

United States Court of Appeals for the Federal Circuit

04-3260

NANCY L. JOHNSTON
(substituted for William F. Johnston),

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

John H. Williamson, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, filed a petition for rehearing for respondent. With him on the petition were Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, and William F. Ryan, Assistant Director. Of counsel on the petition was Jill Gerstenfeld, Attorney, Office of the General Counsel, Office of Personnel Management, of Washington, DC.

Nancy L. Johnston (for William F. Johnston), of Seaford, Delaware, pro se.

Appealed from: United States Merit Systems Protection Board

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ON PETITION FOR REHEARING

Before NEWMAN, CLEVINGER, and, BRYSON, Circuit Judges.

ORDER

A petition for rehearing having been filed by the respondent, Office of Personnel Management,

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for rehearing is granted for the limited purpose of modifying the opinion issued on June 28, 2005. The precedential order modifying the opinion is attached.

(2) The mandate of the court will issue on November 25, 2005.

FOR THE COURT

November 17, 2005

Jan Horbaly
Clerk

cc: Nancy L. Johnston
John H. Williamson, Esq.

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Before NEWMAN, CLEVINGER, and BRYSON, Circuit Judges.

PER CURIAM.

ON RECONSIDERATION

The Office of Personnel Management (OPM) has requested amendment of the court's opinion, reported at Johnston v. OPM, 413 F.3d 1339 (Fed. Cir. 2005), to clarify that the duty to notify Mr. Johnston of his separation and eligibility for disability retirement belonged primarily to the agency that employed Mr. Johnston, rather than OPM. We agree that clarification is warranted. Accordingly, the opinion is modified as follows (with emphases added to show the changes made):

413 F.3d at 1342, second full paragraph, first sentence is changed to read:
"OPM bears the burden of showing that the requisite notice was sent by the agency."

413 F.3d at 1342, third full paragraph, first sentence is changed to read: "The Board ignored the burden on OPM to show that notice was given by the agency, and"

413 F.3d at 1343, first paragraph, last sentence is changed to read: "The burden is on OPM to establish compliance with the statutory and regulatory requirements"

413 F.3d 1343, final paragraph, second sentence is changed to read: ". . . as to whether or when the agency sent or Mr. Johnson received"

No costs.