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## INTRODUCTION

### **The Failure to Put People First at OPM**

Our new President's theme is "putting people first." President Clinton has promised a new administration that will "reinvent" government and place the needs of the people whom this government was created to benefit above the self-serving, outdated bureaucracies that are eating our tax dollars. I believe one area that demands attention is the Office of Personnel Management (OPM). My experience over many years in representing government employees seeking disability retirement is that the only people who are ever put first at OPM are those in charge. Those seeking assistance from them are put last, if at all. It is time for a change, and it is time to insure that "putting people first" at OPM means putting first those people who come for help, and not those who are supposed to be helping them.

My purpose here is to define and document how OPM officials wrongfully abridge the rights of government employees to disability retirement. I contend that this knowing violation of due process of law also constitutes an abuse of power, and that those government officials who are responsible certainly do not promote the efficiency of the service or the public good. Had these same officials been employed in private enterprise and engaged in such misbehavior they would have been fired long ago.

Congress established the right of qualified federal employees to disability retirement, and delegated the authority to administer the program to OPM. What should be a straightforward process of determining eligibility according to basic criteria spelled out by Congress in 5 U.S.C. 8337 has instead become a bureaucratic nightmare. What should be a process that assists disabled federal employees obtain rights provided by law has become an adversarial contest between them and government employees bent on denying that right. As it is currently administered, the disability retirement program serves neither the interests of the government nor those of the government employees whom it is supposed to benefit.

For years now, I have waged a private crusade directed at getting OPM officials to stop their systematic abuse of disability retirement applicants. These same OPM officials have continued to ignore the most rudimentary requests made on behalf of applicants, whether for a timely response to an application, or for the reasons for

denying an application, or for them to respect my client's due process right to counsel.

Over time, I escalated the stridency of my language by putting my word processor into overdrive and casting my entreaties into the largest, boldest print possible. This tactic failed. Not once has any OPM official expressed a willingness to consider my pleas, nor taken a single step to correct the injustices pointed out. The record will reflect that, quite literally, there has never been a single reply to any complaint<sup>1</sup> made by me on behalf of any client. Even by Washington standards, this is frightening.

My battle with the bureaucracy at OPM has in no way diminished my ability to win cases. I have continued to gain disability retirement for nearly every client I have represented. I have also never been openly criticized by OPM officials for my persistence. Instead, these OPM officials do nothing. They have made no attempt to respond, no attempt at reform. It was as if my letters never reached them, or were never opened or read, but simply thrown into the garbage; I fear this last option has been the one of choice.

The motivation behind the actions (and inactions) of these OPM officials is irrelevant. Irrespective of motive, their behavior is inexcusable and untenable. At a minimum it constitutes an abuse of governmental power, as well as a gross violation of due process of law.

Disability retirement is a right, not a handout or charity. It is a property right government employees pay for through direct payroll deductions, and a very significant right at that. The government has entered into a contract with its employees so that if disability within the meaning of the law ensues, and the employee otherwise qualifies, then the employee has a right to a monthly disability retirement annuity.<sup>2</sup>

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<sup>1</sup>Most FOIA requests have also been ignored.

<sup>2</sup> I recently defined disability retirement this way:

Q. What is disability retirement?

A. "Disability retirement is a right. It is a right that enables you to collect a portion of your salary if a medical condition prevents you from continuing in your government job. It is not a favor, a handout, or a gift, but a right for which you have already paid through contributions to your retirement fund. Whereas regular retirement gives you the right to stop working and begin collecting if you reach a certain age, disability retirement gives you this right if you develop a certain condition: Disability. Just as the premium payment on your fire insurance policy protects you against the loss of your house due to fire, your monthly paycheck retirement deduction protects you against loss of income due to disease or injury." Disability

It is very important to see disability retirement as a contractual right and not as charity, welfare or any other kind of handout. Perceiving it as a right allows us to better understand that wrongfully taking it away or wrongfully delaying its receipt constitutes an actionable wrong. It is also important to see that the right to the disability retirement annuity does not have to be withheld forever in order to constitute a wrong. Wrongfully withholding it for any period for which it should not have been withheld constitutes an identical misdeed. Certainly, part of the contractual obligation is to pay qualified employees their annuities on time. For this and other reasons, wrongfully vitiating or delaying the right to disability retirement constitutes an abridgment of the employee's due process right to property, and cannot be tolerated.

I will demonstrate the veracity of the allegations made through reference to four (4) disability retirement cases currently pending before OPM. I represent all four of the applicants in these cases, and each has released me from the attorney-client privilege for the purpose of this report. All four of these cases have now been pending before OPM for well in excess of one year, and one for more than two years.

These four cases are merely exemplary of what goes on in myriad other cases at OPM. I know this because I have been involved in myriad other cases, and it has gone on in the majority of them. Clearly, this abuse, which has taken place in so many cases over so many years, has resulted in significant harm to many government employees, of which my clients are but a tiny sample.

## **[1] OPM OFFICIALS UNCONSCIONABLY DELAY DISABILITY RETIREMENT CASES**

**OPM officials abuse their power in delaying disability retirement cases for periods well in excess of one year, and sometimes for more than two years. This wrong is compounded by the failure of OPM officials to ever provide any explanation or apology for such delay. Every government employee has a right to an expeditious disability retirement decision from OPM and to be treated with fundamental human decency.**

In my judgment, a government employee is entitled to an expeditious decision upon filing a disability retirement application. But irrespective of what I think, it is an obvious fact that OPM officials are *per se* derelict in their responsibilities when you consider that today many disability retirement applications languish at OPM for periods well in excess of a year. Some are buried for nearly two years. Some take *more* than two years. This ludicrous amount of time is not even to issue a final decision, but simply an *initial* decision. It is hard for me to understand why it should take more than three months<sup>3</sup> to bring even the most complex case to at least an initial decision. OPM officials never attempt an explanation or even an apology for such unconscionable delays. These delays not only constitute an abuse of power, but a *rude* abuse of power at that.

Obviously, such delays leave many employees, already devastated by a disabling medical condition or injury, further ravaged by economic ruin. Consider also the discredit brought upon our government and upon OPM by these officials. As such, these wrongs portend serious political consequences for our new administration.

I do not believe that such unconscionable delay is merely the product of an overburdened or under funded bureaucracy. Perhaps a few are, but a pattern is clear: "high-profile," "politically sensitive" cases are expedited. Cases involving "subjective symptoms," which tend to be low profile, are sidetracked. Whatever the cause of these inexplicable delays, whether accidental, negligent or purposeful, they are unscrupulous and constitute an abuse of governmental power.

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<sup>3</sup>It is instructive that the MSPB, which hears appeals of OPM's adverse final disability retirement decisions, operates on a self-imposed time limit of 120 days from the date an appeal is filed to the date a judge issues a final decision. Why should we not expect OPM officials to operate under a similar self-imposed time limit?

All four of the cases considered below have been pending before OPM for inconceivable periods of time, and appear destined to remain there forever unless action is taken. **Mike Brown's** case has been there for *22 months*, **Helen Davis'** case has been there for *19 months*, **Tom Mann's** case has been pending for nearly *two years*, and **Ed Smith's** for *more than two years*. During these periods of delay, there has never been the hint of an explanation or apology. An examination of numerous other cases, filed by me with OPM, confirms that what has happened in these four cases is the rule, and not the exception.

### **Unconscionable Delay in Four Clients' Cases**

**Mike Brown:** The completed disability retirement application of **Mike Brown**, a field medic with the DEA, was received by OPM on May 16, 1991. OPM handed down its initial decision denying his application on October 8, 1992.

*It took these OPM officials 17 months to give Mike Brown an initial decision denying his application, despite repeated attempts by his agency and myself to prod them into action. We have continued the case since then in order to assess our options. Overall, his case has been pending at OPM for 22 months.*

**Helen Davis:** The completed disability retirement application of **Helen Davis**, a computer programmer analyst employed by the IRS, was filed directly by me with OPM on August 21, 1991. I made a supplemental filing two months later. OPM handed down an adverse initial decision on January 2, 1992. It took nearly six months to get the initial decision from the date we first filed with OPM. On February 1, 1992, I filed a response requesting that they reread the application, since everything requested in the adverse initial decision had already been provided. Since then I have not heard from OPM regarding her case.

*We filed our response to OPM's initial decision in Helen Davis' case some 13 months ago. During all of that time we have heard nothing from them. Overall, her case has been pending at OPM for 19 months.*

**Tom Mann:** The application of **Tom Mann**, a civilian supervisory procurement analyst employed by the Department of the Army, was filed directly by me with OPM on April 15, 1991. On September 23, 1991 we provided OPM additional medical information at their request. By letter dated August 27, 1992 OPM issued an adverse initial decision. It took OPM 16 months to get us that initial decision.

*It took these OPM officials 16 months to issue an initial decision, from the time we filed Tom Mann's application with them. We have continued the case since then in order to consider our options. Overall, his case has been pending at OPM for nearly two years.*

**Ed Smith:** The completed disability retirement application of **Ed Smith**, a profoundly deaf draftsman for the DMA, was filed by the employee, without counsel, sometime in 1990. Upon receipt of an adverse initial decision dated October 21, 1991 the employee retained me. I responded to OPM's initial decision through a letter dated November 8, 1991 in which I essentially requested the reasons why the application was rejected, since no reasons were provided in the decisional letter. OPM never provided the reasons why the application was rejected, not even when I filed a FOIA request for those reasons.

*Fifteen months ago we filed our response in Ed Smith's case. Since then we have heard nothing whatsoever from these OPM officials. Overall, his case has now been pending at OPM for more than two years.*

### **Recommendation:**

*OPM officials should be required to meet predetermined self-imposed time limits<sup>4</sup> within which an applicant-employee can anticipate action. Employees applying for disability retirement should be informed of these time limits, and an enforcement mechanism should be implemented to insure that the time limits are met.*

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<sup>4</sup>OPM admits that it has no self-imposed time limits for processing cases. I raised this issue in a FOIA request directed at OPM. Mr. Franklin Lattanzi responded on May 27, 1992 that

"[i]n your May 8, 1992, request you asked for information about how long OPM took in making the decision described in the above item and any guidelines or policies concerning time limitations for making decisions on disability retirement applications. We also do not have this information compiled nor do we have such guidelines or policies, and cannot provide it to you."

## **[2] OPM OFFICIALS ARE GUILTY OF HANDICAP DISCRIMINATION AGAINST GOVERNMENT EMPLOYEES.**

**OPM officials abuse their power by knowingly delaying "low profile" disability retirement cases in which the disabling symptoms are subjective. Concomitantly, OPM officials compound this wrongdoing by expediting "high-profile" cases that are "politically sensitive." This behavior constitutes an abuse of power and handicap discrimination.**

Over the years, I have observed that "high-profile" "politically sensitive" cases are sometimes expedited, while cases involving "subjective" symptoms almost always suffer inordinate delays. This pattern is too consistent over too long a period of time not to be intentional.

Despite the fact that applicants may fully qualify for disability retirement, OPM officials refuse to take them seriously if their claim is based on subjective symptoms. The claims of applicants with less than the most obvious outward signs of disability are dismissed as bogus, despite the fact that the law does not require the applicant to demonstrate any outward signs of disability.<sup>5</sup> Persons who are not virtual basket cases are made out to be malingerers, liars, and cheats, despite the fact that such conclusions are not supported by a shred of evidence. Because determinations are made behind closed doors and in virtual secrecy, such discrimination remains unchecked and runs rampant.

*There is little difference between this type of discrimination, based on invalid perceptions of what a disabling illness should look like, and race discrimination, based on invalid perceptions of what an individual should look like. Both types of discrimination are prohibited by law.*

Ideally, OPM should manage its affairs so that disability retirement cases are adjudicated as they are filed, or very quickly thereafter. Assuming however that the problem is not one of mismanagement, but one of scarce resources, then OPM has an obligation to structure and confine its decision-making into written guidelines aimed at meeting government-wide goals, not the whims and fancies of particular bureaucrats. Apart from the obvious need for self-imposed time limits,

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<sup>5</sup>*Chavez v. OPM*, 6 MSPR 404 (1981)



there is a need for guidelines to control discretion as to which cases should be expedited and under what circumstances.

It appears that OPM officials have no such guidelines, just as they have no such self-imposed time limits for completing their work. Instead, cases are expedited on an ad hoc basis.<sup>6</sup> This allows for potential abuse by individual government officials in deciding which cases get favored treatment and which cases get sidetracked into oblivion. Those OPM officials who have as a consequence been granted license to exercise such unfettered discretion, turn out to exercise it wrongfully in that they either expedite politically sensitive cases to avoid trouble or sidetrack subjective symptoms cases for which they have contempt. This *de facto* "policy," developed under the aegis of OPM officials exercising unfettered discretion behind closed doors, places the focus on the *names* and *types* of diseases and injuries instead of on the *plight* and *circumstances* of the sick and injured. This results in particular illnesses and injuries being expedited<sup>7</sup>, while others are sidetracked without any

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<sup>6</sup>OPM admits that it expedites cases on an ad hoc basis, or put another way, that it has no structured guidelines or other mechanism for expediting cases, and depends instead on the haphazard discretion of those officials who happen to get the case. By letter of May 5, 1992 I made a FOIA request asking OPM to specifically provide

"copies of any OPM guidelines or regulations relating to any special handling given the disability retirement applications of federal government employees with AIDS, Chronic Fatigue Syndrome, Chronic pain or allergies."

In a reply letter dated May 27, 1992 Franklin L. Lattanzi , Chief disability and Special Entitlements Division observed that

". . . OPM does not have any such guidelines or regulations. For your information, staff are instructed that each application for disability retirement must stand on its own merit; that the . . . retirement laws and regulations. . .are to be applied evenly."

This is clearly a joke. The retirement laws and regulations are not applied evenly, and it is questionable whether under the circumstances they should be.

<sup>7</sup>"Expedited" is a relative term. I have actually had very little experience with any case being expedited at OPM. Two or three of my HIV clients have been awarded benefits (but not received any money) within 2 months time

consideration given to the particular circumstances of the sick and injured. Thus, HIV cases, for example, appear to be expedited no matter the financial circumstances or the stage of the disease, while the cases of persons suffering from chronic pain, environmental illnesses, and emotional disorders, no matter their financial or other circumstances, are endlessly bottled up.<sup>8</sup>

If we must make choices as to which cases should be expedited, we may very well want to make it our government's policy to expedite the disability applications of HIV infected employees, as well as those of the terminally ill. However, we may also want to act most quickly, not based merely on the name of the disease or the characterization of the injury, *but based on how much the employee needs money.*

I maintain that the wrongs and abuses in these cases are a reflection of the whims and fancies of OPM officials, and not a rational governmental policy. As such, it represents a reshaping of the Congressional mandate by individuals who have neither the votes nor the skills to do so. Apart from making for poor policy, this unfettered decision-making becomes suspiciously self-serving when the speed with which disability cases are approved is linked to media expectations. We cannot permit this bunch of bureaucrats operating behind closed doors to establish a *de facto* policy designed to serve them at the expense of their constituents.

While this supposition is supported only by anecdotal evidence, this anecdotal evidence comes not only from the four client cases presented here, but also from a host of other cases I have filed over the years. But for the attorney-client privilege and the desire to illustrate these points through currently pending cases, I could have provided many more egregious examples than are presented below. My experience in many of these cases demonstrates that the potential for abuse, which always exists in bureaucratic decision-making, has come to fruition and ripened into a consistent pattern of abuse by the officials in charge at OPM. The proof is in the sampling of cases below.

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after their cases reached OPM. In contrast to the time it takes to process other clients' cases, these cases were certainly "expedited."

<sup>8</sup>In response to a question about how OPM deals with disability retirement applications "when the applicant's symptoms are subjective," Mr. Lattanzi replied that

" . . . we do not have any guidelines or regulations relating to the symptoms of the applicant."

I believe Mr. Lattanzi when he maintains that OPM does not have any guidelines or regulations relating to the symptoms of the applicant. I believe OPM officials prefer to exercise discretion based on whim and fancy. I believe the absence of guidelines for expediting cases, and the concomitant abuse of discretion that results, is in itself evidence of an abuse of official power.

As merely one example, HIV cases, which are apt to come under intense public scrutiny if delayed, and certainly if denied, are, in my experience, awarded retirement quickly, irrespective of the degree of disability or the stage of the disease and without any evidence of financial hardship. This would be wonderful,<sup>9</sup> were it not for the corollary example of my client **Ed Smith**, who, though profoundly deaf, managed to serve his government for more than 20 years as a draftsman. Now, however, he is no longer able to do so, being disabled by severe chronic back pain and degenerative arthritis.

When Mr. Smith retained me, he had just received an adverse initial decision from OPM on his disability retirement application, and needed my assistance because OPM did not provide him with adequate facts upon which he and those helping him with the application could formulate a meaningful response. I took what I thought to be a logical and reasonable approach. Since OPM had not provided a shred of information on why they had rejected Mr. Smith's application, I asked that they provide the details for his rejection. That was more than one year ago. We never heard a single word from them, even though since then we have made repeated requests for a reply.

I believe they took license to ignore us because Mr. Smith's disabling symptom is chronic back pain, and chronic pain is something that no one can see and which only Mr. Smith can feel. Also, chronic back pain and degenerative arthritis are not the sort of high-profile diseases likely to catch the fancy of OPM officials, nor make them act out of fear of taking the rap if the media got wind of their delay. They have therefore taken advantage of him and simply sat upon his application. They have never made any inquiry as to how this completely deaf employee is supposed to live after being without an income for more than two years.

**Mike Brown's** case has been pending at OPM for nearly two years. He also suffers from subjective symptoms: a hearing loss, allowing him to hear most ordinary speech under normal circumstances, but precluding him from hearing commands under noisy conditions. He was hired to treat those wounded in the field during DEA helicopter-mounted drug raids in South America. As a former Green Beret, he loved his job and was completely prepared to take the obvious

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<sup>9</sup>I would not want my position on HIV in any way misunderstood. I have championed the rights of HIV infected employees and I continue to do so. In the early 80's, I pioneered a number of successful legal actions against the military in an effort to gain benefits for HIV disabled servicemen. My work led to the implementation of guidelines in the military preventing the routine discharge of HIV infected military personnel, and allowing disabled HIV infected personnel to collect disability, irrespective of their sexual orientation. I very much want to continue to foster the rights of HIV infected persons, but I do not want to do so simply because they are in the public eye.

risks involved. Unfortunately, he was prohibited from continuing when DEA determined that his hearing impairment might put others at risk, and he could not be accommodated at a desk job.

I surmise that OPM bureaucrats viewed his undramatic disability claim as subjective in nature, and as a consequence, difficult to prove. This, combined with their confidence that no newspaper was going to take after them if they did nothing, led them to do precisely that: nothing. OPM bottled up his case for nearly two years without any inquiry as to how he is supposed to support himself.

**Helen Davis'** case is a classic example of a subjective symptoms case being tabled forever. She has an additional strike against her, in that she has a disease that many do not even believe exists: Chronic Fatigue Syndrome, accompanied by a variety of other illnesses. Clearly, CFS is not yet one of those yet high-profile diseases by which OPM officials feel threatened. It is also nearly impossible for others to perceive, and as a result, many people seem to have reservations as to the validity of her claims. Some people, including the OPM officials involved, probably believe that she is trying to pull a fast one in getting benefits when none are deserved. OPM officials need to meet a higher standard, and should be cognizant of the latest medical information concerning this disease. They need to recognize how very real it is, and how very disabling it has been for Ms. Davis.

Her case has been pending at OPM for one and one-half years. We filed our response to OPM's adverse initial decision over one year ago. In our response, we told them that we had already answered every single question they raised in the initial decision, and we offered that if they would just go back and read what we had already provided, they would find the answers to their questions. In my letter I even demonstrated how in fact we had already answered every question they had raised, outlining for them once again the contents of the application, so that they would not even have to go to the trouble of re-reading it.

That was more than one year ago. We have not heard from them, nor have they ever made any inquiry into how Ms. Davis is supposed to support herself after more than one and a half years of not working. They have merely given their usual response: nothing. The case has been sitting in OPM's office for more than one full year without any action whatsoever.

**Tom Mann's** case has been pending at OPM for nearly two years. It took OPM 16 months just to issue an initial decision. Mr. Mann's application has languished at OPM for nearly one year from the time we provided them our last filing, made at

their request. Let me point out that Mr. Mann suffers from severe asthma that has required him to move to Nevada. His ailment is subjective in that just looking at him it would be hard to tell that he was experiencing debilitating bronchial spasms, but obvious or not, those spasms certainly have disabled him.

As a final note, if Mr. Mann or any of the other three clients mentioned above had been a typist and their hand had been cut off, we would have had an easier case. It would be clear to everyone that they were unable to type without their hand. But none of them were typists, and their hands were not cut off. OPM has taken advantage of the subjectivity of their symptoms, as it does with many others, and thoroughly bottled up their applications.

**Recommendation:**

*Because disability retirement is a program entirely centered on affording financial benefits, "financial hardship" should probably be the single most relevant factor in deciding to expedite a case. OPM should make inquiries into this factor and any others that it deems relevant, and should exercise its discretion in expediting cases based on rational policy grounds incorporating such factors. "Political sensitivity," or the lack of it, should never be a criterion on which a disability retirement case is expedited or sidetracked, nor should the name of a particular disease or the characterization of a particular injury ever be the sole basis on which favored treatment is granted, although it may certainly be one of the factors.*

### **[3] OPM OFFICIALS VIOLATE APPLICANTS' RIGHTS TO REPRESENTATION BY COUNSEL.**

**OPM officials abuse their power by refusing to respect the right of government employees to retain legal counsel in disability retirement cases. Despite proper notice of legal representation, and despite multiple requests to deal exclusively through counsel, OPM officials continue to deal directly with the employee, without informing counsel of their *ex parte* dealings. This constitutes not only a violation of due process but also a violation of the Administrative Procedures Act.**

Government employees who choose to do so have a right to be represented by retained counsel through every stage of the disability retirement process. To frustrate an applicant's choice to be represented by counsel constitutes not only a violation of due process, but also a violation of the Administrative Procedures Act.<sup>10</sup> I do not think anybody would argue with these propositions. Yet my experience, and that of my colleagues representing employees in disability retirement cases, is that we are quite simply ignored, often much to the detriment of our clients.

I have not been ignored as a consequence of some error, such as failing to perfect my representation or failing to properly notify OPM that I was the attorney in the case. There has not been one single case in which OPM officials ever challenged the validity of my representation, and in no case did OPM officials ever complain that I failed to properly notify them of my representation. Instead, with nearly every disability retirement client that I have ever represented, my representation was totally ignored by OPM. OPM officials, though on notice of my representation, simply continued to deal *ex parte* with my clients, only rarely informing me of their contacts.

What is even more mind boggling is the sheer number of cases and the many years over which this stonewall mentality has unrelentingly continued. This has gone on in dozens and dozens of cases, over a period of nearly 14 years, during which I repetitively provided the most elaborate notifications to OPM officials, alerting

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<sup>10</sup>5 U.S.C. 555(b)(1992) entitles a person compelled to appear before an agency to be accompanied by counsel. Further, 5 U.S.C. 550(f) requires agencies to respect the attorney-client relationship when the agency is dealing with an individual represented by counsel.

them that my clients were represented by counsel, and asking them to respect that representation. I never left anything to their imagination as to what I meant by representation by counsel, making it crystal clear that they should not deal directly or indirectly with my clients and that they were required to deal exclusively with me. They never did and continue to refuse to do so.

Apart from representation by counsel being both a constitutional and a statutory right, it is as well essential in order to prevail in particular disability retirement cases. Counsel is critical to applicants whose disabling symptoms are subjective and who do not suffer from a disease or injury likely to spur OPM officials into action on their own. This is confirmed by the abuses documented here.

I filed **Helen Davis'** disability retirement application on grounds of Chronic Fatigue Syndrome directly with OPM and advised them in writing of my legal representation as follows:

"Please be advised that I represent Ms. Helen Davis, in connection with all matters pertaining to his disability retirement. A Designation of Representative form executed by my client is enclosed for your records. . . . Undersigned counsel is Ms. Davis' legal representative. Please respect my client's constitutional right to representation by counsel. That right requires that OPM contact me directly and exclusively if any problems arise with respect to her disability retirement application."<sup>11</sup>

The officials at OPM ignored me, writing directly to Ms. Davis to ask her to provide additional information,<sup>12</sup> and not even bothering to copy me into that letter. I once again wrote to OPM,<sup>13</sup> reminded them of the language in my prior letter, and demanded once again that they respect my client's right to counsel.<sup>14</sup>

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<sup>11</sup>Letter from Harvey Friedman to OPM dated August 21, 1991.

<sup>12</sup> Letter from OPM to Helen Davis dated September 12, 1991.

<sup>13</sup> Letter from Harvey Friedman to OPM dated September 23, 1991

<sup>14</sup>

In relevant part I said this :

"By my letter dated August 21, 1991 I advised that I represent Ms. Helen Davis in connection with all matters pertaining to her disability retirement. I provided OPM with A Designation of Representative form executed by my client. Through that letter, I made my client's filing for disability retirement.

At the close of my letter I said:

Additionally, I asked OPM why Ms. Davis' right to counsel had not been respected, and inquired as to how the matter would be handled by them in the future.<sup>15</sup> I alternatively made my letter a FOIA request for the identical information.<sup>16</sup>

When I received no reply to these questions I wrote a follow up letter, and once again warned OPM officials of my client's right to counsel<sup>17</sup> and the requirement that they deal directly and exclusively with me. Additionally, I reminded OPM that I had not yet received a response to my FOIA request.<sup>18</sup>

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"Undersigned counsel is Ms. Davis' legal representative. Please respect my client's constitutional right to representation by counsel. That right requires that OPM contact me directly and exclusively if any problems arise with respect to her disability retirement application."

Instead of honoring my client's constitutional right to representation by counsel, you dealt directly with her through your letter of September 12, 1991."

15

I raised the following specific questions:

- "(1) Why wasn't my client's right to counsel respected as requested in my letter?
- (2) Will my client's right to counsel be respected in all future dealing with your agency so that you will contact me directly and exclusively as to this matter?
- (3) Whatever your response to these questions, please provide copies of any OPM rules, regulations, policies, etc. which define and implement a federal employee's right to counsel or lack of such right in disability retirement cases before OPM.

16

I specifically said in that letter

"If for some reason you are unable or unwilling to answer these questions or provide this information, **please consider this a FOIA/PA request, and forward it to the correct office for a response within the 10 days provided by law.**"

17

In this letter I once again warned that

". . . undersigned counsel is Ms. Davis' legal representative. Please respect my client's constitutional right to representation by counsel. That right requires that OPM contact me directly and exclusively as to OPM's Initial Decision in this case and should any problems arise with respect to her disability retirement application ."

Letter from Harvey Friedman to OPM dated October 24, 1991.

18

"Let me remind you as well, that I am still waiting for a reply to my FOIA/PA request dated September 23,



The result: for one year nothing whatsoever happened. Then, more than a year later, Helen Davis received an adverse initial decision from OPM <sup>19</sup> addressed directly to her at her home address. An attempt was made to copy me in, but I was provided with a different version of the letter. Her copy was dated January 2, 1992, while my copy was undated. Both letters provided for a response within 30 days of the date of the letter. Had we not compared our two letters, I would never have known that they were different, and that the 30-day time limit was running under her copy, but not under my undated copy. At the time she had been separated from the government for more than one year, so had we missed that 30-day deadline, she could not have refiled, and she would have forever lost her right to disability retirement. Here is a case in which double dealing by OPM officials could have resulted in disaster. Fortunately, I staved it off, but that makes OPM officials no less guilty of wrongdoing.

I confronted OPM yet again with their failure to respect Ms. Davis's client's right to counsel and reminded them yet again that they had not respond to my FOIA request, which I had made more than one year before.<sup>20</sup> Nonetheless, neither of us ever heard from OPM.<sup>21</sup> That was 13 months ago.

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1991. That response should have been provided within the 10 days allowed by law. It was not so provided. Please provide that response immediately."

<sup>19</sup>dated January 2, 1992

<sup>20</sup>

I observed in relevant part that

"THE APPLICANT DEMANDS THAT OPM RESPECT HER RIGHT TO COUNSEL

A government employee, has an absolute right to retain counsel and to be represented exclusively by that counsel, in a disability retirement case. OPM's knowing failure to respect an employee's determination to be represented exclusively by counsel, constitutes a crass violation of the employee's due process rights.

In case after case, OPM systematically breeches government employees' due process right to counsel. It continues to breach that right, even when explicitly warned by counsel to observe that right. In any case, where the right to counsel has been abrogated by the agency, counsel has a responsibility

**Tom Mann's** case represents another futile attempt at having the applicant's right to counsel respected. It is also an example of an even closer brush with legal disaster on account of wrongdoing by OPM officials. I filed Mr. Mann's disability retirement application simultaneously with both OPM's Boyers, Pennsylvania office and its Washington, D.C. office.<sup>22</sup> In both submissions I advised OPM of my representation in language nearly identical to that used in Ms. Davis' case, and I made sure to inform OPM to contact me directly at my law office address. Mr. Mann had moved to Nevada, and I thought he had done so without providing them

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as a member of the bar to attempt to rectify the matter.

OPM breached Ms. Davis' right to counsel in this case and has failed to respond to specific requests for an explanation even when those requests were made through the Freedom of Information Act.

In a letter dated September 23, 1991 and clearly marked as both a regular request and a FOIA request I advised OPM as follows:

\* \* \* \* \*

ALTHOUGH THIS FOIA REQUEST WAS RECEIVED BY OPM ON SEPTEMBER 25, 1991 NO RESPONSE WHATSOEVER HAS EVER BEEN PROVIDED. INSTEAD, MY CLIENT'S DUE PROCESS RIGHT TO COUNSEL WAS VIOLATED AGAIN WHEN SHE WAS PROVIDED THIS "INITIAL DECISION" AND COUNSEL PROVIDED AN UNDATED COPY.

Let me remind you ONCE MORE. Observe the attorney-client relationship in this case and every other case. The attorney-client relationship, prohibits you from dealing directly with my client. This right requires that all communications are to be addressed exclusively to me. Since you must deal exclusively with me as counsel. Sending a letter to my client and a copy to me or visa versa is a violation of her right to counsel. This right has already been breached in this case."

Letter from Harvey Friedman to OPM dated February 1, 1992.

<sup>21</sup>All time limits were properly observed, and the ball has been in their court now for 13 months.

<sup>22</sup>That is because OPM has not published rules as to which of their offices a filing must be made, so we often file with both offices simultaneously, just so as not to take any chances.

his forwarding address.<sup>23</sup> As a result of Mr. Mann's move to Nevada, dealing exclusively with me became critical, since I thought that it would be not only improper but impossible for OPM to reach him directly. Despite my admonishment, OPM apparently had his new address and attempted to communicate directly with him without even copying me into their letter. It sent him a "Special Notice Regarding Your Application for Disability Retirement" dated May 29, 1991 saying that its initial review was not favorable. It concluded by saying that

"if we do not hear from you within the thirty days, we will deny your application."

He never received the letter, because unbeknownst to OPM, he had since moved to a new address in Nevada. I had not been copied into the letter. On July 11, 1991 after the unknown 30 day period had expired, I inadvertently discovered the existence of this letter for the first time as a result of my law clerk making a telephone check with OPM on the status of the case.

In a follow up letter to OPM I summed up the facts, admonished them once again to respect Mr. Mann's right to counsel, and demanded an extension of the time limit that they had caused us to miss.<sup>24</sup> They never bothered to reply.

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In both submissions I observed

"Please be advised that I represent Tom Mann, in connection with all matters pertaining to his disability retirement. A Designation of Representative form executed by my client is enclosed for your records. . . . In that I am Mr. Mann's legal representative, please contact me directly at the above styled address in connection with any matters concerning his disability retirement application."

Letter from Harvey Friedman to OPM dated April 15, 1991.

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I observed in relevant part:

"The fact is, that the notice should not have been served on Mr. Mann at all. It should have been served on me as his attorney. OPM had the fullest notice of my legal representation. In my role as counsel, I filed the disability retirement application on behalf of Tom Mann and informed OPM of my legal representation. Just so that there could be no misunderstanding, I made identical duplicate filings with both OPM's Boyers' office and its Washington, D.C. office.

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Since I only learned of the existence of this document yesterday, the 30 day time limit starts running from that time and not from May 29, 1991. I hereby request an additional 45 days within which to file a response in that we are having difficulty locating the applicant. Our response will therefore be filed on September 24, 1991. Please inform me immediately as to how you intend to treat this matter."

Letter from Harvey Friedman to OPM dated July 12, 1991.

Because they failed to reply, I made a special inquiry of the Medical Division, which we were told was the issuing authority for this particular notice. In order to insure that I would get a response, I made it both a request for information from that particular Division and a FOIA request<sup>25</sup> to OPM.

In that request, dated September 23, 1991 I asked for specific information as to why the right to counsel had not been honored, how OPM would proceed in the future, and for additional relevant information.<sup>26</sup> There was never any reply, either from the Medical Division or through FOIA.

After receiving no reply through either route for more than one year, OPM issued an adverse initial decision dated August 27, 1992 giving Mr. Mann 30 days to respond. Not only did the OPM officials send this initial adverse decision once again directly to Mr. Mann, but they once again sent it to the wrong address. Once

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I observed in my letter to the Medical Division:

"If for some reason you are unable or unwilling to answer any of these questions or provide this information, please consider this a FOIA/PA request, and forward it to the correct office for a response within the 10 days provided by law."

<sup>26</sup>(1) Why wasn't my client's right to counsel respected as requested in my letter?

(2) Will my client's right to counsel be respected in all future dealing with your agency so that you will contact me directly and exclusively as to this matter?

(3) Whatever your response to the above two questions, please provide copies of any OPM rules, regulations, policies, etc. which define and implement a federal employee's right to counsel or lack of such right in disability retirement cases before OPM.

(4) Why have I still not received a response to my letter of July 12, 1991, received by your office on July 15?

(5) Whatever your response to question #4 above, please provide copies of any OPM rules, regulations, policies, etc. which define and/or implement a federal employee's right to receive a timely response from the OPM re a request for an extension of the time limit, and/or any other request which may be made to OPM.

In the event that the fee for acting on this request, is not waived and is in excess of \$50.00, please inform me of the anticipated charge before proceeding."

more Mr. Mann did not receive OPM's letter. Fortunately, this time OPM copied me into their letter, and so I knew of its existence and misdirection. I once more admonished OPM officials, and in a letter dated September 23, 1992 I observed in relevant part:

"Despite, multiple, elaborate and, explicit prior warnings, not to do so, OPM once again sent its letter, the letter dated August 27, 1992 directly to my client instead of directly to me as his counsel of record. As it did previously, it sent it to him at the wrong address---the same wrong address that it had previously used. My client has never received that letter. Fortunately a copy of the letter was received by me.

I look forward to your immediate reply. Don't send it to my client. Send it to me, his lawyer. Send it to me his lawyer, not only because the law requires that you deal exclusively with me but as well because you don't have my client's correct address and your letter won't ever reach him."[Emphasis supplied]

I was wrong in believing that just because they did not have his new address that they would not try to continue dealing *ex parte* with Mr. Mann. OPM officials found his new address in Nevada and sent directly to him a copy of the August 27, 1992 initial decision, with a cover letter giving him 30 days from the cover letter's date, September 18, 1992 to respond. Unfortunately, this time they did not bother copying me into the mailing and, not having received the cover letter, I had no idea of this new 30-day time limit that was now presumably running against him.

Here are some of the issues that I raised at the time in a research memorandum to my law clerk. I think they point out just a few of the more obvious ramifications of this abuse of power by OPM officials:

"OPM's letter marks time from the date of the letter and not the receipt. What if Mr. Mann had not received the letter until after the 30-day deadline and I had received it before the 30 day deadline and neither of us had made a response within the 30-day deadline? Certainly if OPM misdirects a letter and it reaches the employee after the deadline, he cannot be held to that deadline, or can he? Would they now be able to hold him to that deadline on grounds of constructive receipt through me? Why should they be allowed to take

advantage of my receipt, when all the time they have wrongfully continued to deal directly with him?

And what if he receives the letter and makes his own response, forgetting about me, for one reason or another, and he loses on his response. Haven't they denied him representation by counsel? Is it harmful error so that he can contest the loss on due process grounds or will they be able to say that he voluntarily waived his right to counsel because he replied on his own and that way defeat him?

And isn't one of the purposes of having the adversary (OPM) deal exclusively with counsel and not with the client, to insulate the client from unprotected responses by the government that in the absence of advice of counsel, might make the client act to his detriment?"

I don't want you to research these points, but I do want you to be aware, as a future lawyer, of the implications of the government's misdeeds in this and other cases; aware that these are not just some hyper-technical legal errors made by government but errors that can result in grave harm to our clients. It is for this reason that we should never stop our attempts at reform. That is our duty as lawyers."

**Recommendation:**

*Once OPM is properly put on notice that counsel has been retained, OPM should comport with all of the rules traditionally connected with such legal representation and should deal exclusively with counsel. Ex parte communications by OPM officials with applicants known to be represented by counsel should be forbidden.*

**[4] OPM OFFICIALS REFUSE TO PROVIDE THEIR REASONS FOR DENYING DISABILITY RETIREMENT, MAKING IT IMPOSSIBLE TO PREVAIL ON APPEAL.**

**OPM officials abuse their power in failing to provide the specific reasons for making adverse initial decisions. OPM officials currently provide applicants with nothing more than an abstract of OPM's regulations and a checklist, from which they are required to guess at which information OPM wants on appeal. Government by checklist and form letter, while an easy way out for OPM officials, is an inadequate way to put applicants on notice of the infirmities in their applications. Without being informed of the specific reasons for a denial, applicants have no practical way of knowing what additional information is required in order to prevail in a final decision. This makes a mockery of the initial decision stage and virtually guarantees that most applicants will be unable to prevail. Fundamental fairness requires that OPM officials provide the specific reasons for an adverse initial decision, irrespective of what may or may not be required by current regulations.**

Government Employees whose disability retirement applications are rejected by OPM in an initial decision have a right to be put on reasonable notice of the specific deficiencies in their case. Notice is reasonable only if it provides an applicant with sufficient information as to what those deficiencies are, so as to enable a willing applicant the opportunity to rectify them. Correcting those deficiencies is an impossibility unless the notice specifically tells the applicant what needs fixing.

OPM officials put employees on the most qualified, ambiguous and general sort of notice. It works well for the form letter writer but not the recipient. It provides information keyed to the multitude at the expense of that needed by the individual. OPM officials tell you that their "denial was based *largely* on the fact that you have provided insufficient medical evidence" and that "there *may be* medical evidence available which was not submitted with your application." They then provide "a list of the *kind* of medical information that *could* be helpful." This is *not* adequate notice, because it does not identify the specific deficiencies in the

application so that they can be remedied, yet it is the only notice provided to applicants. It makes the employee guess at what those deficiencies are. Disability retirement should not be some sort of lottery. In the final analysis, this form letter approach to denying benefits epitomizes the failure of OPM officials to do the job for which they are paid.

Nearly three decades of lawyering has taught me this: *the surest way to lose a case is to give the answers before being told the questions*. Anything less than adequate notice of the deficiencies militates against the employee ultimately providing a successful response. OPM's form letter and checklist approach to adverse initial decisions nearly guarantees an unsuccessful final decision. While form letters *per se* are not violative of the right to notice, this particular form letter is violative of that right. It merely parrots back the regulatory language and the seven criteria under which OPM operates, and provides a checklist of information common to particular illnesses and injuries, but not specific to the employee's circumstances.

Notice is inadequate when either the wrong list is provided (as it was in Mr. Mann's case) or when everything on the list is checked off (as it was in Mr. Brown's case) or when nothing on the list is checked off, or when everything on the list that is checked off has already been provided (as it was in Ms. Davis' case).

This laid-back brand of government by form letter and checklist simply does not work. An adverse initial decision that fails to articulate what the employee needs to do next in order to make the application pass muster is worthless. It constitutes an abuse of power by OPM officials because they *know* that it is worthless and because they depend on that very worthlessness to whittle away their case load as applicants drop out of the process in frustration and despair. This wrongdoing is further compounded when applicants specially request the reasons for a denial and are ignored, or are provided with bogus reasons.

In the only case in which any OPM official ever responded directly to a request for the specific reasons for denying a client's application, he observed:

"I cannot elaborate on it pending the reconsideration."

I replied:

". . . your excuse in refusing to elaborate because the case is "pending reconsideration" is utterly absurd. The implication: you would be able to elaborate after the reconsideration is no longer pending. By law,



and equity, you were supposed to do it before the reconsideration got underway so that the employee would know what was required. Lots of good would do my client to get the reasons for being denied disability retirement after her opportunity for OPM review is over."

There was never any reply from that official or any other official. Here is how I counsel clients on this issue:

"Unfortunately, this stage of the process is often a wasted effort. In most instances and as a consequence of bureaucratic laziness, OPM fails to provide the reasons why the application was rejected. This pretty much makes the opportunity provided by law for reconsideration, worthless, since you have to guess at what will change the minds of those at OPM. Nevertheless, provide them something on reconsideration, even if it amounts to nothing. That way you preserve your right to appeal to the M.S.P.B." <sup>27</sup>

A prime example of this recurring problem of government by form letter and checklist is **Helen Davis'** disability retirement case. Ms. Davis received a typical adverse initial decision form letter denying her application. Most of my clients have received the identical form letter. The letter began by assuring her that her case was "*carefully considered*" under the referenced regulations, but did not meet OPM's criteria. The letter then listed the seven general criteria<sup>28</sup> that all applicants

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<sup>27</sup>Disability Retirement Law For Federal Government Employees by Harvey Friedman (1992).

<sup>28</sup>Here are the seven general criteria given to Ms. Davis and most other applicants. I assume that the purpose of providing them is to provide sufficient information for an applicant to appeal an adverse initial decision, Ms. Davis was told that she did not "meet criteria 2 through 7"

- "1. A deficiency in service with respect to performance, conduct, or attendance, or in the absence of any actual service deficiency, a showing that the medical condition is incompatible with either useful service or retention in the position.
2. A medical condition, which is defined as a disease or injury.
3. A relationship between the service deficiency and the medical condition such that the medical condition has caused the service deficiency.
4. The duration of the medical condition, both past and expected, and a showing that the condition, in all probability, will continue for at least a year.
5. The inability to render useful and efficient service arose while serving under the Civil Service Retirement System.
6. The agency's inability to reasonably accommodate the employee's medical condition.

must meet in disability retirement cases. Without *ever* providing any facts specific to Ms. Davis' case, the letter went on to say:

"Because your application does not establish that you have a disabling medical condition, your application does not meet criteria 2 through 7."

•••••

"We have determined that you are not eligible for disability retirement. Our denial was *based largely* on the fact that you have provided insufficient medical evidence showing your condition is disabling. There *may* be medical evidence available which was not submitted with your application. Enclosed is a list of the *kind* of medical information which *could* be helpful in a reconsideration. Please see the enclosure." [emphasis added]

The enclosure was another form entitled *Attachment for Initial Decision Letter*. Its two pages reiterated nearly verbatim the information on the form letter considered above, including once again listing the seven criteria. Its second page parroted back verbatim the ten questions that appear on the Physician's Statement.<sup>29</sup>

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7. The absence of another available position, within the employing agency and commuting area, at the same grade or pay level and tenure, to which the employee is qualified for reassignment, with accommodation."

In order for this information to constitute useful notice of the deficiencies in an application, it of course presupposes an understanding of such terms as "useful and efficient service," "reasonably accommodate," "deficiency in service," etc. Clearly, this information is meaningless to the average employee, let alone many lawyers.<sup>29</sup>

These are the 10 questions from the OPM's form known as the Physician's Statement. I assume that the purpose they were provided to Ms. Davis in the initial decision, was to provide her or her physician with sufficient information, so as to enable one of them to remedy any deficiencies. Unfortunately, nowhere in the initial decision was there any hint as to which of these 10 questions were in contest and which information that either had or had not been provided by Ms. Davis, was relevant to which questions.

- "1. The history of the specific medical condition(s), including references to findings from previous examinations, treatment, and response to treatment.
2. Clinical findings from the most recent medical evaluation, including any of the following which have been obtained: findings of physical examination, results of laboratory tests, x-rays, EKGs and other special evaluations or diagnostic procedures and, in the case of psychiatric disease, the findings of mental status examination and the results of psychological tests.

Another page was attached entitled CHRONIC FATIGUE SYNDROME with Ms. Davis' name penciled in at the top. This form began:

"The medical documentation pertaining to this individuals condition is inadequate. The following information is needed":

Under that was listed all of the data, lab tests, physical findings, and the like required by the Centers for Disease Control (CDC) to make a diagnosis of Chronic Fatigue Syndrome.

Since OPM's form letter claimed that Ms. Davis' application for disability retirement had been "*carefully reviewed*," yet failed to provide a single shred of information that had emerged from that careful review, I took the liberty of writing to OPM. I take this same liberty in nearly every similar case, and in each case I say approximately the same thing as I said in this case. OPM officials have never responded to me in any case. I therefore cannot tell you what they say in reply, but I think it is worth repeating verbatim much of what I said in this particular letter on behalf of Ms. Davis.<sup>30</sup>

First I set out my position without mincing words:

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3. Assessment of the current clinical status and plans for future treatment.
  4. Diagnosis.
  5. An estimate of the expected date of full or partial recovery.
  6. An explanation of the impact of the medical condition of [sic] life activities both on and off the job.
  7. Assessment of the degree to which the medical condition has or has not become static or will stabilize and an explanation of the medical basis for the conclusion.
  9. The probability that the individual will suffer injury or harm if he or she is not restricted or accommodated. Explain the medical basis for the conclusion.
  10. The medical basis for the decision to recommend or not to recommend restrictions that prohibit the individual from attending work altogether or performing specific duties of the position. If any work-related restrictions or recommended accommodation have been imposed, explain the therapeutic or risk-avoiding value of the restrictions and whether or not any similar restrictions on non-work-related activities have been imposed."

It appears that OPM has recently revised the Physician's Statement so that it has only five questions. Since I are not privy to OPM forms, I am waiting for a client to show me a copy.

<sup>30</sup>Letter to OPM from Harvey Friedman dated February 1, 1992

## "1. THE APPLICANT REFUSES TO ACCEPT OPM's FAILURE TO PROVIDE ONE SINGLE REASON FOR DENYING HER DUE PROCESS RIGHT TO DISABILITY RETIREMENT

Amazingly, OPM managed to issue its purported "initial decision" in this case without providing my client with one single shred of information explaining what was wrong with her application."

After considering the factual information with which we had provided OPM,<sup>31</sup> I went on to discuss OPM's failure to provide the reasons for denying Ms. Davis' application:

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Here is some of the factual information I pointed out we had already provided and that this information disproved OPM's contention that we had "provided insufficient medical evidence showing [her] condition is disabling."

"The most cursory reading of our application demonstrates that in fact we not only responded to all those relevant issues raised in OPM's Physician's Statement but as well provided extensive and detailed evidence "showing [that Ms. Davis'] condition is disabling." First, we provided extensive and detailed "medical evidence showing [that Ms. Davis'] condition is disabling" through all of the required OPM forms. The Physician's Statement, the Applicant's Statement and the Supervisor's Statement were all chock-full with extensive and detailed evidence "showing [that Ms. Davis'] condition is disabling."

Additionally, we took this case a giant leap further than required and provided extensive and detailed evidence "showing [that Ms. Davis'] condition is disabling," using our own forms, techniques, and resources. For instance, we provided two completed 7-page-long, Third Party Disability Retirement Questionnaires, developed specifically by us, to demonstrate how the medical condition is disabling to the Applicant. One such *Questionnaire* was completed by a friend of the Applicant who is also her co-worker. The other *Questionnaire* was completed by the Applicant's husband. Both of these documents were filled with extensive and detailed evidence "showing [that Ms. Davis'] condition is disabling." Moreover, we provided comments and observations from her psychotherapist, presenting extensive and detailed medical evidence "showing [that Ms. Davis'] condition is disabling."

"In its purported "initial decision," OPM does nothing more than repeat verbatim the regulatory language set out in 5 C.F.R. 831.502. Parroting back the regulations, in no way assists an applicant for disability retirement in identifying the infirmities in the application and cannot be allowed to suffice as an initial decision. While the use of a form letter avoids work for OPM bureaucrats, it fails to provide adequate notice of the alleged infirmities in the application. This form letter, could just as well have been sent to any other disability retirement applicant in any other disability retirement case. In fact, that is precisely what OPM does.

This identical 4 page form letter has been and continues to be used routinely and repeatedly by OPM to deny disability retirement to government employees irrespective of the merits of their case.

Whether this bogus "initial decision," being foisted on government employees, is designed to discourage them pursuing their right to disability retirement or merely as an easy way out, for lazy OPM bureaucrats, the result is the same. Discouraged and unable to fathom what is required, many walk away from a benefit to which they have a due process right. What is particularly unjust and particularly galling, is that the offender agency, is the very entity charged by law, with managing the federal government bureaucracy and serving as a "model employer."

If infirmities exist in the application, it's OPM's job to point them out with specificity; not mine to try to guess at them. Parroting back regulations, provides us with nothing upon which we can act. OPM might just as well have sent Ms. Davis a one word letter saying "NO!" A government employee has a due process right to proper notice of

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Any insufficiency lies not in our submission, but in OPM's failure to read that submission. As a member of the Bar, I will not allow any client of mine to be subjected to such an abysmal failure of government process. It is utterly outrageous. It will not be tolerated."

Letter from Harvey Friedman to OPM dated February 1, 1992.

the reasons why an application for disability retirement has been rejected. "

I then went on to criticize OPM's failure to do anything more than repeat verbatim the CDC approved criteria on Chronic Fatigue Syndrome. I observed that we had already provided information on all the criteria, that this "initial decision" was nothing less than a joke, and that it reflected nothing less than a failure to even bother to read our application.<sup>32</sup> I closed demanding that OPM respond within 30

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First I parroted their own words back to them:

"[You say that]there may be medical evidence available which was not submitted with your application. [You say that ]the following is a list of the kind of medical information which could be helpful in a reconsideration." [emphasis supplied]

Then I observed:

"That "list" copied nearly verbatim from the CDC approved criteria on Chronic Fatigue Syndrome, had of course been reviewed by our physician prior to our submission. Thus, he considered each and every issue relevant to Ms. Davis' medical condition, which was raised in the CDC approved criteria and addressed each which was relevant. We performed and summarized the results for each laboratory and diagnostic test on the OPM list (except for one, which was inappropriate). We considered each clinical condition on the OPM list, required to be considered, and excluded each before arriving at the diagnosis of chronic fatigue syndrome as is required and reported all this in the Physician's Statement.

It is absurd and it is insulting, for some OPM bureaucrat to tell us that we haven't provided something, which we have in fact provided. This "initial decision" is a joke and reflects nothing less than a failure to even bother to read our application.

Providing a list of all the possibilities, "which could be helpful," in no way assists us in identifying the alleged infirmities in our particular application. And since the purpose of the initial decision is to provide the employee with information to correct such infirmities, the "initial decision" in this case, (and

days. *They never responded, despite the fact that this letter was received by both their Boyers and Washington offices more than one year ago.*

**Ed Smith's** case presents similar issues. As stated before, Mr. Smith retained me after OPM made an initial decision denying his request for disability retirement.<sup>33</sup> I asked OPM for the specific reasons for the denial,<sup>34</sup> requested that they provide a

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in the myriad other cases, in which the identical form letter has been issued) is absolutely worthless.

Certainly, a government employee has greater rights than this. A government employee has a right to be told the precise reason for a denial and should not have to guess at that reason. Disability retirement is not some sort of lottery. This form letter list-approach to denying disability retirement, while surely a time-saver for OPM bureaucrats, deprives employees of fundamental due process of law."

<sup>33</sup>Letter to Ed Smith from OPM dated October 21, 1991.

<sup>34</sup>

I said in relevant part as follows:

"(2) Please articulate in writing the precise reasons why this claim for disability retirement was rejected by OPM. The initial decision dated October 21, 1991 fails to articulate in any way whatsoever why OPM rejected my client's claim.

(a) In its four page form letter dated October 21, 1991, OPM does nothing more than repeat verbatim the regulatory language set out in 5 C.F.R. 831.502. Parroting back the regulations, in no way assists us in identifying the infirmities in the application.

(b) In its four page form letter dated October 21, 1991, OPM observes that

"[t]here may be medical evidence available which was not submitted with your application. The following is a list of the kind of medical information which could be helpful in a reconsideration." [emphasis supplied]

The letter then goes on to provide an extensive list of the kinds of medical information which could be helpful.

Providing us a list of all the possibilities someone at OPM could dream up "which could be helpful" in no

response in 10 days, and alerted them to the attorney-client relationship. I needn't have bothered with any of it. Neither Mr. Smith nor I ever heard from them.<sup>35</sup> I wrote to OPM again, this time in the form of a FOIA request.<sup>36</sup> I reiterated the issues I had raised in my previous letter, and asked for information relevant to their failure to reply.<sup>37</sup> Neither Mr. Smith nor I never received any reply whatsoever to this FOIA request.

I wrote to OPM yet again:<sup>38</sup>

"THIS IS MY THIRD LETTER PERTAINING TO THIS CLIENT WITH THE IDENTICAL REQUEST. OPM has failed to answer my prior letters. In letters dated November 8, 1991 and December 5, 1991 I requested notification on requests for an extension of time. In both those letters I also asked for the precise reasons why this claim for disability retirement was rejected by OPM. Please provide an immediate and appropriate response."

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way assists us in identifying the infirmities in the application.

In short, this form letter says nothing upon which we can act. OPM might just as well have sent Mr. Smith a one word letter saying "NO!" and given him 30 days to appeal. A government employee has a due process right to proper notice of the reasons why his application for disability retirement has been rejected."

[Letter from Harvey Friedman to OPM dated November 8, 1991]

<sup>35</sup>except for a form letter granting him a 30 day extension of time, although we had requested 45 days.

<sup>36</sup>FOIA request from Harvey Friedman to OPM dated December 5, 1991.

<sup>37</sup>"Pursuant to the Freedom of Information Act, I seek the following specific information.

(1) Please provide detailing by either name or position, those individuals at OPM who form the chain of command in setting and executing policy in connection with a request such as this.

(2) Please provide the internal guidelines or policy detailing how responses such as the one I made in my November 8, 1991 letter, for more information at to be dealt with by OPM officials and employees

(3) Please provide the name or position of the individual responsible.

(2) Please detail why no reply was provided to this request.

<sup>38</sup>Continuing FOIA Request from Harvey Friedman to OPM dated January 2, 1992



Neither Mr. Smith nor I ever heard from OPM either in connection with this matter or any other matter, despite these three letters and an additional six phone calls. That was more than one year ago.

**Tom Mann** has also been victimized by OPM's form letter, checklist approach to denuding government employees of their rights. He received a form letter nearly identical to those received by Mr. Smith and Ms. Davis. In his case, however, OPM provided an additional checklist entitled "*Additional Information for Psychiatric Disorders*," and another entitled "*Additional Information for Occupational Asthma/Reactive Airway Disease*."

Mr. Mann's disability application is grounded on a diagnosis of "Brittle Reactive Airway Disease," but it is *not* grounded on a clinical psychiatric disorder. Thus, the request for "*Additional Information for Psychiatric Disorders*," is irrelevant to our case and a total waste of time. This demonstrates one of the dangers of government by checklist and form letter. If you arm enough irresponsible government officials with enough checklists and form letters, they will be sure to send them out irrespective of their relevancy. Responding to this irrelevant request will cost Mr. Mann a minimum of \$1,000.00 in psychiatric fees. I certainly do not intend to put him to that expense until someone at OPM demonstrates its relevancy.<sup>39</sup>

**Mike Brown's** case is demonstrative of just how stubborn OPM officials can be in refusing to provide the reasons why they have requested particular information. It is a study in cavalier attitude on the part of an official entrusted with unbridled governmental power.

OPM official George Young wrote to Mr. Brown and asked him for what *at first* seemed to be precisely the information we had already submitted. It took some study to finally grasp Mr. Young's oblique request that a new Physicians Statement was required, signed by an M.D., and that the Ph.D. who had signed off on it was not acceptable.

I did what I thought he had asked for and then some. I provided him a copy of the original Physician's Statement, but this time signed by the ENT specialist at the VA Hospital; an M.D. by the name of Dr. Alfredo J. Diaz. Additionally, I took three pages to spell out precisely how both Physicians' Statements (one from Dr.

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<sup>39</sup>We are in the process of questioning OPM as to its reasons for requiring a psychiatric evaluation and report. However, I do not seriously expect any response to my inquiry.

Schafer, the Ph.D., and one from Dr. Diaz the M.D.) satisfied his request for information, at least as best I could figure out his request for information." 40

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I said to Mr. Young in relevant part:

"Let me also take this opportunity to point out precisely how the Physician's Statement in this case satisfies the request for information set out in your July 3, 1991 letter.

The Physician's Statement provided a ". . . current comprehensive evaluation from an M.D." in the form of a "detailed history regarding Mr. Brown's current symptoms, physical findings [and] results of laboratory studies and therapy of [his] hearing loss condition. . ." This was set out in detail in the first 4 parts of the Physician's Statement as follows:

1) What is the history of the specific medical condition(s)?

The patient reports that while on combat duty in 1968 with the U.S. Military in Vietnam, he narrowly missed being struck by a mortar round, the explosion from which damaged both his eardrums. Nevertheless the patient remained in the military on active duty until his retirement in 1988. Thereafter, the patient went to work for the Department of State in a job involving drug interdiction. He then moved to a similar job at DEA specifically because of the promise to allow him to work directly in the field. The patient reports that after being assigned to field duties with DEA in Project Snowcap, the Agency determined that his hearing impairment disabled him from further duty in the field. The patient reports that the Agency thereupon removed him from his field assignment, much against his will, and required him to work in its Washington, D.C. office. The patient maintains that while he believes he did suffer damage to his eardrums while in the service in 1968, the damage did not so impair him as to disable him from employment, either in the military (where he served for some 20 years, despite the impairment) or in the civilian sector jobs he held thereafter. Further damage was incurred during active duty in Vietnam and as a paratrooper in special forces assignments for twenty years.

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2) What are the clinical findings from the most recent medical evaluation?

The patient suffers from mild to profound hearing loss in the right ear, beginning at 1,500 Hz, and mild to severe hearing loss in the left ear, beginning at 1,500 Hz. He has normal middle ear function bilaterally. His speech recognition was excellent in the right ear and good in the left ear at loud presentation levels. Results of Brain stem Auditory Evoked Potentials (BAEPs) demonstrated normal I-III, III-V, and I-V interpeak latencies bilaterally, suggesting cochlear site of lesion. This supports the contention that his hearing loss was noise-induced. The patient demonstrates acoustic reflexes below 2,000 Hz, absent at 2,000 and 4,000 Hz bilaterally, which are consistent with degree of hearing loss reported.

3) How do you assess the current clinical status and what are your plans for future treatment?

The patient's speech recognition at conversational levels is impaired. This is particularly so in the presence of any background noise. No medical or surgical treatment is available. He should limit his exposure to loud sounds and have at least yearly examinations, which should be more frequent if he experiences any further hearing impairment. The patient would benefit from hearing aids bilaterally.

4) What is your diagnosis for this patient?

The patient suffers from a high frequency sensorineural hearing loss bilaterally, probably noise-induced.

I trust that this submission is responsive to OPM's request. If not please let me hear from you directly."

Unfortunately I had not placated Mr. Young. In another letter to Mr. Brown he escalated his demand<sup>41</sup> and requested *once again* that Mr. Brown provide all of the information he had already provided *twice*; the information in both physicians' statements. He accomplished this by sending Mr. Brown a checklist with the 10 questions in the Physician's Statement and said:

"HAVE YOUR PHYSICIAN RESPOND TO ALL TEN QUESTIONS ABOVE, AND ATTACH ALL REPORTS OF X-RAYS, LABORATORY, CONSULTATIONS, DIAGNOSTIC PROCEDURES PERFORMED, AND HOSPITAL RECORDS TO SUBSTANTIATE HIS DIAGNOSIS. ABSOLUTE ADHERENCE TO ALL TEN QUESTIONS IS REQUIRED BEFORE A REVIEW IS PERFORMED"<sup>42</sup>  
[all emphasis supplied by Mr. Young]

By return mail I simply asked him why we should have to do this since we had already submitted the same information twice.<sup>43</sup>

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<sup>41</sup>Letter from George Young to Mr. Brown dated November 4, 1991. Note that Mr. Young addressed his letter to Mr. Brown, the client, even though I had addressed my letter to him and he was on notice that I was Mr. Brown's attorney. In fact, I believe it fair to say, that in the many years I have sent letters to Mr. Young on behalf of various clients, he has never once responded directly to me but always directly to my clients.

<sup>42</sup>Letter from George Young to Mike Brown dated November 4, 1991.

<sup>43</sup>Given the fact that we had already submitted our physician's statement twice, once signed by a Ph.D. and once signed by an M.D. essentially answering all ten of these questions. And given the fact that in submitting the Physician's Statement signed by the M.D., I had taken the time to write a three page explanation as to four of those same ten questions which had been raised in OPM's letter of July 3, 1991 I was mystified and irked. Here is what I said in relevant part to Mr. Young in my reply letter dated December 3, 1991:

"I'm sorry, but I simply cannot figure out what it is that you are seeking through your letter of November 4, 1991 to my client Mike Brown. You demand "**ABSOLUTE ADHERENCE TO ALL TEN QUESTIONS. . .**" [Your emphasis] which are the identical ten questions raised in the Physician's Statement. All ten of these ten questions have already been answered; once by Judith Schafer, Ph.D. and then again by an ENT specialist, Alfredo J. Diaz, M.D. If you want something more, you need to tell me what it is, because I can't figure it out.

If the form or format or presentation or something else is not correct, let me know precisely what the

When I received no reply, I wrote to him once again demanding a reply in no uncertain terms.<sup>44</sup> The result? Three and one-half months later, by letter dated

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problem might be. If relevant to the disability retirement determination, we will provide the information in whatever form or substance might be required. As to further tests, you have in your possession the relevant diagnostic audiology test required to support the disability claim. If there is some other test, that is relevant to your disability decision, please identify it for us. We are more than willing to provide any additional test that is relevant to your disability retirement determination, though our experts have been unable to think of any. Without further explanation, I have no idea what else to provide. Again, tell us, and if relevant we will provide it."

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Instead of receiving an initial decision in the case or some explanation of why, what I had provided in my August 8, 1991 letter, did not satisfy you, I received instead an OPM form-checklist dated November 4, 1991 with the identical ten questions from the Physician's Statement repeated and required to be answered again. No explanation. No nothing.

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In closing, let me observe that from our perspective we have provided the information requested. But again too, if I am missing the point, if something about the information provided is lacking or something has not been provided that is relevant to the process, please let me know. Any relevant request will be promptly honored."

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"But this process must move forward and it must move forward now and without further ado. The protection of my client's due process rights requires a resolution of this matter within a period not to exceed 30 days from the date of this letter." [Emphasis Supplied]

I then went on to observe further that

"[y]ou have gone well past the 30 days. In fact you have been Mickey-Mousing around with this case for

April 15, 1992 Mr. Young wrote directly to Mr. Brown and without ever answering any of the questions I had raised, once again asked for:

"a medical exam from ENT specialist copies of all medical records and documents from the VA for the period from January, 1990 to March, 1992. Also, copies of all recent audiogram, brain stem auditory evoked response studies, etc."

Because my client was desperate, and because this looked like the ultimate standoff, I located several audiological tests and provided them with a letter dated June 26, 1992.

We waited another four months, when OPM officials finally handed down an adverse initial decision, denying my client's application for disability retirement *on grounds that have nothing to do with any of the questions raised by Mr. Young or the submissions made by us*. Instead, Mr. Brown's application was denied *on grounds that his disabling medical condition existed prior to his service under the retirement system*.

It is mind boggling to think that Mr. Young had previously never even eluded to the issue of a preexisting disability, but instead had us go through a meaningless exercise in producing irrelevant information (not once but three times). Since he was writing to us for information to support our application, one has to wonder why he would not have written and simply asked us something like this:

*Please provide medical documentation indicating either that your client was not disabled by his hearing loss prior to being covered by*

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more than 7 months. More importantly you have passed that point in time so that your non action constitutes a crass violation of my client's due process rights. I am convinced that any neutral decision-maker would agree. Just as importantly, you have taken this matter to a point which exceeds the limits of my patience thereby gaining my personal animus. Certainly this is not a good thing to have happen to a lawyer, but no individual, not this employee not my other clients and not this lawyer should have to endure from a public servant the obfuscation, intransigence and inaction which so clearly characterizes your behavior in this case and myriad others. Unless I have an immediate, relevant, reasonable and responsible response, I am going to move this matter to a whole new plane."

*the retirement system or became disabled from his hearing loss only after being covered by the retirement system.*

This raises the issue of why Mr. Young did not raise this relevant question before handing down a decision, but instead asked three times for irrelevant information. I do not believe that Mr. Young was necessarily being malevolent when he failed to cue us to the issue on which this case was to be decided. I believe instead that Mr. Young, together with the rest of his OPM colleagues, simply operate on automatic. The officials at OPM deal exclusively in form letters and checklists and little more. Apparently the issue of a prior disability is not incorporated into a form letter, while the questions from the Physician's Statement are.<sup>45</sup>

## **RECOMMENDATION**

*OPM officials should promulgate guidelines aimed at providing reasonable notice of the defects in a disability retirement application. In this connection, OPM officials should only request relevant information from applicants and should always be prepared to explain the relevancy of their requests for information. Irrespective of the stage of the process, no application should be denied without providing the applicant with reasonable notice of the deficiencies. Notice is reasonable only if it provides an applicant with sufficient information as to what those deficiencies are, so as to enable a willing applicant the opportunity to rectify them.*

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<sup>45</sup>We have since then continued the case in order to consider how best to proceed.

**[5] OPM OFFICIALS KNOWINGLY THWART ACCESS TO ESSENTIAL DISABILITY RETIREMENT FORMS, THEREBY DISCOURAGING LEGAL REPRESENTATION.**

**OPM officials abuse their power by knowingly limiting the distribution of disability retirement forms, thereby restricting access in an effort to keep out "outsiders."**

Representation by counsel is essentially thwarted if counsel is unable to obtain the necessary forms for clients, yet the forms necessary for disability retirement are unavailable to attorneys and others outside of OPM and agency personnel offices. The opposite should be the case; lawyers as part of their legal representation should have ready access to these government forms. The examples cited previously demonstrate the disdain for lawyers at OPM. Precluding them from access to forms is but another way in which to frustrate their entry into the process.

Although printed by the GPO, these forms are unavailable for purchase either there or at OPM, nor is there a single office within OPM that I have been able to identify that distributes such forms to non-agency personnel. Government employees can get these forms from their personnel offices, but that is apparently the only place they can get them. Employees who have lost or mutilated their forms, or employees who no longer have contact with their personnel offices, can only get the forms by going back to their personnel offices. But they cannot come to me for the forms. Instead I must go to them.

My office has made two elaborate test runs to gain access to these forms. My assistant, Jason Hendler, prepared a report on his efforts in November 1990.<sup>46</sup> A

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<sup>46</sup>**The Search for the Elusive Application**

10:15 on a warm Wednesday morning, I was given what I thought would be a simple task. Harvey asked me to get about 20 copies of the Civil Service Retirement System & FERS forms required by OPM to process a disability retirement case. All I had to do was call the appropriate office at OPM. What could be easier? I was soon to pay for my naivete. What follows is a step-by-step list of the phone calls I made in search of this document:

1) Robert Rodriguez @ Public Info. (606-2789) says to call Mary Beth Toomy, head of the Forms Office.



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2) @ Forms Office, they insist that they cannot give out the form, and they suggest calling the Retirement Information office.

3) Back to Rob Rodriguez, who says that the retirement info. office will indeed give us the forms.

4) @ retirement info., Mr. Gregory explains that they have no applications to give out, and he gives little info. regarding how to get them. I ask to speak with a supervisor, and he claims that none are available.

5) 11:00, I call retirement info. again and am able to speak to a supervisor, Ms. Timmons, who refuses to give out the application. "We don't have any to give out," she explains. When asked why, she merely restates what has been stated before: "an individual can get them from their agency." Where does that leave us? The helpful Ms. Toomy suggests that we call the Government Printing Office. After much prodding, she says that she'll send us ONE application. How kind.

6) @ G.P.O., they need the 12-digit stock # in order to locate the document.

7) I call the Forms Office again to get the stock #, which happens to be 13 digits. The woman there suggests that I call the G.S.A, but doesn't suggest an appropriate department.

8) I call the G.P.O., and they say that they have absolutely no record of this stock number.

9) I call the G.S.A. office of the Item Manager for the form, Shirley MacNeil (703-557-5927) who says that they currently have absolutely no forms, that the forms should be on their way to a G.S.A. warehouse via truck, and that she should have them within a few days. However, she couldn't give them to me anyway (I'm not a government agency). She does suggest that I call the head of Customer Service, Beal Parker (708-5932).

10) Mr. Parker isn't in, but his assistant says that, by law, they can not sell the form to anyone in the private sector. To get the form, I would have to go to a personnel office at a government agency. She gives me the number of someone at G.P.O. who might be able to help.

review of his report gives a feel for the frustration in attempting to get an OPM form. It also reveals that our attempts to get these forms were largely an exercise in frustration.

The one thing that we did discover from this research was that restricting access to disability forms is premeditated. According to Ms. Toomy, the reason forms cannot be supplied to persons outside an agency is a result of OPM's intent to preclude employees from going to outside sources for assistance on retirement problems. This is accomplished by forcing employees to come to their personnel office in order to get the application forms. Our findings are consistent with Ms. Toomy's reasoning..

### **Recommendation:**

*OPM forms should be made readily and easily available to anyone who wants them. If cost is a factor, these forms should be made easily*

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11) The guy @ G.P.O. explains that they only take orders from the government and do not have any forms left over after orders are sent out. Their bookstore would not have the forms either.

MISSION: unaccomplished

RESULT: we may receive one application from Ms. Timmons.

November 2, 1990

1) We receive one application and one disability packet, as promised, from Ms. Timmons (I assume it was from her).

3) Ms. Toomy indicates by phone to Harvey the following reason why they will not give out the application: OPM's intent is to PRECLUDE employees from going to outside sources for assistance on retirement problems. Employees must thus come to the personnel office to get their application forms. (Now we can nail 'em!) She suggests that we call Mary Sugar (pronounced SUE-GAR) who is Deputy Assistant Director of Retirement at OPM (606-0788). (We'd better call fast, before they change the number on us.)

Jason Hendler

P.S. In May 1991, another assistant, Drew McLeod made a similar attempt to get disability retirement forms from OPM. The results were nearly identical: an enormous runaround.

*available for purchase.*

**[6] OPM OFFICIALS REFUSE TO PROVIDE PROCEDURAL GUIDANCE ON A WIDE RANGE OF ISSUES, HOLDING APPLICANTS RESPONSIBLE NEVERTHELESS.**

**OPM officials abuse their power by not publishing clear-cut procedural guidance for filing disability retirement applications. They compound that abuse by ignoring specific requests for information vital to preserving applicants' rights. Without knowledge of such rules, applicants act at their peril.**

This abuse by OPM officials covers a wide range of misbehavior, so wide and so varied that much of it must be reserved for another report. Here in abbreviated form are some of the abuses awaiting applicants and their lawyers.

6a. *Can I file my application on a Saturday, Sunday or holiday?* Talk about not giving you the time of day, OPM officials will not give you the day of the week. I have been unable to discern the requirement for making a filing that falls on a Saturday, Sunday or legal holiday.<sup>47</sup> This is particularly relevant since documents must be received<sup>48</sup> by OPM on the due date, and not just deposited into the US mail. What happens when the agency is closed on the date something is due? Is the due date the next business day? The answer is probably yes in most places, but OPM is not most places. Each time the issue comes up, my office has been forced to go through all sorts of gyrations to insure a timely filing.<sup>49</sup>

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<sup>47</sup>Ms. Davis had received an "initial decision" from OPM denying her application and giving her 30 days from the date of that denial to request reconsideration. Although I had instructed OPM to deal only with me, as Ms. Davis' counsel, OPM failed to do that and sent the denial letter to Ms. Davis, date stamped January 2, 1992. OPM sent me a copy of its denial letter but that copy was undated. I only learned of the January 2, 1992 date later and at the last moment, when Ms. Davis provided me with her copy of the letter.

While I considered the undated copy sent to me to be the controlling document, I determined that it was also the most prudent course of action to request reconsideration within 30 days of the January 2, 1992 date stamped on Ms. Davis' copy. On this basis our response was due in OPM on February 2, 1992. That date happened to be a Saturday.

<sup>48</sup> I have yet to discover the reason for this rule, which is at odds with good business practices and contrary to the way most of the rest of the civilized world operates.

<sup>49</sup>Helen Davis' case is a good example. Her filing deadline fell on a Saturday. I decided that the best way to protect her due process rights was to attempt to deliver the document to OPM even though it was a Saturday. OPM staff members were in the Washington, D.C. office on Saturday, February 2, 1992, and spoke with me by phone, but I was informed that they would not accept delivery of the reconsideration because they were "closed." Nevertheless, I sent my assistant to OPM's headquarters building. He made it to the retirement office and attempted to give our

6b. *Can I file my application with OPM's Boyers office by Federal Express or Messenger?* OPM's street address at its Boyers office may be top-secret, or it may simply not exist. The same may be true of a working telephone number for employees to check on their applications. The Boyers office is reputed to be housed in a limestone cave, and how many caves have a street address or telephone number? This precludes last minute filings or filings but by mail. Just try to Fed Ex or messenger an application or anything else to a limestone cave that has no address and no telephone. You cannot, and OPM has not provided a solution.

6c. *With which office do I file my application?* I have never figured out which office at OPM does what. While I'm sure there is a rule, no one's talking. I haven't found a hint anywhere as to which OPM office a document should be sent to, or in which office you can locate a document once it has been sent to OPM. Sometimes it is Boyers, sometimes it is Washington. Compounding this, the folks in Washington either cannot or will not tell you anything about the applicant's file sitting in Boyers, and visa versa. They cannot or will not even tell you if the file is in fact sitting in Boyers, and visa versa. Nor have I ever figured out why sometimes OPM's letter will tell an applicant to respond to the Washington office, instructing the applicant to use the enclosed envelop, but the enclosed envelope will bear the address of the Boyers office, and visa versa.

6d. *Can I ask OPM for more time before I have to file?* Yes you can ask for as much time as you want, but you will get *30 days*; no more, no less. This is part of the form letter, checklist lifestyle. OPM officials are programmed to grant *30 day* extensions, and that is all. Deprogramming them is going to be just another part of "*reinventing government*."

My letter to OPM of November 5, 1992 on behalf of Mr. Brown illustrates this contention:

"The Applicant hereby requests an additional 90 days in which to provide a response. Every time I request an extension of time in a case as the representative of an Applicant; no matter what the length

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request for reconsideration to an employee in that office. She refused to take it, observing that it could cause legal problems to accept a letter on a Saturday.

After this experience, I decided to get the answer directly from the OPM officials who "make" the rules. I made a FOIA request for information vital to filing applications on non-business days and for other information. Of course, I never got any reply whatsoever. That was more than one year ago.

of the extension requested, the reasons for requesting such extension, or the type of case in which the extension is requested, the reply from your office is identical: 30 days. It is as if OPM is not able to conduct its business except in 30 day increments.

This practice must cease because it potentially compromises the due process rights of the applicant. Therefore, please observe that I am requesting a 90 day extension in this case. Either grant the 90 day extension requested or tell me why we can only have the 30 day extension that you have granted every other single time I have requested an extension for other than 30 days."

OPM's response to this demand? They granted a *30 day* extension.<sup>50</sup> There was of course no explanation. Now this is interesting: eight days later, using the identical form letter, they granted a *90 day* extension.<sup>51</sup> I now found myself with *two* different extensions of time, one for *30 days* and one for *90 days*, and both to file the same document. Despite that, this was a triumph of sorts. This was the first time that an OPM official had *ever* granted me anything but a *30 day* extension. My triumph was short lived when, later in the same case, I requested a further *60 day* extension of time, and OPM granted a *90 day* extension.

6e. *Can I give OPM important information about my disability that is not in their forms?* You can, but they will either send it back or not read it. Here is another aspect of the form letter, checklist mentality. OPM officials refuse to consider information that does not come from their forms. No matter how probative the information might be, they will either refuse to accept it or, if they accept it, they will refuse to consider it. Just last month, OPM refused to accept x-rays in a case dependent on x-ray evidence. I was told that they have nowhere to store them. Neither have they ever considered the elaborate information I sometimes provide in cases in the form of detailed questionnaires from people who have personal knowledge of my client's disability. This is unfortunate, considering that OPM's forms utterly fail to elicit the type of information relevant to the disability retirement decision.

6f. *Will OPM update my long-delayed application before making a decision in my case?* No. OPM officials apparently have no mechanism for updating

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<sup>50</sup>Letter from OPM to Mr. Brown dated November 10, 1992.

<sup>51</sup>Letter from OPM to Mr. Brown dated November 18, 1992.

long delayed applications, even though it's their fault that the applications are long delayed. This sometimes results in applications being adjudicated on stale information and cases being wrongfully denied. Leave and performance records provided in the initial submission may no longer be relevant by the time OPM officials get around to making a decision. One client's case was wrongfully disapproved on grounds that her medical condition had not kept her from performing her job, *since she had an excellent attendance record*. That may have been true when she filed her application, but by the time OPM acted, she owed the agency sick leave and had been on LWOP for many months as a result of her disability. Since this was a final OPM decision, our only option was to appeal to MSPB. That is one incredibly expensive option and exclusively the result of the failure by OPM officials to do what they are paid to do.

### **Recommendation**

*OPM officials should publish procedural guidance for the benefit of applicants and need to make such information easily accessible. In addition, they should always be prepared to respond in timely fashion to questions raised by applicants and their representatives.*

## CONCLUSION

The officials running OPM's disability retirement program are clearly guilty of a broad array of wrongs and inequities. Between their unconscionable delays, acts of discrimination, violations of rights, withholding of information, and refusal to provide procedural guidance, they have managed to turn the disability retirement program into a bureaucratic nightmare. It is my hope that this report will open essential avenues of inquiry leading to reform in OPM's disability retirement program. If *putting people first* means anything, it means reforming this process, which today *puts people last*.

Respectfully submitted,

Harvey Friedman