations Division
P.O. Box 272030 D-2671
Denver, Colorado 80227-9030

July 30, 2009

[REDACTED]

The official records of your retirement deductions withheld by your agency have been certified correct and have been sent to the United States Office of Personnel Management (OPM) via a Register of Separations. Identifying data from that Register is provided below for your information. You should refer to this data if you need to contact OPM:

FULL NAME: [REDACTED]
SEPARATION DATE: 7/16/2009
RETIREMENT SYSTEM (CSRS or FERS): CSRS
REGISTER NUMBER: [REDACTED]
REGISTER DATE: 7/30/2009
DATE REGISTER MAILED TO OPM: 7/30/2009
PAYROLL OFFICE NUMBER: [REDACTED]

OPM's processing times fluctuate depending on current workloads. If you have filed an application for retirement or refund of your retirement deductions, you may contact OPM for the status of your claim as shown below:

You may contact OPM's Retirement Information Office from 7:30 AM to 5:00 PM (Eastern Time) by calling 1-888-USOPMRET - 1 (888) 767-6738, by sending an e-mail to retire@opm.gov, or by writing to the address shown below. Please include the register number and register date shown above in this letter.

U.S. Office of Personnel Management
Retirement Operations Center
PO Box 45
Boyers, PA16017

IN/15/09

Attachment 1

United States
Office of Personnel Management
Retirement Programs
Washington, DC 20415

Date	09/03/2009
Claim No.	CSA- [REDACTED]

We Are Refunding Your Excess Retirement Deductions

We are including in your initial annuity payment the retirement deductions taken from your salary after you performed service in excess of the service necessary to produce the maximum basic annuity. These deductions are not needed to give you the maximum annuity you earned. (To obtain the maximum annuity, we have applied your excess deductions to pay in full for any service for which no retirement deductions were taken and to pay any redeposit due for service for which you received a refund.) See your retirement benefits booklet for the amount of refunded deductions and interest.

If you wish, you can use this money to buy additional annuity. If you decide to do this, we will report the amount of additional annuity we pay you as a separate item for income tax purposes. Your additional annuity will not receive cost-of-living adjustments.

Most people prefer to accept the refund of excess deductions because it takes 10 years or longer for the additional annuity to equal the total refund. You can buy \$7.68 of additional annuity each year (not month) for each \$100 of excess deductions and interest. If you are married and you have provided a survivor benefit for your spouse, the figure quoted is the annuity you can purchase if you want your spouse to share in the added income after your death. A spouse's share of the additional annuity is 50% of the amount payable to the annuitant. If you are not married, we have quoted you the amount of additional annuity payable only during your lifetime.

Do nothing if you want to keep the refund. If you want, instead, to purchase additional annuity, return the amount of the excess deductions and interest to us within 30 days from the date of this letter. Use a check or money order made payable to the Office of Personnel Management and mail it to the Office of Personnel Management, P.O. Box 7125, Washington, DC 20044. Please be sure to show your CSA number and the words "Voluntary Contributions" on your check or money order and attach a copy of this letter to your remittance.

If you are married and do not want your spouse to share in the added income after your death, you must write to us asking for additional annuity payable only during your lifetime; attach your request to the check or money order and be sure to sign the request. You cannot change your mind after the 30-day time limit has expired. You cannot change the amount of additional annuity you receive if your marital status changes after the 30-day time limit has expired.

Office of Retirement Programs

United States
Office of Personnel Management
Retirement Operations Center
PO Box 45
Boyers, PA 16017-0045

Form Approved:
OMB No. 3206-0212

Rollover Information

Claim number	CSA [REDACTED]
Case name	[REDACTED]
This notice dated	October 7, 2009
Please reply by	November 6, 2009

This letter explains an important election available to you that will affect your lump-sum payment. You have until the "reply by" date shown above to decide how you want your benefit to be paid. The enclosed "Special Tax Notice Regarding Rollovers" explains how the election affects your payment. Please read carefully all of the information provided with this letter before making your decision.

Rollover Allowed

Effective January 1, 2002, you are permitted to roll over certain benefits paid after December 31, 2001, into an individual retirement arrangement (IRA), the Thrift Savings Plan, or an eligible employer plan under certain conditions. If the U.S. Office of Personnel Management (OPM) pays the taxable portion of your payment as a direct rollover, no tax is withheld. If OPM pays the taxable portion to you, 20% Federal income tax must be withheld, but to defer income tax you have the option to roll over part or all of the taxable portion yourself within 60 days after you receive the payment. You may then apply for a refund of the 20% withheld when you file your tax return. You may roll over any non-taxable portion of your payment, as well as any taxable portion, subject to the following conditions.

- * You can roll over the taxable portion to an IRA, an eligible employer plan, or your own open account with the Thrift Savings Plan.
- * You can roll over the non-taxable portion to an IRA, but you must keep track of the taxable and non-taxable amounts in the IRA. You can also roll over the non-taxable portion to an eligible employer plan, if the plan certifies that it is willing to accept the payment in a direct trustee-to-trustee transfer from OPM and to account for the payment in accordance with tax law. The plan makes this certification on the enclosed Rollover Election Form, RI 38-117. You cannot roll over the non-taxable portion to the Thrift Savings Plan.
- * Your taxable portion and your non-taxable portion are shown under "Description of Payment."

Description of Payment

You are due a lump-sum payment for Excess Deductions

The amount of your payment is \$17,802.31

The taxable portion is \$571.86

The non-taxable portion is \$17,230.45

CSA 4 495 281

Election Options

The enclosed "Rollover Election" form provides two options for receiving your benefit. Please select one option and return your completed election in the enclosed pre-addressed envelope to reach OPM by the date shown at the top of this letter.

If you choose Option A, we will make the distribution payable to you, less 20% tax withholding on the taxable portion, and send it to your regular payment address. To defer income tax you have the option to roll over part or all of the taxable portion yourself within 60 days after you receive the payment. You may include part or all of the non-taxable portion with the rollover of the taxable portion.

If you choose Option B, we will make all or part of the distribution payable to the IRA(s) or eligible employer plan you specify, with no tax withheld, and send it to you or to the account you specify. We will pay to no more than two IRAs or plans including the Thrift Savings Plan. We will make any remainder of the benefit payable to you, less 20% tax withholding on any remaining taxable portion, and send it to your regular payment address. To defer income tax you have the option to roll over part or all of the remaining taxable portion yourself within 60 days after you receive the payment. If you choose Option B, the amount you elect to roll over must be \$500.00 or more. You may include part or all of the non-taxable portion with the rollover of the taxable portion.

Please note that if you elect Option B, Part 4 must be completed by the financial institution administering your individual retirement arrangement (IRA) or by your eligible employer plan before we can process your election.

Tax Information

See the enclosed "Special Tax Notice Regarding Rollover." Consult a qualified tax advisor or the Internal Revenue Service if you need more information on tax matters.

Questions

If you have questions about the rollover election, you may send us email at retire@opm.gov or call the OPM Retirement Information Office, 1-888-767-8738, Monday through Friday, 7:30 a.m. to 7:45 p.m., Eastern time. Customers within local calling distance to Washington, D.C., must contact us on (202) 606-0600. Address written inquiries to:

U.S. Office of Personnel Management
Retirement Operations Center
PO Box 45
ATTN: ROLLOVERS
Boyers, PA 18017-0045

Please furnish the claim number shown on the other side of this notice when contacting OPM and give us your daytime telephone number.

Important

If you do nothing, we will make payment to you after the "reply by" date shown above, less 20% tax on the taxable portion, and send it to your regular payment address. You have the option to rollover part or all of the taxable portion yourself tax free within 60 days after you receive the payment.

Enclosure: Special Tax Notice Regarding Rollovers, RI 37-22
Rollover Election, RI 38-117
Return Envelope

Privacy Act Statement

Public Law 102-318 authorizes the solicitation of this information. The data you furnish will be used to identify direct rollovers and determine Federal income tax withholding on your lump-sum benefit. The information may be shared and is subject to verification via paper, electronic media, or through the use of computer matching programs, with national, state, local or other charitable or social security administrative agencies in order to determine benefits under their programs, to obtain information necessary for determination or continuation of benefits under this program, or to report income for tax purposes. It may also be shared and verified as noted above, with law enforcement agencies when they are investigating a violation or potential violation of civil or criminal law. Section 7701 of title 31, U.S. Code requires that any person doing business with the Federal government furnish a Social Security Number or tax identification number. The Government may use your number in collecting and reporting amounts that you owe the Government. Failure to furnish information may result in Federal income tax withholding from your lump-sum benefit.

Public Burden Statement

We think providing this information takes an average 30 minutes per response, including the time for reviewing instructions, getting the needed data, and reviewing the requested information. Send comments regarding our estimate or any other aspect of this form, including suggestions for reducing completion time, to the U.S. Office of Personnel Management, OPM Forms Officer, (3206-0212), Washington, D.C. 20415-7900. The OMB number, 3206-0212, is currently valid. OPM may not collect this information, and you are not required to respond, unless this number is displayed.



United States
**Office of
Personnel Management** Washington, DC 20415-0001

12/09/2009

CSA [REDACTED]

Dear Mr. [REDACTED]

Upon further review the following service has been disallowed.

The military service for the years 58,59,60,61,62,63,64,65, and 66 was not usable. National Guard service is generally not creditable unless the service was active duty performed under title 10 of the U.S. Code - which would include Presidential or Secretary call-up. Initial active duty for training performed under title 10 is also potentially creditable (but not if performed under title 32). The annual training performed by the National Guard is usually performed under title 32 of the U.S. code, so it would not be creditable. In fact except for periods of mobilization (call-up). Most National Guard active duty is performed under Title 32.

The enactment of the Uniformed Services Employment and Reemployment Rights Act (USERRA) of 1994 changed the definition of "military service" in the retirement law with respect to absences from Federal civilian employment followed by reemployments that occur after August 1, 1990. After August 1, 1990, when a CSRS or FERS employee is absent from his civilian position to perform National Guard active duty under title 32, and exercises reemployment rights with his civilian Federal employer after the service, he may receive credit for the absence (subject to military deposit).

In your case the service was considered under Title 32 and not creditable. You were credited for your regular military service from 01/26/68 to 01/04/69. Your new total excess deduction amount is \$7,870.44.

This represents the initial decision of the Office of Personnel Management (OPM). If you wish to dispute our findings, you may request reconsideration. We have enclosed Information and Instructions on Your Reconsideration Rights (form RI 38-47), which explains how to file your request. Please note that your request for reconsideration must be filed within 30 days of the date of this letter. After receipt of your request for reconsideration, OPM will issue a final decision in this matter. If you disagree with OPM's final decision, you can appeal to the Merit Systems Protection Board (MSPB). You may appeal to the MSPB only after OPM has issued a final decision. To ensure prompt handling, please attach a copy of this letter to your reconsideration request. You may provide additional evidence or statements to substantiate your claim.

Attachment 4

02/23/2011 09:01 FAX 808 545 4683

SEN DANIEL AKAKA

2010/013

Sincerely,



A. Garcia

Legal Administrative Specialist
Claims 1 Group

Enclosure: RI 38-47.

Attachment 4

January 03, 2010



Office of Personnel Management
Retirement Operations Center
P. O. Box 45
Boyers, PA 16017-0045

Dear Sir/Madam;

In response to A. Garcia's letter dated 12/09/2009 (Attachment 1) and received by me on 12/15/2009 this is my request for reconsideration of your initial decision, because I believe you may be in error.

I have consulted with Capt. Samuel F. Wright, JAGC, USN (Retired) who is now Director, Reserve Officers Association Servicemembers Law Center. He told me he is one of two attorneys previously employed by the Department of Labor to draft the initial language for the Uniformed Services Employment and Reemployment Rights Act of 1994 and that the intent of the proposed legislation at the time was to "grandfather" events before the actual passage of the legislation. Given this, the philosophy of the legislation was to enhance, not restrict, the various situations that might be encountered by reservists and/or veterans. Further, this philosophy is reflected in your Benefits Administration Letter, Number 95-101, dated January 27, 1995, i.e., that "USERRA requires that OPM's regulations provide at least as liberal benefits for Federal employees as the regulations which will be proposed by the Department of Labor and which will be applicable to the private sector." Your pre-1995 philosophy as reflected in the CSRS and FERS Handbook, Chapter 22 entitled creditable Military Service does that. Capt. Wright also told me he is not aware of this matter having been litigated.

Further, for your information my military service for the years 58, 59, 60, 61, 62, 63, 64, 65 and 66 was reviewed by the U.S. Fish and Wildlife Service as required by a Comptroller General Decision and my military time was deemed creditable for retirement purposes. Accordingly, the Service changed my Service Computation Date to reflect the creditable military time and documented it in Notification of Personnel Action dated 12/20/71 (Attachment 2, Page 1 of 5). Pages 2-5 of attachment 2 document the continuity of this action.

I have claimed only Federal active military duty meeting the criteria articulated by the applicable portions of the CSRS and FERS Handbook contrary to A. Garcia's assertion that in my case the service was considered under Title 32 and not creditable. I included copies of appropriate excerpts from the OPM handbook with my retirement application for OPM's perusal and have not repeated them here. However, I am herewith providing supplementary evidence to substantiate my claim. Attachment 3 is a copy of Letter Order dated 17 June, 1958 stating "By Direction of the Pres, UP of Subsection 233(D), Armed Forces Reserve Act of 1952 (PL476,82D

100-5313

Congress) and Reserve Forces Act of 1955 (PL 305, 84TH Congress), FOL Amn-AFNGUS, . . . are ordered to ACDUTRA for PD 19-JUN THRU 25 AUG 58 for the USAF Basic Military Training Course BT 00012."

Orders for Federal active duty including the annual 15-day Training Periods were issued pursuant to Title 10 of the U.S. Code via various communications including regulations, letters, messages, etc., to the parent reserve unit, which in turn, issued appropriate orders (called Special Orders, aeronautical orders, etc.) to individuals of the unit. Both personnel specialists of my agency personnel office and I made inquiries to appropriate adjutant general offices as instructed by the CSRS and FERS Handbook to retrieve copies of orders reflecting Title 10 authority, however, we were informed that military personnel records rarely contain copies of all orders placing individuals on active duty. More often the Special Orders issued to individual unit members cite Air Force Regulations that have articulated the authority (i.e. Title 10 USC) for the actions. Thus, when attending the annual 15-day training or other designated Federal active duty the individual reservist had all the responsibilities and benefits of regular airmen; including benefits, for example, such as access to military commissaries otherwise unavailable to reservists. Attachment 4 is examples for orders reflecting the Title 10 USC authority or other qualifying criteria identified in the CSRS and FERS Handbook and Attachment 5 is examples of special orders issued pursuant to Title 10 USC authority by the respective adjutant general offices or lower echelons delegated the task of issuing special orders.

I am also including as Attachment 6, a copy of Section 831.301 Title 5 Code of Federal Regulations which is the implementing regulation for the statute detailing credit for military services. According to this regulation it would seem that my military time is creditable for retirement purposes.

I would appreciate your review of this supplementary information. If you do not then concur with this claim of Federal active duty as creditable Federal service, please extend the time limit for resolution in accordance with your form RI38-47 entitled Instructions on Your Reconsideration Rights. I will need additional time to obtain written evidence from military and Congressional sources and the Department of Labor to further substantiate the applicability of my military time as a reservist and veteran to my civil service retirement. Previous experience by me and my Service Personnel office in making these kinds of inquiries indicates a minimum of sixty days is required to obtain a written response even if initiated by telephone and followed by written confirmation.

Thank you.

Sincerely,

[REDACTED]
DOB [REDACTED]
CSA [REDACTED]

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON 25, D. C.



Reply to

Attn of: AFPMPJC2

7 October 1963

Subject: Appointment as a Reserve Officer of the Air Force

O : 2d Lt [REDACTED] AO [REDACTED] Res AF
40 Churchill Street
Amherst, Massachusetts

AFSC: 6421
TKSD: 27 Apr 63
PSD: 27 Apr 63
TFCSD: 27 Apr 63

THRU: The Adjutant General, State of Massachusetts

1. The Secretary of the Air Force has directed me to inform you that, by direction of the President, you are tendered an appointment as a Reserve Officer of the Air Force, in the grade and with service number shown in address above, for an indefinite term.
2. There is attached a form for oath of office (AF Form 133), which you are requested to execute and return promptly to this office. The execution and return of the required oath of office constitute an acceptance of your appointment. No other evidence of acceptance is required. Failure to execute and return the required oath of office will result in cancellation of this appointment and withdrawal of Federal recognition in the Air National Guard.
3. Upon acceptance, this appointment will become effective on the date of temporary Federal recognition in the Air National Guard, State of Mass., 27 April 1963. If you accept this appointment, you will be discharged from any appointment you may hold in this or another service.
4. You will not perform the duties of an officer under this appointment until specifically ordered by competent authority.
5. Authority for this appointment is Sec 593 and 8351b, Title 10, U. S. Code.

A handwritten signature in cursive script, reading "S. O. Sartor", is located below the numbered list.

S. O. SARTOR
Colonel, USAF
Directorate of Military Personnel

1 Atch
AF Form 133 w/envelope
Copy to: Ch, NGB

DEPOSITS FOR POST 56 MILITARY SERVICE

Persons First Employed Under the Civil Service Retirement System Before 10-1-82

If You Will Be:	Your Choices:	Effect on Your Annuity:
Eligible for Social Security benefits at the time of retirement	Paying deposit for post-56 military service before retiring	All military service will be counted in computation of annuity.
	Not paying deposit for post-1956 military service before retiring	All military service will count towards <u>title</u> to annuity. Only Pre-1957 military service counted in <u>computation</u> of annuity.
Ineligible for Social Security benefits at the time of retirement, but become eligible after annuity has begun (at age 62)	Paying deposit for post-56 military service before retiring	All military service will be credited for title and computation at the time annuity begins <u>and</u> later.
	Not paying deposit for post-56 military service before retiring	All military service will be credited for title and computation when annuity begins. At age 62 (when you become eligible for Social Security), your annuity will be recomputed to eliminate credit for post-1956 military service.
Not eligible for Social Security benefits at age 62	→	All military service will be credited for title and computation without payment of deposit.

SERVICE CREDIT PROBLEM

QUEST **Q:** I retired in December 2003 and had 20 years of service as of July 2003, but worked five more months just to make sure I had good credit for 20 years. I wanted to buy back my military service (active duty) so I would have credit for that time. I cannot get the Minnesota National Guard to verify active duty I performed. Therefore, the Office of Personnel Management (OPM) will credit me with only 19 years, 11 months and 26 days, not 20 years, five months and six days.

Prior to retirement, I contacted the Minnesota National Guard. They told me to contact the St. Louis records center. They told me to contact the National Guard, who said they don't have to "confirm" the duty. I then contacted my senator, who after four and a half months did nothing. Then I contacted my congresswoman. So far, her office has not gotten anywhere. OPM and DFAS have both said it's past the one-year time period, therefore, it's a dead issue; I wouldn't get any back pay or credit, and basically to just drop it.

Because I tried to get this all taken care of before I retired, I don't think this is entirely my fault. Is there any way the organization can help me?

Response: You may want to see the Web site www.opm.gov/asd. Scroll down to the "CSRS and FERS Handbook for Personnel and Payroll Offices." See CO 22, Chapter 22 on Creditable Military Service. At the end of this chapter is an explanation of creditable National Guard service and how this should be verified. Your former agency should have this handbook.

You should submit the information to your former agency and OPM for consideration if the National Guard service appears to be creditable. (If you don't have a computer, contact NARFE, and we will send the information to you.)

111 FMSR 68

110 LRP 48082

**Linton V. Powell v. Office of Personnel
Management**

114 MSPR 580

U.S. Merit Systems Protection Board

DC-0831-10-0408-I-1

August 23, 2010

Related Index Numbers

1002.045 Retirement Benefits

Judge / Administrative Officer

Susan Tsui Grundmann

Judge / Administrative Officer

Anne M. Wagner

Judge / Administrative Officer

Mary M. Rose

Ruling

The MSPB reversed an initial decision that dismissed the appellant's appeal of the Office of Personnel Management's denial of his application for a deferred annuity. The board remanded the appeal for further adjudication.

Meaning

The MSPB may take jurisdiction over a retirement appeal in the absence of an OPM reconsideration decision where the appellant has made repeated requests for such a decision, and the evidence indicates that OPM does not intend to issue a reconsideration decision.

Case Summary

The Office of Personnel Management denied the appellant's application for a deferred annuity on the basis that he lacked the requisite creditable service. Almost seven years later, he filed a board appeal, alleging that OPM improperly denied his request. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to establish that OPM issued a final decision on his deferred annuity request. The MSPB determined that

the AJ erred in finding that the board lacked jurisdiction, ruling that OPM in effect had issued an appealable final decision concerning the appellant's request for a deferred annuity. The board found that OPM's Dec. 17, 2007, letter constituted a final, appealable decision on the appellant's eligibility for a deferred annuity. The letter did not mention reconsideration, and nothing in OPM's submissions indicated that it intended to take further action on this matter.

The MSPB remanded the appeal for further adjudication. If the AJ found that the appeal was timely filed or that good cause existed for the delay, he was to adjudicate the merits of the appeal.

Full Text

APPEARANCES:

Linton V. Powell, Colon, Panama, pro se.

Kristine Prentice, Washington, D.C., for the agency.

Opinion and Order

The appellant has filed a petition for review of the initial decision that dismissed his appeal of the decision of the Office of Personnel Management (OPM) denying his application for a deferred annuity under the Civil Service Retirement System (CSRS). For the reasons set forth below, we DENY the petition for failure to meet the Board's review criteria under 5 C.F.R. § 1201.115(d), REOPEN the appeal on the Board's own motion under 5 C.F.R. § 1201.118, REVERSE the initial decision, and REMAND the appeal for further adjudication consistent with this Opinion and Order.

Background

The appellant applied for a deferred annuity, and OPM issued a September 18, 2003 initial decision denying his request on the basis that he lacked the requisite creditable service. Initial Appeal File (IAF), Tab 1 at 1, Tab 4 at 4. The initial decision informed the appellant that he had 30 days to request reconsideration and advised him that he could seek a

refund for his retirement deductions. IAF, Tab 4 at 4. The appellant apparently contacted OPM again, and the same official who issued the initial decision wrote the appellant a December 5, 2003 letter stating that if the appellant did not like the initial decision, he was required to request reconsideration within 30 days, and that she could not assist the appellant because she was the one who made the initial decision. IAF, Tab 1 at 7. The appellant apparently contacted OPM again, and OPM issued a December 17, 2007 letter that made no reference to OPM's prior correspondence with the appellant in 2003, but similarly stated that the appellant lacked the requisite 5 years of creditable service for an annuity. *Id.* at 8. The December 17, 2007 letter also stated that he was ineligible for any further benefits because he had received a refund for his retirement deductions in 2006. *Id.* The record does not contain the appellant's correspondence to OPM.

On or about March 20, 2010, the appellant filed a Board appeal, alleging that OPM improperly denied his request for a deferred annuity. *Id.* at 1-2. The appellant did not request a hearing. OPM moved to dismiss the appeal for lack of jurisdiction on the basis that it had not issued a final decision on the matter. IAF, Tab 4 at 2. The administrative judge issued a show cause order informing the appellant that the Board has jurisdiction to review an OPM determination regarding an individual's retirement rights or interests only after OPM has issued a final or reconsideration decision. IAF, Tab 5 at 1. He directed the appellant to file evidence and argument to prove that the appeal is within the Board's jurisdiction. *Id.* at 1-2. He also issued an order stating that the appeal appeared to be untimely, and directing the parties to file evidence and argument on the issue. IAF, Tab 3 at 1-4. The appellant replied to the jurisdictional order, alleging that he "immediately responded" to OPM's initial decision, but that OPM denied his response as untimely. IAF, Tab 7. The parties did not respond to the administrative judge's order regarding the timeliness of the appeal.

The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction.

IAF, Tab 8, Initial Decision (ID) at 1, 5. He found that the appellant failed to establish that OPM issued a final decision on his request for an annuity. ID at 4-5. Because he dismissed the appeal for lack of jurisdiction, the administrative judge did not reach the timeliness issue. ID at 5 n.*.

The appellant has filed a petition for review, claiming that he responded to OPM's initial decision outside the 30-day time period due to belated receipt of OPM's decision. Petition for Review File (PFR File), Tab 1 at 3. He seems to argue that OPM should have considered this response as a request for reconsideration. *Id.* The appellant also challenges the merits of OPM's decision. *Id.* at 4-6. OPM has filed a response, arguing that the petition for review should be denied for failure to meet the Board's review criteria. PFR File, Tab 4 at 4.

Analysis

The Board generally has jurisdiction to adjudicate an individual's rights and interests under the CSRS only after OPM has rendered a reconsideration decision on the issue in question. *Luna v. Office of Personnel Management*, 89 M.S.P.R. 465, ¶ 8 (2001); see 5 C.F.R. §§ 831.109(c)-(f), .110. Nevertheless, the Board may take jurisdiction over a retirement appeal in the absence of an OPM reconsideration decision where the appellant has made repeated requests for such a decision and the evidence indicates that OPM does not intend to issue a reconsideration decision. *Luna*, 89 M.S.P.R. 465, ¶ 8. Because, as discussed below, OPM in effect has issued an appealable final decision concerning the appellant's request for a deferred annuity, we find that the administrative judge erred in determining that the Board lacks jurisdiction over the instant appeal. ID at 4-5.

In this case, the record shows that the appellant filed an application for a deferred annuity with OPM, and that OPM issued a September 18, 2003 initial decision denying the application.¹ IAF, Tab 1 at 1, Tab 4 at 4. The record also shows that the appellant subsequently contacted OPM at least twice because

OPM issued letters on December 5, 2003, and December 17, 2007, responding to his further inquiries. IAF, Tab 1 at 7-8. It is apparent from the letters themselves that the appellant was making further inquiry into his eligibility for a CSRS annuity. *Id.* Therefore, we disagree with OPM that "there is no evidence that [the appellant] requested reconsideration." IAF, Tab 4 at 2. However, the record does not show whether the appellant's inquiries met the criteria for a request for reconsideration. See 5 C.F.R. § 831.109(d) ("A request for reconsideration must be in writing, must include the individual's name, address, date of birth and claim number, if applicable, and must state the basis for the request.").

Nevertheless, regardless of whether the appellant properly requested reconsideration from OPM, we find that OPM's December 17, 2007 letter constitutes a final, appealable decision on the appellant's application for a deferred annuity. IAF, Tab 1 at 8. The letter, addressed to the appellant, states:

You received a refund of your contributions on 12-22-2006. You are not eligible for any further benefits from the U.S.[.] Civil Service Retirement System.

The SF50 you submitted states that you did not pay into the retirement system during this period of service. This time could not be used towards your five years of service needed for a deferred annuity at age 62.

Id.

The December 17, 2007 letter clearly constitutes a decision on the appellant's eligibility for benefits under the CSRS, but OPM did not label it as either an initial decision or a final decision. *Id.* The letter does not state that the appellant has any right to seek reconsideration from OPM, which is a requirement of an OPM initial decision. 5 C.F.R. § 831.109(c). Nor did it inform the appellant of his right to appeal to the Board under 5 C.F.R. § 831.110, which is a requirement of an OPM final decision. 5 C.F.R. § 831.109(f). Under the circumstances of this case, however, we find that the December 17, 2007 letter

constitutes a final, appealable decision from OPM. Specifically, the letter did not mention reconsideration, and nothing in OPM's submissions to the Board indicates that it intends to take further action in this case. IAF, Tab 1 at 8, Tab 4 at 2; PFR File, Tab 4 at 4; see *Johnson v. Office of Personnel Management*, 113 M.S.P.R. 118, ¶ 12 (2010); *Luna*, 89 M.S.P.R. 465, ¶ 9; *Scallion v. Office of Personnel Management*, 72 M.S.P.R. 457, 461 (1996) (the absence of a reconsideration decision does not preclude Board review of a retirement decision when OPM fails to advise the appellant of his right to request a reconsideration decision and does not intend to issue any further decision on the appellant's application). Because OPM did not inform the appellant of his right to request reconsideration of its December 17, 2007 decision, we find it inappropriate to require a reconsideration decision as a prerequisite for Board review. See *Richards v. Office of Personnel Management*, 29 M.S.P.R. 310, 312 (1985). We therefore find that OPM's December 17, 2007 letter constitutes an appealable final decision affecting the appellant's rights and interests under the CSRS and that the Board has jurisdiction to consider the merits of the appellant's claim.² See IAF, Tab 1 at 8.

As noted above, the administrative judge ordered the parties to file evidence and argument regarding the timeliness of the appellant's Board appeal, but the record closed without either party responding to the order. *Supra*, ¶ 3; IAF, Tab 3 at 1-4. Nevertheless, for the following reasons, we find it inappropriate to rule on the timeliness issue based on the existing record.

When an agency is required to notify an individual of his Board appeal rights but fails to do so, the agency's failure may constitute good cause for a filing delay. See *Shiflett v. U.S. Postal Service*, 839 F.2d 669, 674 (Fed. Cir. 1988); *McClendon v. Office of Personnel Management*, 92 M.S.P.R. 250, ¶¶ 10-13 (2002). In such cases, an appellant need not show that he acted diligently in discovering his Board appeal rights; he need only show that he acted diligently in pursuing his Board appeal rights once he discovered them. *Herring v. U.S. Postal Service*, 72 M.S.P.R.

438, 443 (1996). In this case, OPM's December 17, 2007 decision does not appear to include notice of Board appeal rights, and it is unclear whether or how long the appellant delayed in filing his Board appeal once he actually learned of his Board appeal rights. Because the timeliness issue will likely turn on these facts, and the parties were not previously ordered to address these specific issues, we find it appropriate to remand the appeal for further development of the record. See *Bautista v. Office of Personnel Management*, 74 M.S.P.R. 47, 50 (1997).

Order

Accordingly, we remand this case to the Washington Regional Office for further adjudication consistent with this Opinion and Order. If the administrative judge finds that the appeal was timely filed, or that good cause existed for the delay, he shall adjudicate the merits of the appeal.

¹The record does not contain the appellant's application for an annuity.

²To the extent that OPM intended its December 5, 2003 letter to constitute an appealable final decision, IAF, Tab 1 at 7, that does not preclude the Board from taking jurisdiction over the appeal pursuant to the December 17, 2007 letter, *id.* at 8, *cf. Smith v. Office of Personnel Management*, 114 M.S.P.R. 395, ¶¶ 7-8 (2010) (where OPM issued two decisions it had designated as "final" on the appellant's application for a survivor annuity, the Board had jurisdiction pursuant to the later decision). In addition, the instant appeal is distinguishable from *Muycov. Office of Personnel Management*, 104 M.S.P.R. 557, ¶¶ 2-3, 11-12 (2007), where the Board found that OPM's letter informing the appellant that it was rejecting his new request for reconsideration, after the Board had already adjudicated his appeal concerning an earlier reconsideration request, was not an appealable final decision. The Board concluded that the letter in *Muyco* did not constitute a decision on the merits of the appellant's claim of entitlement to an annuity, but instead, it merely referred to OPM's previous final decision, which the appellant had

already appealed to the Board. 104 M.S.P.R. 557, ¶¶ 2, 11. In this case, however, the December 17, 2007 letter addresses the merits of the appellant's claim without referring to any previous OPM decision. IAF, Tab 1 at 8.

Cases Cited

89 MSPR 465
113 MSPR 118
72 MSPR 457
29 MSPR 310
839 F.2d 669
92 MSPR 250
72 MSPR 438
74 MSPR 47

91 FMSR 5031

**Rachel E. Thomas v. Office of Personnel
Management, Louis M. Thomas
(Intervenor)**

**U.S. Merit Systems Protection Board
BN08318910095(01/28/91); 46 MSPR 651
January 28, 1991**

Judge / Administrative Officer

**Before: Levinson, Chairman; Amador, Vice
Chairman; Parks, Member**

Related Index Numbers

30.004 Death Benefits, Eligibility

30.005 Death Benefits, Effect of Federal Laws

91.0036 Retirement, Annuities, Survivor

**1023.012 Statutory Construction, Congressional
Intent**

1024.052 Federal Laws, Spouse Equity Act

Case Summary

The Board found that the intervenor's request to eliminate the appellant's survivor annuity was properly denied.

The intervenor petitioned for review, claiming that his request to eliminate the appellant's survivor annuity was improperly denied. Upon review, the Board held that the appellant was entitled to the survivor annuity that had been elected for her prior to her divorce from the intervenor. The annuity had been "expressly provided for" in the divorce decree, contrary to the intervenor's contentions.

Full Text

APPEARANCES:

Norris R. Karp, Esquire, Boston, Massachusetts, for the appellant.

H.T. Newland, Jr., Washington, D.C., for the agency.

Susan F. Horwitz, Esquire, Boston, Massachusetts, for the intervenor.

Opinion and Order

The intervenor has petitioned for review of the

initial decision, issued on June 7, 1989, that did not sustain the agency's reconsideration decision granting the intervenor's request to eliminate the appellant's survivor annuity benefit. 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. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order. The agency's reconsideration decision is NOT SUSTAINED.

Background

When Mr. Thomas retired from government service in 1983, he elected to provide a survivor annuity for his wife, the appellant. Following the Thomases' divorce in 1987, Mr. Thomas requested the Office of Personnel Management (OPM) to cancel the appellant's survivor benefit and recompute his annuity to the life rate. OPM initially declined to do so, citing Paragraph 3 of the property settlement agreement which had been incorporated into the court's decree of divorce:

The Husband agrees to maintain all rights and benefits to which the Wife is entitled and may realize in connection with his retirement and pension package as a retired employee of the federal government.

Agency File (A.F.), Tab 5. OPM advised Mr. Thomas that the appellant was entitled to retain her survivor annuity benefit under 5 U.S.C. § 8341(h)(1), which establishes a former spouse's entitlement to a survivor annuity when expressly provided for in a decree of divorce. A.F., Tab 4.

OPM reversed its position in its reconsideration decision, finding that the property settlement agreement did not expressly provide for survivor annuity benefits as required by section 8341(h)(1) and its regulations. A.F., Tab 2. When the appellant filed an appeal to the Board's regional office, OPM again reversed its position and asked the Board to reverse its reconsideration decision.¹ The administrative judge found that the language employed in Paragraph

3 of the court-approved property settlement agreement did expressly provide for a survivor annuity as required by the statute and regulations.

In his petition for review, Mr. Thomas contends that the administrative judge erroneously interpreted and applied the applicable statutes and regulations.

Analysis

When a Federal employee elects to receive a reduced annuity at the time of retirement in order to provide a survivor annuity to his spouse, and the couple later divorces, the former spouse is entitled to retain her survivor annuity benefit "if and to the extent *expressly provided for*" in the terms of the decree of divorce or court-approved property settlement agreement. 5 U.S.C. § 8341(h)(1) (emphasis added).² The "expressly provided for" requirement is further explicated in OPM's regulation at 5 C.F.R. § 831.1704(c)(2):

For purposes of awarding a former spouse annuity, the court order must either state the former spouse's entitlement to a survivor annuity or direct an employee, Member, or retiree to provide a former spouse annuity.

Mr. Thomas contends that the court-approved property settlement agreement in this case did not "expressly provide for" a survivor annuity as required by the statute and OPM's regulation because it did not use the specific phrases "survivor annuity" or "former spouse annuity." Although the property settlement agreement in this case could have been more artfully worded, we believe that the language used—"The Husband agrees to maintain all rights and benefits to which the Wife is entitled and may realize in connection with his retirement and pension package as a [Federal retiree]"—clearly and unambiguously referred to the appellant's then existing survivor annuity. Indeed, Mr. Thomas has failed to point to any other right or benefit to which this language could have been intended to apply, and we concur with OPM and the administrative judge that no other reasonable construction is possible.

We view the "expressly provided for"

requirement of the statute and OPM's regulation as precluding OPM or the Board from undertaking its own determination of spousal entitlements or making an award of survivor benefits based on uncertain or ambiguous state court orders.³ To say that a provision must be "express," however, is not to say that it must contain particular "magic words." A provision is "express" when it is "clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous." Black's Law Dictionary 521 (5th ed. 1979). We conclude that, since the clear and unmistakable intent of the court order in this case was to award the appellant a survivor annuity, it "expressly provided for" that benefit within the meaning of section 8341(h)(1).

Mr. Thomas's reliance on *Bottrell v. Office of Personnel Management* [MSPB DC08318710201(03/23/88), 88 FMSR 5113], *aff'd per curiam*, 867 F.2d 1421 (Fed. Cir. 1989), is inapposite. We there held that a divorce decree was ineffective to award a former spouse annuity under 5 U.S.C. § 8341(h)(1), where it named the wife as the "sole and primary beneficiary of any death benefits which her husband would receive by reason of his employment with the United States government. . . ." We noted, however, the ambiguity of the term "death benefits," which can mean either a survivor annuity or a lump-sum payment. *Id.* There is no such ambiguity in the court order at issue in this case.

In further support of his argument that a qualifying court order must contain certain specific phrases, Mr. Thomas relies on a set of Guidelines issued by OPM to explain how it will interpret terms and phrases frequently used in awarding survivor benefits. See 5 C.F.R. Part 831, Subpart Q, Appendix B. These Guidelines state that "[t]o provide a section 8339(j) [former spouse] annuity, the order *must* use terms such as 'former spouse annuity,' 'section 8339(j) annuity,' or 'survivor annuity.'" *Id.* (emphasis added).

We find that, despite the use of the word "must," the Guidelines were intended as aids to the practitioner, not as mandatory requirements. First, it is apparent that OPM itself does not view the Guidelines

as substantive rules, since it did not cite them in its reconsideration decision as a basis for granting Mr. Thomas's request for a life rate annuity, and since OPM's current position is that the court-approved property settlement agreement is a qualifying court order under 5 U.S.C. § 8341(h)(1) and 5 C.F.R. § 831.1704. Second, it is significant that the Guidelines are not contained in the regulations themselves, but in a separate Appendix. They presumably would have been incorporated into the regulations themselves if intended as mandatory requirements. Third, the term "Guidelines," as opposed to "rules," "regulations," or "requirements," connotes something of an advisory nature.

Two other considerations assist us in our interpretation of the statute and OPM's regulation. First, Congress enacted section 8341(h) as remedial legislation to close what it perceived to be a significant gap in the financial protection afforded former spouses of Federal retirees. Prior to the Spouse Equity Act, OPM could honor a state court order dividing a Federal pension as a marital asset, but could not honor a state court order awarding a survivor annuity to a former spouse. The legislative history reflects Congress's concern about this gap in coverage:

For most former spouses of Federal employees, the threat of living in poverty is exacerbated. Most of these women remained in the home during their marriages and are not eligible for either social security or private pensions. Access to survivor benefits is vital to this group of former spouses.

H.R. No. 1054, 98th Cong., 2d Sess. 12, reprinted in 1984 U.S. Code Cong. & Admin. News 5540, 5542-43. Remedial legislation such as section 8341(h) must be broadly construed to achieve its remedial purpose. See *Hollander v. Office of Personnel Management* [MSPB DC08318810038(12/19/88), 88 FMSR 5480], review granted sub nom. *Horner v. Hollander*, 878 F.2d 1443 (Fed. Cir. 1989) [90 FMSR 7003] (Table). To hold that a court order does not award a survivor annuity to a former spouse unless it employs certain "magic

words," even where such a benefit was clearly and unambiguously intended, would elevate form over substance and frustrate the Congressional purpose.

Second, if a divorce decree or other court order fails to use appropriate language to award a survivor annuity, the former spouse does not have the opportunity to go back into state court and amend or modify the decree to properly award a survivor annuity.⁴ This lack of an opportunity to correct an ambiguously worded order further militates against an overly strict or hypertechnical reading of section 8341(h).

Order

Accordingly, we ORDER the agency to rescind its reconsideration decision granting the intervenor's request to recompute his annuity to the life rate. We further ORDER the agency to honor the Judgment of Divorce Nisi, entered by the Probate and Family Court Department of the Commonwealth of Massachusetts, Suffolk Division, on May 29, 1987, as a qualifying court order entitling the appellant to a former spouse annuity. The agency must complete this action within 20 days of the date of this decision.

We also ORDER the agency to inform the appellant of all actions taken to comply with the Board's order and of the date on which it believes it has fully complied. See 5 C.F.R. § 1201.181(b). We ORDER the appellant to provide all necessary information that the agency requests in furtherance of compliance. The appellant should, if not notified, inquire about the agency's progress. See *id.*

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance. See 5 C.F.R. § 1201.182(a).

This is the Board's final order in this appeal. See 5 C.F.R. § 1201.113(c).

Notice to Appellant and Intervenor

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in this appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). 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 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

1 The administrative judge asked OPM to issue a new reconsideration decision reflecting the agency's current posture in the case, but OPM declined to do so. *See* Initial Appeal File, Tabs 7, 10.

2 Section 8341(h) was added by the Civil Service Retirement Spouse Equity Act of 1984 (Spouse Equity Act), Pub. L. No. 98-615, § 2(4)(G), 98 Stat. 3195, 3200-01.

3 The legislative history of the Spouse Equity Act does not include any significant explication of the "expressly provided for" language in section 8341(h)(1). This language is identical, however, to language in 5 U.S.C. § 8345(j)(1), which authorizes OPM to honor a state court order dividing a Federal retiree's pension as a marital asset. The legislative history of that provision, which was enacted in 1978, reflects Congress's judgment that, rather than undertake its own determination of spousal entitlements, the Federal government should defer to state courts, the traditional arbiters in divorce proceedings, as to the equitable division of Federal retirement benefits. *See McDannell v. Office of Personnel Management*, 716 F.2d 1063, 1065-66 (5th Cir. 1983). For OPM or the Board to construe unclear and ambiguous state court orders as they relate to

former spouse annuities would improperly make them, and not the state courts, the arbiters of spousal entitlements.

4 Section 8341(h)(4) of Title 5, U.S.C., precludes OPM from honoring a court order awarding a former spouse annuity if the order constitutes a modification to the divorce decree made subsequent to the annuitant's retirement. OPM's regulations further provide that an order entered after an employee's retirement will not be effective to award a former spouse annuity unless it is the first order terminating the marital relationship between the retiree and the former spouse, and that it will not recognize a later order, such as a *nunc pro tunc* order, that purports to retroactively amend, explain, clarify, or interpret the earlier order. 5 C.F.R. § 831.1704(e). We have invalidated this regulation to the extent that it requires that a qualifying order must be the first order terminating the marital relationship, holding that an order may be effective to award a former spouse annuity if it is the first order in the divorce action that adjudicates property division and alimony issues. *See Love v. Office of Personnel Management*, MSPB Docket No. DA08318910394, slip op. at 12 (January 28, 1991). We have not, however, invalidated OPM's rule regarding clarifying or explanatory orders.