

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

PAUL HOLTERMANN,  
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,  
Agency.

CSA 2 623 754

DOCKET NUMBER  
NY083192039111

DATE: MAY 5 1993

Gary J. Barrack, Poughkeepsie, New York, for the  
appellant.<sup>1</sup>

Jane N. Lohr, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Antonio C. Amador, Vice Chairman  
Jessica L. Parks, Member

Chairman Levinson concurs in the result.

OPINION AND ORDER

The appellant petitions for review of the initial decision which sustained the reconsideration decision of the Office of Personnel Management (OPM). 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 the appeal on our own motion

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<sup>1</sup> The appellant filed his petition for review pro se, but did not revoke his designation of Mr. Barrack as his representative. See 5 C.F.R. § 1201.31(a).

under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING the reconsideration decision.

#### BACKGROUND

The appellant retired from the Internal Revenue Service (IRS) on August 10, 1983, and applied for a disability annuity. Initial Appeal File (IAF), tab 1. By letter dated November 9, 1983, OPM advised the appellant that his annuity would be reduced when he became eligible to receive Social Security benefits unless he deposited a sum equal to 7 percent of the total pay he had received for military service after 1956. IAF, tab 5, subtab 6. OPM also stated that it could not take final action on the appellant's retirement claim until he elected whether or not to make a deposit. *Id.* By letter to OPM dated April 19, 1984, the appellant indicated that he was "willing but unable" to make the deposit. He attached to his letter a signed election form, which he altered by striking through the words "do not want" and substituting the words "am not able" in the clause "I do not want to make a deposit"; he also struck through language acknowledging that the election was irrevocable. *Id.* Some time later, OPM rendered a final adjudication on the appellant's retirement application.<sup>2</sup>

In 1991 the appellant asked OPM to allow him to make a deposit for his post-1956 military service, IAF, tab 1

<sup>2</sup> It is not clear when final adjudication occurred, but it was before 1987. See IAF, tab 1 (attachment A, para. 11).

(attachment D), but OPM denied the request. *Id.* (attachment E). On March 19, 1992, OPM notified the appellant that his annuity would be reduced because he had become eligible for Social Security benefits. IAF, tab 5, subtab 4. The appellant sought reconsideration, IAF, tab 5, subtab 3, which OPM denied. *Id.*, subtab 2.

The appellant filed a timely petition for appeal, asking that he be permitted to make a deposit for his post-1956 military service in order to reverse the reduction in his annuity. IAF, tab 1. The administrative judge sustained the reconsideration decision, holding that the appellant elected not to make a deposit and, thus, to grant the relief sought would impermissibly result in an expenditure of funds from the Treasury which was not authorized by statute. IAF, tab 11.

In his timely filed petition for review, the appellant asks that the Board reopen the record so that he may introduce additional documentary evidence in which OPM allegedly conceded that the appellant "did not understand [his] rights, the circumstances, and options" surrounding the deposit requirement. Petition for Review file (PRF), tab 1; see IAF, tab 1 (attachment A, para. 12).<sup>3</sup> OPM has not responded to the petition for review.

#### ANALYSIS

Under Pub. L. No. 97-253, 96 Stat. 763 (effective October 1, 1982), a civil service annuitant who retired after

<sup>3</sup> To date, the appellant has apparently been unable to obtain this evidence. PRF, tab 1.

September 7, 1982, is entitled to credit for active-duty military service performed after 1956 under both the Civil Service Retirement and Social Security systems, but only if he or she deposits with the Civil Service Retirement Fund a sum equal to 7 percent of his or her total post-1956 military pay. 5 U.S.C. §§ 8332(j), 8334(j). If an annuitant subject to Pub. L. No. 97-253 does not make such a deposit, OPM must recompute his or her annuity payment, excluding credit for post-1956 military service, when the annuitant becomes eligible for Social Security benefits. 5 U.S.C. § 8332(j)(1).

Under the initial regulations implementing Pub. L. No. 97-253, see 47 Fed. Reg. 43634 (Oct. 1, 1982), an individual who wished to make a deposit was required to make payment to his or her employing agency prior to separation. See 5 C.F.R. § 831.2105 (Jan. 1, 1983). OPM subsequently amended the regulations in order to allow individuals who had retired after September 8, 1982, and before October 1, 1983, to remit a deposit to OPM after separation. 48 Fed. Reg. 3353, 3357 (Jan. 25, 1983). OPM explained that the amendments were made in order "to avoid any hardship for individuals who retired without opportunity to make a deposit, or for employees who retire before employing agencies can implement the provisions [of the previously-issued regulations] to accept deposits for military service." *Id.* at 3354. Whereas a deposit made to an employing agency prior to separation could be made in installments, a deposit remitted to OPM after separation had to be made in a lump sum "prior to final adjudication of the

application for retirement or survivor benefits." *Id.* at 3357-58 (sections 831.2104, 831.2105, 831.2107). OPM issued further amendments to the implementing regulations (effective October 1, 1983) in recognition of the fact that, because of administrative error or misleading advice, some individuals had not been given an opportunity to make a deposit prior to separation. 49 Fed. Reg. 28631 (May 16, 1984). Under the amendments, such an individual would be permitted to make a lump sum deposit to his or her former employing agency, regardless of his or her separation date, during a "period of grace" that would terminate when OPM took final action on the individual's retirement claim. *Id.* See 5 C.F.R. § 831.2107(a)(1) (1992).

The appellant retired on August 10, 1983, without making a deposit. He alleged below that he did not learn of the deposit requirement until after he was separated, and that he was unable to make the lump sum payment because he had put all of his savings toward his son's college education. Hearing tape; IAF, tab 1 (attachment A). According to the appellant, if the IRS had advised him of the deposit requirement prior to his separation, he would have made the deposit in installments. Hearing tape.

The administrative judge correctly held that the Board cannot order OPM to reverse the reduction in the appellant's annuity so long as he has not made a deposit for his post-1956 military service, since such a deposit is explicitly required by 5 U.S.C. § 8332(j). See *Office of Personnel Management v.*

*Richmond*, 496 U.S. 414 (1990) (equitable considerations cannot serve as the basis for a payment from the federal Treasury in derogation of statute). The administrative judge did not fully address whether OPM should have allowed the appellant to revoke his *de facto* election not to make a deposit and permitted the appellant to make a belated deposit, in light of the appellant's allegation that he was wrongfully deprived of the opportunity to make a deposit by installment payments before his separation. As we held in *Pinkston v. Office of Personnel Management*, MSPB Docket No. DC831M910750I1, slip op. at 6 n.2 ( May 5, , 1993), the Supreme Court's decision in *Richmond* does not bar OPM from allowing an individual to make a deposit for military service beyond the regulatory deadline. We reopen the appeal in order to address this issue.

Under the regulatory regime described above, the appellant was required to have made a deposit before OPM took final action on his retirement application, irrespective of why he failed to make a deposit before he was separated. There are three potential bases for waiving a regulatory deadline: (i) the regulation itself may specify circumstances under which the deadline should be waived; (ii) an agency may be equitably estopped from enforcing a regulatory deadline if it engaged in affirmative misconduct; and (iii) an agency's failure to provide notice of election rights and corresponding deadlines may warrant a waiver of a filing deadline, if such notice is required by statute or regulation. *Speker v. Office*

of *Personnel Management*, 45 M.S.P.R. 380, 385 (1990), *aff'd*, 928 F.2d 410 (Fed. Cir. 1991) (Table). None of these bases is applicable here.

First, 5 C.F.R. Part 831, Subpart U, which implements Pub. L. No. 97-253, makes no provision for an individual to make a deposit for post-1956 military service after final adjudication of his or her retirement application. But see *Pinkston*, slip op. at 6 (where an individual failed to make a deposit before he was separated due to administrative error, and where he was not given an opportunity to make a deposit before the final adjudication of his retirement application, he was entitled under 5 C.F.R. § 831.2107(a)(1) to have OPM set a time limit for making a deposit).

Second, the appellant does not allege, and there is no indication, that either the IRS or OPM affirmatively misled him regarding his rights under Pub. L. No. 97-253; accepting as true the appellant's allegation that he was not advised of the ramifications of Pub. L. No. 97-253 before he was separated, we find that such a failure to inform does not rise to the level of affirmative misconduct. Cf. *Speker*, 45 M.S.P.R. at 385 (OPM's failure to advise a retiree of her right to elect an alternative annuity was not affirmative misconduct).<sup>4</sup>

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<sup>4</sup> In *Fox v. Office of Personnel Management*, 50 M.S.P.R. 602, 606 n.4 (1991), we modified the second basis for waiving a regulatory deadline set forth in *Speker*, insofar as it was inconsistent with the Supreme Court's subsequent ruling in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990). The appellant does not allege circumstances which

Third and finally, neither Pub. L. No. 97-253 nor its implementing regulations requires pre-separation counselling related to the potential impact of Pub. L. No. 97-253. But see 48 Fed. Reg. 3354 (Jan. 25, 1983) (OPM "urges[] all agencies . . . to counsel employees who plan to retire before October 1, 1983" regarding the deposit requirement). Thus, accepting as true the appellant's allegation that he was not apprised of the deposit requirement before he retired, such failure does not warrant a waiver of the deadline for making a deposit. Cf. *Speker*, 45 M.S.P.R. at 386 (OPM's failure to advise a retiree of her right to elect an alternative annuity did not warrant a waiver of the deadline for making such an election, where neither statute nor regulation in effect during the election period required notice).

Accordingly, we find no basis for allowing the appellant to make a belated deposit for his post-1956 military service.

#### ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

#### NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See

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would trigger equitable estoppel under the pre-*Richmond/Speker* test, so we need not decide how *Speker*, as modified, might apply.



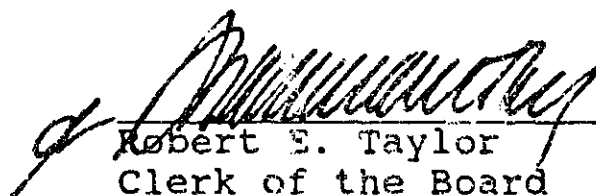
5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

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).

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board