

**2021-1116**

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**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

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**DOREEN CROSS,**

**Petitioner,**

**v.**

**OFFICE OF PERSONNEL MANAGEMENT,**

**Respondent.**

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**PETITION FOR REVIEW FROM THE MERIT SYSTEMS PROTECTION  
BOARD IN NO. AT-0843-19-0760-I-1**

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**REPLY BRIEF FOR PETITIONER**

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**ARGUMENT AND CITATION TO AUTHORITY**

**A. Mr. Cross Did Not Receive Sufficient Notice Regarding the Need to Re-Elect Survivor Benefits Following His Divorce As Required.**

Respondent asserts that Mr. Cross received sufficient notice regarding the need to re-elect former spouse survivor benefits following his divorce.

The Office of Personnel Management failed to provide any evidence that it sent notices to Mr. Cross regarding his annuity benefits between 2005 through 2014, and instead relies upon Petitioner's statement that she found a 2012 Notice following Mr. Cross's death. The Office of Personnel Management cannot presume that Mr. Cross in fact received the Notices as it cannot provide the same, nor is it appropriate for OPM to opine that Mr. Cross was aware of the need to re-elect benefits for a former spouse following divorce as it has no basis on which to support this contention.

By OPM's own admission, it cannot produce or confirm that Notice was properly sent to Mr. Cross from 2005 to 2014 with the exception of the 2012 Notice found by Ms. Cross after Mr. Cross's death. Even the 2012 Notice is only part of the record because Mrs. Cross found and produced it. OPM was unable to. Instead, the Agency contends that the Board determined OPM sent the same annual notice of survivor annuity election rights to Mr. Cross since 2005 all of which "likely contain" the specific language regarding survivor annuity elections for a

former spouse.

In *Wood v. OPM*, the Court addressed the statutory obligation for OPM to provide notice of election rights to the affected employee on an annual basis and noted that failure to provide the requisite notice combined with evidence of intent entitled a former spouse to the annuity. 241 F.3d 1364 (Fed. Cir. 2001). The Court provided that if the required notice is not provided, OPM cannot deny the annuity even if the election has not been made during the applicable time period, as long as there was evidence that the employee wished for his former spouse to receive the annuity. *Id.* at 1367.

Here, OPM has asserted that Mr. Cross received annual notices relating to his annuity which should have provided notice of the statutory requirement to re-elect a reduced annuity to provide for his former spouse. However, this contention fails to address the fact that Mr. Cross died within six (6) months of his legal divorce from Petitioner and did not receive the requisite statutory notice regarding the need to re-elect the reduced annuity to provide for Petitioner following his divorce but prior to his death. At the time Mr. Cross received his 2014 Statutory Notice, assuming he did, in fact, receive it, he and Petitioner were still married. There was no former spouse to make an election for at that time. OPM failed to present any evidence that annual notices were actually sent to Mr. Cross and did not contest the fact that Mr. Cross did not receive any notice of the need for

reelection in the timeframe following his divorce but prior to his death.

In *Hairston v. OPM*, the Court found that the annual notice requirement was not effectively provided when the notice failed to inform the retiree of the need to affirmatively elect a former spouse annuity. 318 F.3d 1127 (Fed. Cir. 2003). Mr. Hairston retired in 1980 and the couple divorced in 1984, although the final judgment of dissolution was not entered until 1987. The Court explained that Mr. Hairston first received notice of the need to re-elect in December 1986, approximately four (4) months prior to the finalization of the divorce decree. Mr. Hairston received annual notices until 1994 but never explicitly elected to provide Ms. Hairston with the survivor annuity following their divorce. However, OPM notified Mr. Hairston of his option to restore his full annuity payments following his divorce, but Mr. Hairston did not make such a request and did not object to continued receipt of reduced payments following his divorce. *Id.* At 1129.

Ultimately, the Court held that OPM must pay a survivor annuity if the following occurs: (1) the statutorily required notice is ineffective; and (2) the evidence shows that the employee intended to provide a former spouse annuity. *Id.* at 1130. In *Hairston*, the Court explained that the Board did not contest Mr. Hairston's intent to provide Ms. Hairston a survivor annuity and that the remaining issue was whether the first relevant notice received by Mr. Hairston was confusing and therefore ineffective. The Court further opined that it did not consider the

suitability of the notice provided to Mr. Hairston prior to the finalization of his divorce and noted that it is the first notice received after the finalization of divorce which is critical because it is at that point at which the employee's election rights to provide a former spouse annuity begin. *Id.* at 1131. The Court concluded that because there was sufficient evidence to prove that Mr. Hairston intended to provide a former spouse annuity and the first notice following the finalization of the divorce was ineffective, Ms. Hairston was entitled to receive the former spouse survivor annuity. *Id.*

In Petitioner's case, Mr. Cross never received any notice of the need to re-elect a surviving spouse annuity following his divorce and prior to his death. As previously discussed, the Cross's divorce was finalized in March 2015 and Mr. Cross passed away in September 2015. Mr. Cross received nothing from OPM following his divorce which would have put him on notice that he needed to affirmatively re-elect to provide a former spouse survivor annuity for Petitioner. Furthermore, Administrative Judge Morris explained in his Initial Decision that it was apparent based on the evidence that Mr. Cross intended for Petitioner to receive a former spouse survivor annuity.

The factual background found in *Simpson v. OPM* is incredibly similar to the instant case, and the Court in *Simpson*, once again, found that a former spouse was entitled to the annuity. 347 F.3d 1361 (Fed. Cir. 2003). In *Simpson*, the

couple separated in 1987, and upon Mr. Simpson's retirement in 1988, he elected reduced annuity benefits for himself to provide for Ms. Simpson. *Id.* at 1361-62. The couple amicably divorced in 1993 and Mr. Simpson continued to receive a reduced annuity until his death in June 1994. *Id.* When Ms. Simpson applied for a former spouse survivor annuity in August 1994, she was denied on the basis that the election of survivor benefits automatically terminated upon her divorce and that Mr. Simpson had not affirmatively re-elected benefits for her. The Administrative Judge in Simpson similarly found persuasive testimony from friends and relatives that Mr. Simpson would have wanted to elect a survivor benefit for Ms. Simpson, irrespective of the couple's divorce. *Id.* at 1362. The Court determined that OPM's notice was legally deficient because it failed to adequately inform Mr. Simpson that if he intended that his former spouse continue to receive an annuity, he must make a new election within two years of their divorce. *Id.* at 1364. Moreover, the Court found that OPM's notices of record failed to comply with the statutory requirement of notice because an annuitant who elects an annuity for his spouse while married reasonably expects that he has complied with the statute sufficiently to cause the annuity to be paid on his death. *Id.* At the time of divorce, Mr. Simpson had already made an election but he did not make the election after his divorce and the OPM notice did not indicate that he needed to make a reelection. *Id.* The Court noted that while the undated notices contained a section regarding



survivor annuity benefits, each of the notices was legally deficient because they did not contain a statement that pre-divorce election would automatically terminate upon divorce and inform a retiree of the need to make a new election for a former spouse. *Id.* at 1365. Finally, the Court noted that Mr. Simpson, being deceased, was no longer able to make the reelection himself and therefore the Board was instructed to order OPM to grant Ms. Simpson the former spouse survivor annuity as if Mr. Simpson had made a timely reelection. *Id.* at 1367.

Notably, Respondent relies on *Downing v. Office of Personnel Management*, 619 F.3d 1274, 1377, n.2 (Fed. Cir. 2010) to support its assertion that Mr. Cross received adequate, timely notice of the need to re-elect a survivor annuity, while distinguishing the facts from those at issue. Respondent provides that the case held that “Mr. Downing further received adequate notice through the annual forms sent to Mr. Downing in December 2006 and 2007, **which were sent after his divorce was finalized** and reminded him that he was required to make a reelection within two years.” See, Respondent’s Brief at 14, citing *Downing v. Office of Personnel Management*, 619 F.3d 1274, 1377, n.2 (Fed. Cir. 2010) (emphasis added). Here, even Respondent notes that the notices which were found acceptable were sent after the couple had divorced. In stark contrast, Mr. Cross, by every party’s admission, never received a notice after his divorce. Furthermore, Petitioner has consistently provided that the fine print on the back of the 2012 letter, which was

the only notice anyone is aware of, was unclear, confusing, and misleading.

Petitioner stated such during her MSPB hearing, and, in fact, provided the 2012 Notice as it was the only document she found, and she was convinced that the fine print on the back could not possibly be the statutory notice to which OPM had referred. There exists no evidence to demonstrate that Mr. Cross received the statutorily required notice after his divorce, or even in any year other than 2012.

**B. Mr. Cross Clearly Intended For Mrs. Cross To Receive A Survivor Annuity.**

The U.S. Court of Appeals for the Federal Circuit has consistently upheld former spouse survivor annuity benefits in circumstances such as the case at bar wherein the annuitant has clearly intended for their former spouse to receive the benefit but died prior to making the statutory re-election.

In *Brush v. OPM*, the circumstances are almost identical wherein the Court found that Ms. Brush was entitled to a former spouse survivor annuity. 982 F.2d 1554 (Fed. Cir. 1992). The Brushes were married when Mr. Brush elected a reduced annuity for his surviving spouse upon his retirement in 1984. In 1987, the Brushes divorced, however, their divorce decree did not contemplate the surviving spouse annuity or benefits. Mr. Brush passed away in September 1989 and Ms. Brush filed for survivor benefits in October 1989. Per 5 C.F.R. 831.612(d)(1), in order to provide former spouse survivor annuity, Mr. Brush needed to submit a written election to provide former spouse survivor annuity for Ms. Brush within

two years of their divorce. When Mr. Brush passed away, there was still remaining time within the two-year period that he could have restated his election for former spouse annuity. The Court found that the happenstance of Mr. Brush's death was not persuasive to find deficient his lack of former spouse annuity election because all economic requirements were met as he continued to receive a reduced annuity following his divorce and leading up to his death. *Id.* at 1563. In fact, the Court opined that the government should not be permitted to escape an obligation intended by Congress where money has been appropriated and substantive economic requirements have been met. *Id.* At 1564.

Likewise, in *Vallee v. OPM*, the Court held that in order to authorize payment of a survivor annuity where the retiree was now deceased, there must exist sufficient evidence to show that the retiree intended the survivor annuity for their former spouse. 58 F.3d 613 (Fed. Cir. 1995). The deceased retiree's intent was determined based upon his decision to decline restoration of his full annuity following his divorce. *Id.* at 616. In *Vallee*, the federal employee retired in 1982 and elected a reduced annuity to provide for his spouse. The couple divorced in 1984, however, the retiree declined to restore his full annuity following the divorce and instead continued to receive a reduced annuity until his death in 1992. *Id.* at 615. Here, the Court also noted OPM's failure to provide statutory notice of the requirement of re-election following divorce. *Id.*

There is substantial case law to support Petitioner's entitlement to a former spouse survivor annuity based on the clear intent of Mr. Cross during his lifetime, and the failure of OPM to provide adequate notice of the need to make a reelection following his divorce. OPM failed to proffer any evidence that it complied with the statutory notice requirement following the Cross's divorce. Furthermore, in the Initial Decision, the Administrative Judge does not question Mr. Cross's intent to provide for Petitioner following their separation and subsequent divorce.

Petitioner should not be denied a former spouse survivor annuity on the basis of Mr. Cross's untimely death shortly after the finalization of their divorce. It is clear that all of the financial obligations to provide Petitioner with a survivor annuity have been met, and OPM should not be permitted to avoid this responsibility.

### **C. Respondent Has Mischaracterized Petitioner's Testimony**

In arguing that Mr. Cross received required yearly notices regarding his rights with respect to his annuity, Respondent provides that "Ms. Cross concedes that Mr. Cross was provided with a notice that included the information that he must submit a new survivor annuity election following a divorce" Respondent's Brief at 12.

Respondent has mischaracterized Petitioner's testimony. Petitioner concedes that Mr. Cross received this required notice in 2012, years before the divorce became final, and only in 2012. Respondent has provided no evidence that Mr. Cross received this notice in any year other than 2012, and based on the lack of evidence,

Petitioner does not concede that Mr. Cross received required notices each year. Most notably, as even Respondent admits that Mr. Cross did not receive a yearly notice between the Cross' divorce and Mr. Cross' death, it is clear that Mr. Cross did not receive a notice regarding post-divorce elections at a time that he was actually divorced, when that information would apply to him.

### **CONCLUSION**

**WHEREFORE**, for the aforementioned reasons, Petitioner respectfully requests that the Decision of the MSPB be **reversed**, and that this Court **grants** Petitioner's request for former spouse survivor annuity, provide the back-dated annuity she is entitled to since Mr. Cross's death, and order the Agency to provide back-pay, attorneys' fees, and any other relief the Court deems appropriate.

Respectfully submitted this 10th day of June, 2021.

**MELVILLE JOHNSON, P.C.**

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE  
REQUIREMENTS**

1. This brief complies with the Rules of this Court. The brief contains 2,546 words, which meets the limitation pursuant to Federal Circuit Rule 32(b).
2. This brief complies with typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman font.

**MELVILLE JOHNSON, P.C.**

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DOREEN CROSS,	)	
	)	
Petitioner,	)	Appeal Number: 2021-1116
	)	
v.	)	
	)	
OFFICE OF PERSONNEL	)	
MANAGEMENT,	)	
	)	
Appellee.	)	
_____	)	

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that undersigned counsel served the foregoing Reply Brief of Petitioner, by causing a copy to be sent to the following via CM/ECF on June 10, 2021:

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