

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2007 MSPB 40

Docket No. CB-1205-06-0022-U-1

**Narciso R. Vergara,
Petitioner,**

v.

**Office of Personnel Management,
Agency.**

February 5, 2007

Rizalino S. Cayle, Olongapo City 601F, Philippines, for the petitioner.

Earl A. Sanders, Washington, D.C., Esquire, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

OPINION AND ORDER

¶1 This matter is before the Board on petitioner's request, pursuant to 5 U.S.C. § 1204(f), for review of the Office of Personnel Management's (OPM) regulation at 5 C.F.R. § 831.201(a)(13).¹ For the reasons set forth below, we DENY the request.

¹ Petitioner asks the Board to review 5 C.F.R. § 831.201(a)(14) (1963-1987). That regulation was renumbered as 5 C.F.R. § 831.201(a)(13) by OPM in 1988. See 53 Fed. Reg. 42,933, 42,936 (Oct. 25, 1988). We will use the current citation in this decision.

BACKGROUND

¶2 Petitioner is a former federal employee, who was given an indefinite appointment with the Department of the Navy, effective July 6, 1967, and was separated, effective July 2, 1986. Regulation Review File (RRF) Tab 1, Exhibits (EX) B-1, B-3, B-3A. Petitioner submitted documentation of his appointments which indicates that he was not covered by the Civil Service Retirement System (CSRS).² *Id.* The regulation at issue provides that Federal employees serving under indefinite appointments made after January 23, 1955 are excluded from CSRS coverage. 5 C.F.R. § 831.201(a)(13). OPM requests that the Board deny petitioner's request for regulation review. RRF, Tab 3.

ANALYSIS

¶3 The Board has authority, pursuant to 5 U.S.C. § 1204(f), to review a regulation and declare it invalid on its face or invalidly implemented by an agency. The Board may find OPM rules and regulations invalid if it determines that the implementation of the rules or regulations would require an employee to commit one of the prohibited personnel practices defined in 5 U.S.C. § 2302(b).

¶4 Here, petitioner argues that 5 C.F.R. § 831.201(a)(13) is not in accordance with section 2(e) of The Federal Executive Pay Act of 1956 (1956 Act), Pub. L. No. 854, § 401 (July 31, 1956), the predecessor of 5 U.S.C. § 8347(g), which authorizes OPM to exclude from CSRS coverage “an employee or group of

² The Standard Form 50 (SF-50) documenting petitioner's appointment, Exhibit B-1, shows his Federal retirement coverage as “None,” represented by the numeral “4” in box number “10” on the form. RRF, Tab 1. The SF-50s documenting additional personnel actions, including petitioner's termination, show petitioner's retirement coverage as “Other,” represented by the numeral “5” in box number 8. *Id.* at Ex. B-2 and B-3. The documentation of termination shows that petitioner received severance pay in accordance with a collective bargaining agreement. *Id.* at Ex. B-3 and B-3a. The Board has held that an appellant's service is not covered by the CSRS where the SF-50s describing that service indicate that he was not subject to the CSRS and that he received retirement pay in accordance with a collective bargaining agreement. *Reyes v. Office of Personnel Management*, 60 M.S.P.R. 172, 174-75 (1993), *aff'd*, 29 F.3d 645 (Fed. Cir. 1994 (Table)).

employees ... whose employment is temporary or intermittent.” *See* RRF, Tab 3 at 3. According to petitioner, the regulation is also inconsistent with Executive Order 9154, 3 C.F.R. § 1152 (1938-1943), which did not specifically exclude from civil service retirement coverage employees holding indefinite appointments, and which, petitioner argues, is still valid. Petitioner, however, does not fully explain how 5 C.F.R. § 831.201(a)(13), either on its face, or as implemented, would require the commission of a prohibited personnel practice. Rather, petitioner makes the bare assertion that section 831.201(a)(13) would, if implemented, result in the prohibited personnel practice defined at 5 U.S.C. § 2302(b)(12),³ that is, the taking or failing to take an action in violation of a “law, rule, or regulation implementing, or directly concerning, the merit system principles ... ” Petitioner cites 5 U.S.C. § 2301(b)(8)(A) as the relevant merit system principle. RRF, Tab 1 at 6. Section 2301(b)(8)(A) provides that employees should be protected against arbitrary action. Yet, petitioner does not explain how the allegedly violated statute and Executive order implement the merit system principle found at 5 U.S.C. § 2301(b)(8)(A), as required by 5 C.F.R. § 1203.11(b)(2).⁴ While petitioner has failed to meet fully the requirements of 5 C.F.R. § 1203.11(b)(2), we do not deny review on that basis because we find other more compelling reasons to deny review.

³ Petitioner cites 5 U.S.C. § 2302(b)(11). That statutory provision was renumbered as 5 U.S.C. § 2302(b)(12) in 1998. *See* The Veterans Employment Opportunities Act of 1998 § 6(a)(2), 5 U.S.C. § 2302(b)(12).

⁴ Section 1203.11(b)(2) provides as follows:

(2) If the prohibited personnel practice at issue is one prohibited by 5 U.S.C. 2302(b)(12), the request must include the following additional information:

(i) Identification of the law or regulation that allegedly would be or has been violated, and how it would be or has been violated; and

(ii) Identification of the merit system principles at issue and an explanation of the way in which the law or regulation at issue implements or directly concerns those principles.

¶5 The decision whether to grant review of a regulation is within the Board's discretion. 5 U.S.C. § 1204(f)(1)(B). In deciding whether to grant review, the Board will consider the following factors: (1) whether there is a likelihood that the issue will be resolved through other channels of appeal; (2) the availability of other equivalent remedies; (3) the extent of the regulation's application; and (4) the strength of the arguments against its validity. *Tabradillo v. Office of Personnel Management*, 93 M.S.P.R. 257, 259 ¶ 4 (2003). Factors 2 and 4 are relevant here.

¶6 The documentation submitted by petitioner shows that he is over age 62 and that he has completed more than five years of creditable Federal service. See RRF, Tab 1, EX B-1, B-3 and B-3A. If petitioner meets the requirements of 5 U.S.C. § 8333(b), he would be entitled to a deferred annuity pursuant to 5 U.S.C. § 8338(a). Further, if petitioner files an application for a deferred annuity with OPM, he would have a right to an adjudication of that application by OPM pursuant to 5 U.S.C. § 8347(b).⁵ Thus, petitioner has an alternate remedy to pursue his claim of entitlement to retirement under the CSRA.⁶ Moreover, petitioner's "[r]equest for settlement of appeal in the Petition For Review Settlement Program" indicates that he is seeking a CSRS annuity in the guise of a request for regulation review. RRF, Tab 4.

⁵ Petitioner's argument that the tenure group designation on the documentation of his appointments shows that he was entitled to CSRS coverage is an argument that may be raised in connection with any application for retirement that he may file. Similarly, petitioner's argument, to the extent it is relevant, that Executive Order 10826, 3 CFR 362 (1959-1963), provides relief for administrative error, may be addressed in an adjudication of petitioner's entitlement to retirement benefits.

⁶ Petitioner refers, at p.7 of his petition, to evidence unavailable in a prior proceeding but he does not specify the nature of that proceeding. Thus, it is unclear whether petitioner has filed an application for benefits or another regulation review request. Also, OPM states that it has been unable to determine whether petitioner has already filed an application for retirement. See RRF, Tab 3 at 9.

¶7 Additionally, petitioner’s arguments regarding the validity of the regulation are weak. Indeed, petitioner’s arguments regarding the validity of the regulation have already been considered and rejected by the Federal Circuit and the Board. *See Rosete v. Office of Personnel Management*, 48 F.3d 514 (Fed. Cir. 1995); *Trabradillo*, 93 M.S.P.R. 257; *Enrique v. Office of Personnel Management*, 82 M.S.P.R. 305 (1999). In *Rosete*, petitioner argued that “excepted, indefinite” appointments do not fall within the statutory terms “temporary or intermittent” and, therefore, may not be excluded from CSRS coverage. 48 F.3d at 518. The court disagreed, and in doing so specifically rejected the same claim made here that Executive Order 9154 (E.O.), 3 C.F.R. § 1152 (1938-1943) is still in effect. *Id.* at 519. The court held further that E.O. 9154 was superseded by Executive Order 10,180, 3 C.F.R. § 363 (1949-1953), which is the source of 5 C.F.R. § 831.201(a)(13). The court noted that E.O. 10,180 specifically excluded employees with indefinite appointments from civil service retirement coverage and that the continuation of that exclusion in 5 C.F.R. § 831.201(a)(13) represented a reasonable and long-standing interpretation of the statutory language “temporary or intermittent.” *Id.* Accordingly, without prejudging any application for a CSRS annuity that petitioner may file, we find here that his arguments challenging the validity of 5 C.F.R. § 831.201(a)(13) are weak and we DENY his request for review.

ORDER

¶8 This is the final decision of the Merit Systems Protection Board in this regulation review proceeding. Title 5 of the Code of Federal Regulations, section 1203.12(b) (5 C.F.R. § 1201.12(b)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, <http://fedcir.gov/contents.html>. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board
Washington, D.C.